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WHEN: Tuesday, September 12, 2006
9:00 a.m.–Noon

WHERE: Office of the Federal Register
Conference Room, Suite 700
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RESERVATIONS: (202) 741–6008

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

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 250

RIN 3206–AK77

Personnel Management in Agencies—Employee Surveys

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations implementing mandatory employee surveys as required by the National Defense Authorization Act for Fiscal Year 2004. The regulations add a new subpart which requires agencies to conduct an annual survey of their employees. In addition, the final regulations provide a list of questions that must appear in each agency's employee survey.

DATES: *Effective Date:* This rule is effective on January 1, 2007.

FOR FURTHER INFORMATION CONTACT: For information on the survey questions, contact Julie Brill by phone on 202–606–5067, by FAX on 202–606–1399, or by e-mail at *julie.brill@opm.gov.* For all other information, contact Hakeem Basheerud-Deen by phone on 202–606–1434, by FAX on 202–606–2329, or by e-mail at *hakeem.basheerud-deen@opm.gov.* You may contact Ms. Brill and Mr. Basheerud-Deen by TTY on 202–418–3134.

SUPPLEMENTARY INFORMATION:

Requiring Annual Employee Surveys

Section 1128 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136, 5 U.S.C. 7101 note) requires each agency to conduct an annual survey of its employees ''to assess—

(1) Leadership and management practices that contribute to agency performance; and

(2) Employee satisfaction with—

(A) Leadership policies and practices;

(B) Work environment;

(C) Rewards and recognition for professional accomplishment and personal contributions to achieving organizational mission;

(D) Opportunity for professional development and growth; and

(E) Opportunity to contribute to achieving organizational mission.''

Prescribing Certain Survey Questions

The law requires OPM to ''issue regulations prescribing survey questions that should appear on all agency surveys.'' In addition, the law requires agencies to make the survey results available to the public and post the results on their Web sites, unless the head of the agency determines that doing so would jeopardize or negatively impact national security.

Discussion of Comments

On September 16, 2005, OPM issued proposed regulations at 70 FR 54658 and requested comments by October 17, 2005. OPM received written comments from seven agencies, three non-profit organizations, three labor unions, one academic institution, and nine individuals. Generally, the comments were very supportive of the proposed regulations. Below we summarize and respond to comments that suggested changes or recommended clarification.

Survey Administration

One agency recommended OPM exempt small agencies with fewer than 1000 employees from the survey requirement. As an alternative to full exemption, this agency recommended OPM consider exempting these agencies in the years when the Federal Human Capital Survey is not administered by OPM. This agency commented the costs involved in survey administration are too great for small agencies. OPM did not adopt this agency's primary or alternative recommendation regarding the exemption of small agencies. While OPM appreciates the financial impact that all agencies must take into consideration when administering the employee survey, we note that the law has defined the jurisdiction of these regulations as all executive agencies and, therefore, must include small agencies in this requirement.

Another agency commented it would be more cost-efficient for OPM to administer the annual survey for all Federal agencies than each agency administering on its own. OPM disagrees because the law requires each Federal agency to conduct an annual employee survey. Each agency has the flexibility to administer the employee survey in a manner that meets its objectives. In years when OPM administers the Federal Human Capital Survey (FHCS) it will include the items in subpart C. Agencies participating in the FHCS will satisfy the annual survey requirement for any year in which the FHCS is conducted if all major components are represented in the FHCS. It is the agency's responsibility to ensure all major components are represented in the results because the law does not exclude different segments of agencies, even if they are not reported to OPM's Central Personnel Data File (e.g., intelligence employees). As a result, agencies may need to supplement their FHCS results with survey results from employees not sampled by the FHCS.

Two labor unions, three non-profit organizations, and one academic institution suggested OPM provide one or more survey administration options agencies can pursue. As noted in the preceding paragraph, agencies have several survey administration options.

Additionally, these same entities recommended OPM add to the regulation a statement prescribing agencies to administer their surveys between September 1 and December 31, thus ensuring data comparability. OPM does not agree with this recommendation. We believe agencies should have the flexibility to administer the employee survey according to mission requirements.

One agency suggested OPM extend the data collection date to January 31 because of the impact on agencies' abilities to meet the requirements related to the Office of Management and Budget's Proud-to-be-Three Goals. OPM did not adopt this suggestion noting that agencies have a 12-month window to meet the survey requirements. We believe this timeframe will not cause undue hardship on agencies.

Another agency recommended OPM provide a clear statement of why employees are being asked the questions in these surveys. The Act clearly states the purpose is to assess employee satisfaction and leadership and

management practices that contribute to agency performance. OPM is issuing these regulations and the required items in accordance with the legislation.

One individual requested that OPM mandate followup action to hold agencies accountable for the results of the survey. While OPM agrees that followup action should be an integral part of an agency's survey process, it is beyond the scope of this regulation for OPM to mandate such action because the law only authorizes OPM to issue regulations prescribing survey questions. However, OPM will provide supplemental guidance to agencies on potential followup actions and the use of results from the employee surveys on our Web site at *http://www.opm.gov.*

Two agencies conducting employee surveys for the past several years expressed concern this new requirement may have a negative impact upon the progress these agencies have made in their survey programs. These agencies wish to continue to use their agency-specific surveys and not participate in the required annual survey. OPM notes this requirement is mandated by law and agencies must participate. However, an agency can append the required items to an existing survey, or collect data from a small, statistically valid sample (OPM will provide supplemental guidance on sampling on our Web site at *http://www.opm.gov*) with minimal or no impact on an existing program. We commend those agencies that have developed and refined agency-specific surveys that meet their goals.

Survey Content

One agency commented on the lack of reference points and/or definitions of key terms for agencies and survey respondents. This agency suggested OPM provide a definition of the concepts/terms in context with the questions being asked (e.g., manager, supervisor, organization). OPM agrees that providing a definition of the key terms used in the annual survey will give agencies and respondents a clearer understanding of the questions. We have modified section 250.301 to include a definition of the terms *agency, executives, managers, supervisors, team leaders, leaders, work unit,* and *organization.* The definitions of these terms are consistent with their use in OPM's Federal Human Capital Survey. In addition, we have renumbered the subsequent sections of this regulation to ensure uniformity.

OPM received multiple comments and suggestions on additions to, and deletions from, the proposed list of survey items. These comments suggested various constructs were not covered in the items, or were not covered well, including: pay-for-performance; nepotism; favoritism; waste and fraud; managerial performance; employee involvement in decision-making; an agency's adherence to Federal laws, rules, regulations, and accepted employment practices (particularly as they relate to working through unpaid lunch time); and leadership competencies. While OPM notes agencies maintain flexibility to expand their own surveys and add agency-specific items, we revisited the proposed list of survey items to ensure coverage of the legislated constructs. As a result, OPM is adding the following items:

5. I have trust and confidence in my supervisor.
12. Supervisors/team leaders in my work unit support employee development.
13. My talents are used well in the workplace.
14. My training needs are assessed.
18. In my most recent performance appraisal, I understood what I had to do to be rated at different performance levels (e.g., Fully Successful, Outstanding).
20. Pay raises depend on how well employees perform their jobs.
24. My supervisor supports my need to balance work and family issues.
29. Employees have a feeling of personal empowerment with respect to work processes.
30. My workload is reasonable.
31. Managers communicate the goals and priorities of the organization.
33. How satisfied are you with the information you receive from management on what's going on in your organization?
35. How satisfied are you with your opportunity to get a better job in your organization?

One agency recommended OPM provide a ''Do Not Know'' (DNK) option for all items while an individual suggested OPM remove the DNK option. This individual suggested the practice of comparing dissimilar data is not consistent with scientific methodology. OPM disagrees, noting it is appropriate to leave out the DNK option when an employee clearly should have an opinion and should provide one. For example, all employees have opinions about certain benefits, such as pay, so it would be appropriate to leave out the DNK option on questions pertaining to it (e.g., Question 40, ''Considering everything, how satisfied are you with your pay?'') It should be noted response options for the required items are consistent with prior administrations of the items in the Federal Human Capital Survey.

One individual stated the survey questions are biased and provide responses favorable to management. This individual indicated unions should be given the opportunity to provide their own set of questions, which can be appended to the management survey, and data should be collected by unbiased agency representatives to guard against management ''skewing the data'' in their favor. OPM disagrees the items are biased. Results from the Federal Human Capital Survey range from very positive to much less positive. Additionally, several unions have indicated they are in favor of OPM's proposed set of items. Finally, agencies can expand their own survey and add agency-specific items, and have the

option to have a third party collect their data.

Another individual commented that item 19 in the proposed rule; ''In my organization, leaders generate high levels of motivation and commitment in the workforce'' captures the Senior Executive Service Executive Core Qualification (ECQ) ''Leading People'' while the other four ECQs are not captured. This individual recommends OPM include items to capture all the ECQs. OPM did not adopt this recommendation noting the survey items are not intended to measure qualifications, but rather managerial and leadership practices.

Agency Web Sites

Three labor unions, three non-profit organizations, and one academic institution suggested OPM change the requirement for agencies to post survey results to their Web sites from 120 days to 90 days after an agency completes survey administration each year. OPM did not adopt this suggestion because we believe a shorter timeframe would create an undue hardship on many agencies, especially large departments that may have to compile results from their different components.

Additionally, these same entities suggested OPM post all survey results on OPM's Web site, while one agency suggested OPM make survey results available to the Federal community in odd-numbered years. We did not adopt this suggestion noting the Act requires agencies, not OPM, to post results on their own Web sites. In addition, agencies have the flexibility to add items to their surveys, and therefore, survey results may be unique to each specific agency.

Data Reporting

Three labor unions, three non-profit organizations, and one academic institution suggested OPM require all survey data be reported as weighted data, if applicable. OPM did not adopt this suggestion noting it would be a burden to require agencies to weight their data. However, OPM suggests agencies evaluate their data for representativeness, and will provide supplemental guidance on processes and procedures for doing so. To allow for such evaluations, OPM is adding the following demographic items for agencies with 800 or more employees to assist in evaluating representativeness: supervisory status, gender, ethnicity, race, and agency subcomponent. Agencies with fewer than 800 employees are exempt from this requirement. We are including this exemption in section 250.302 in an attempt to protect the anonymity of respondents in small agencies. Small agencies who wish to add demographics to their survey may do so if they wish to evaluate representativeness of the survey responders. These demographic items will be listed as items 41 through 45, respectively.

Guidance

Several individuals and agencies submitted questions and requests for guidance on administering, analyzing, and reporting on the annual employee surveys. To assist agencies in their compliance with these rules, OPM will provide supplemental guidance on our Web site to include frequently asked questions and answers, instructions on sampling and administration, evaluating representativeness, followup actions, and strategies for using survey results to effect change in various human capital initiatives, at *http://www.opm.gov*.

Regulatory Flexibility Act

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

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 250

Authority delegations (Government agencies), Government employees.

Office of Personnel Management.

Linda M. Springer,

Director.

■ Accordingly, OPM is amending 5 CFR part 250, as follows:

PART 250—PERSONNEL MANAGEMENT IN AGENCIES

■ 1. The authority citation is revised to read as follows:

Authority: 5 U.S.C. 1101 note, 1103(a)(5), 1104, 1302, 3301, 3302, 7101 note; E.O. 13197, 66 FR 7853, 3 CFR 748 (2002); E.O. 10577, 12 FR 1259, 3 CFR, 1954–1958 Comp., p. 218.

Subpart B—[Added and Reserved]

■ 2. Add and reserve subpart B.

■ 3. Add subpart C to read as follows:

Sec.

Subpart C—Employee Surveys

250.301 Definitions.
250.302 Survey requirements.
250.303 Availability of results.

Subpart C—Employee Surveys

§ 250.301 Definitions.

In this part—

Agency means an executive agency as defined in 5 U.S.C. 105.

Executives are members of the Senior Executive Service or equivalent.

Leaders are an agency's management team. This includes anyone with supervisory or managerial duties.

Managers are those individuals in management positions who typically supervise one or more supervisors.

Organization means an agency, office, or division.

Supervisors are first-line supervisors who do not supervise other supervisors; typically those who are responsible for employees' performance appraisals and approval of their leave.

Team leaders are those who provide employees with day-to-day guidance in work projects, but do not have supervisory responsibilities or conduct performance appraisals.

Work unit means an immediate work unit headed by an immediate supervisor.

§ 250.302 Survey requirements.

(a) Each executive agency must conduct an annual survey of its employees containing the definitions and each question in this subpart.

(b) Each executive agency may include survey questions unique to the agency in addition to the prescribed employee survey questions under paragraph (c) of this section.

(c) The definitions and 45 prescribed employee survey questions and response choices are listed in the following tables:

Key terms	Definitions
Agency	An executive agency as defined in 5 U.S.C. 105.
Executives	Members of the Senior Executive Service or equivalent.
Leaders	An agency's management team. This includes anyone with supervisory or managerial duties.
Managers	Those individuals in management positions who typically supervise one or more supervisors.
Organization	An agency, office, or division.

Key terms	Definitions
Supervisors	First-line supervisors who do not supervise other supervisors; typically those who are responsible for employees' performance appraisals and approval of their leave.
Team leaders	Those who provide employees with day-to-day guidance in work projects, but do not have supervisory responsibilities or conduct performance appraisals.
Work unit	An immediate work unit headed by an immediate supervisor.

Employee survey questions	Employee response choices
Personal Work Experiences	
(1) The people I work with cooperate to get the job done	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, or Strongly Disagree.
(2) I am given a real opportunity to improve my skills in my organization.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, or Strongly Disagree.
(3) My work gives me a feeling of personal accomplishment	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, or Strongly Disagree.
(4) I like the kind of work I do	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, or Strongly Disagree.
(5) I have trust and confidence in my supervisor	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, or Strongly Disagree.
(6) Overall, how good a job do you feel is being done by your immediate supervisor/team leader?	Very Good, Good, Fair, Poor, or Very Poor.
Recruitment, Development & Retention	
(7) The workforce has the job-relevant knowledge and skills necessary to accomplish organizational goals.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(8) My work unit is able to recruit people with the right skills	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(9) I know how my work relates to the agency's goals and priorities	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(10) The work I do is important	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(11) Physical conditions (for example, noise level, temperature, lighting, cleanliness in the workplace) allow employees to perform their jobs well.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(12) Supervisors/team leaders in my work unit support employee development.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(13) My talents are used well in the workplace	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(14) My training needs are assessed	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
Performance Culture	
(15) Promotions in my work unit are based on merit	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(16) In my work unit, steps are taken to deal with a poor performer who cannot or will not improve.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(17) Creativity and innovation are rewarded	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(18) In my most recent performance appraisal, I understood what I had to do to be rated at different performance levels (e.g., Fully Successful, Outstanding).	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or No Basis to Judge.
(19) In my work unit, differences in performance are recognized in a meaningful way.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(20) Pay raises depend on how well employees perform their jobs	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree or Do Not Know.
(21) My performance appraisal is a fair reflection of my performance	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(22) Discussions with my supervisor/team leader about my performance are worthwhile.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(23) Managers/supervisors/team leaders work well with employees of different backgrounds.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(24) My supervisor supports my need to balance work and family issues.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
Leadership	
(25) I have a high level of respect for my organization's senior leaders	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(26) In my organization, leaders generate high levels of motivation and commitment in the workforce.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.

Employee survey questions	Employee response choices
(27) Managers review and evaluate the organization's progress toward meeting its goals and objectives.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(28) Employees are protected from health and safety hazards on the job.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(29) Employees have a feeling of personal empowerment with respect to work processes.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(30) My workload is reasonable	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(31) Managers communicate the goals and priorities of the organization	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
(32) My organization has prepared employees for potential security threats.	Strongly Agree, Agree, Neither Agree Nor Disagree, Disagree, Strongly Disagree, or Do Not Know.
Job Satisfaction	
(33) How satisfied are you with the information you receive from management on what's going on in your organization?	Very Satisfied, Satisfied, Neither Satisfied Nor Dissatisfied, Dissatisfied, or Very Dissatisfied.
(34) How satisfied are you with your involvement in decisions that affect your work?	Very Satisfied, Satisfied, Neither Satisfied Nor Dissatisfied, Dissatisfied, or Very Dissatisfied.
(35) How satisfied are you with your opportunity to get a better job in your organization?	Very Satisfied, Satisfied, Neither Satisfied Nor Dissatisfied, Dissatisfied, or Very Dissatisfied.
(36) How satisfied are you with the recognition you receive for doing a good job?	Very Satisfied, Satisfied, Neither Satisfied Nor Dissatisfied, Dissatisfied, or Very Dissatisfied.
(37) How satisfied are you with the policies and practices of your senior leaders?	Very Satisfied, Satisfied, Neither Satisfied Nor Dissatisfied, Dissatisfied, or Very Dissatisfied.
(38) How satisfied are you with the training you receive for your present job?	Very Satisfied, Satisfied, Neither Satisfied Nor Dissatisfied, Dissatisfied, or Very Dissatisfied.
(39) Considering everything, how satisfied are you with your job?	Very Satisfied, Satisfied, Neither Satisfied Nor Dissatisfied, Dissatisfied, or Very Dissatisfied.
(40) Considering everything, how satisfied are you with your pay?	Very Satisfied, Satisfied, Neither Satisfied Nor Dissatisfied, Dissatisfied, or Very Dissatisfied.
Demographics (for agencies with 800 or more employees)	
(41) What is your supervisory status?	a. Non-Supervisor: You do not supervise other employees. b. Team Leader: You are not an official supervisor; you provide employees with day-to-day guidance in work projects, but do not have supervisory responsibilities or conduct performance appraisals. c. Supervisor: You are responsible for employees' performance appraisals and approval of their leave, but you do not supervise other supervisors. d. Manager: You are in a management position and supervise one or more supervisors. e. Executive: Member of the Senior Executive Service or equivalent.
(42) Are you	a. Male. b. Female.
(43) Are you Hispanic or Latino?	a. Yes. b. No.
(44) Please select the racial category or categories with which you most closely identify (Please select one or more).	a. White. b. Black or African American. c. Native Hawaiian or other Pacific Islander. d. Asian. e. American Indian or Alaska Native.
(45) What is your agency subcomponent? (If Applicable)	An agency provided list of major divisions, bureaus, or other components one level below the agency/department.

§ 250.303 Availability of results.

(a) Each agency will make the results of its annual survey available to the public and post the results on its Web site, unless the agency head determines that doing so would jeopardize or negatively impact national security. The posted survey results will include the following:

(1) The agency's evaluation of its survey results;

(2) How the survey was conducted;

(3) Description of the employee sample, unless all employees are surveyed;

(4) The survey questions and response choices with the prescribed questions identified;

(5) The number of employees surveyed and number of survey respondents; and

(6) The number of respondents for each survey question and each response choice.

(b) Data must be collected by December 31 of each calendar year. Each agency must post the beginning and ending dates of its employee survey and either the survey results described in paragraph (a) of this section or a statement noting the decision not to post no later than 120 days after the agency completes survey administration. OPM may extend this date under unusual circumstances.

(c) Each agency must submit its survey results to OPM no later than 120 days after the agency completes survey administration.

[FR Doc. E6–14037 Filed 8–23–06; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 354

[Docket No. 04–042–2]

RIN 0579–AB88

User Fees for Agricultural Quarantine and Inspection Services

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the user fee regulations by adjusting the fees charged for certain agricultural quarantine and inspection (AQI) services that are provided in connection with certain commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international airline passengers arriving at ports in the customs territory of the United States. Prior to the interim rule, user fees had not been adjusted since October 1, 2001. Due to the events of September 11, 2001, and the resulting increased security concerns, a greater volume and variety of cargo entering the United States is being inspected. We determined that the fee adjustments were needed to recover the costs of this increased inspection activity and to account for routine inflationary increases in the cost of doing business. The adjusted AQI user fees cover fiscal years 2005 through 2010.

DATES: Effective on August 24, 2006, we are adopting as a final rule the interim rule that became effective on January 1, 2005.

FOR FURTHER INFORMATION CONTACT: For information concerning program operations, contact Mr. William E. Thomas, Director, Quarantine Policy, Analysis and Support Staff, PPQ, APHIS, 4700 River Road Unit 60, Riverdale, MD 20737–1236; 301–734–8295. For information concerning rate development, contact Ms. Donna Ford, Branch Chief, Financial Services Branch, FMD, MRPBS, APHIS, 4700 River Road Unit 55, Riverdale, MD 20737–1232, (301) 734–5901.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule published in the **Federal Register** on December 9, 2004 (69 FR 71660–71683, Docket No. 04–042–1), and effective on January 1, 2005, we amended the user fee regulations in 7 CFR part 354 by adjusting the fees charged for certain agricultural quarantine and inspection (AQI) services that are provided by the Animal and Plant Health Inspection Service (APHIS) and the Customs and Border Protection (CBP) Bureau of the Department of Homeland Security in connection with certain commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and international airline passengers arriving at ports in the customs territory of the United States. Prior to the interim rule, user fees had not been adjusted since October 1, 2001. Due to the events of September 11, 2001, and the resulting increased security concerns, a greater volume and variety of cargo entering the United States is being inspected. We determined that the fee adjustments were needed to recover the costs of this increased inspection activity and to account for routine inflationary increases in the cost of doing business. The adjusted AQI user fees cover fiscal years 2005 through 2010.

We solicited comments on the interim rule for 60 days ending on February 7, 2005. We received 315 comments by that date. The comments were from individuals, an air courier, trade associations representing airlines and air couriers, and State governments. The comments are discussed below by topic.

A number of commenters argued that instead of raising user fees, we should cut costs by increasing efficiency, outsourcing, or employing new technologies.

We are constantly working to improve our efficiency and cut costs. Since border inspection is a core Federal Government responsibility, we do not view outsourcing inspectors' functions as a viable way of accomplishing either goal. We have taken steps to reduce our personnel-related expenditures, however, thereby reducing the costs of inspection. These steps have included using lower-grade employees to perform certain tasks when doing so would not compromise effectiveness, and implementing shift work to reduce our overtime costs. The use of X-ray technology, the Internet, online databases, and specially trained detector dogs has helped make our inspection and clearance processes more efficient. Nevertheless, the costs of providing AQI services do rise from year to year due to inflation, and, as we noted in the supplementary information section of the December 2004 interim rule, increased security concerns have resulted in inspectors having to inspect a greater volume of cargo entering the United States and a greater variety of types of cargo than they did before September 11, 2001. The user fee increases that were provided for in the interim rule were necessary to enable us to recover the full costs of maintaining the AQI program.

Many commenters argued that by increasing our AQI user fees, we were actually imposing a ''stealth tax increase.'' It was further argued by some of these commenters that since only Congress has the right to raise taxes, our fee increases were thus unconstitutional.

We do not agree with this comment. A tax is money paid by the general public to support general Government operations. A user fee is money paid for a specific Government service by the beneficiary of that service and is designed to recover the costs of providing that service. The AQI user fees covered by the interim rule are intended to recover the costs of providing AQI services for commercial vessels, commercial trucks, commercial railroad cars, commercial aircraft, and airline passengers and are paid by commercial vessel companies, commercial truck drivers, commercial railroad companies, commercial airlines, and international airline passengers. As such, our AQI user fees are user fees and not taxes. We have congressional authority to collect these fees. The Food, Agriculture, Conservation and Trade Act of 1990, as amended, authorizes the Secretary of Agriculture to prescribe and collect fees to cover the cost of providing the AQI services covered by the interim rule.

A commenter suggested that APHIS should have engaged in a public deliberative process prior to the rulemaking, consulting the aviation industry and the general public. The commenter also recommended that we create a user fee advisory committee to deliberate on future user fee changes and AQI expenditures.

We welcome the submission of information at any time that would help us contain costs or enhance our efficiency. We published the December 2004 rule as an interim rather than a proposed rule in response to an emergency funding situation. The aviation industry and the general public did have an opportunity to comment on the interim rule following its publication. The fees in effect previously were not sufficient to allow us to recover our costs fully, and without immediate fee adjustments, the AQI accounts would have gone into deficit status, which could have resulted in an interruption of services. The interim rule ensured the adequate funding and continued operation at necessary levels of CBP and APHIS activities vital to preventing the

introduction of plant and animal pests and diseases into the United States.

Some commenters expressed the view that a 25-percent reserve in each AQI account was excessive. It was suggested that 10 to 15 percent might be a more reasonable figure.

We have determined that a reasonable reserve is one quarter of the annual costs of providing an AQI service. A 25-percent reserve is needed to ensure continuity of AQI services in cases of fluctuations in activity volumes. For example, following the September 11, 2001, terrorist attacks, there was a significant drop in international passenger travel, and several airlines filed for bankruptcy protection. The volume decrease in air travel led to a significant drop in AQI user fee collections for commercial aircraft and international air passengers. In order for us to continue the AQI programs for commercial aircraft and international air passengers through that uncertain time, we relied heavily on our 25-percent reserve. Without a sufficient reserve balance in place, experienced full-time personnel would have been furloughed and services reduced. As volumes returned to normal levels, the AQI program would have needed to recruit, replace, and/or rehire these furloughed employees. This disruptive and costly process would have increased the cost of AQI services and, consequently, would have necessitated higher user fees than those provided for in the interim rule. There would also have been an increased risk of the introduction of harmful plant pests and the possible establishment of those pest populations in the United States, potentially resulting in additional costs related to containing and/or eradicating such pests. The 25-percent reserve also allows for some growth in the AQI program should APHIS find it necessary to increase its inspection workforce and the number of inspections conducted due to an increase in the demand for service. An adequate reserve enables us to enhance inspection technology in order to better protect the United States from agricultural pests and diseases. A 25-percent reserve is also needed should it become necessary to shut down an AQI program completely, in which case we would need to have funding available to cover 3 months of operating expenses while the program is being shut down. A final reason for maintaining a 25-percent reserve, though not applicable to all AQI services, is the lag in AQI user fee collections. Payments are made into AQI user fee accounts for commercial aircraft and international airline passengers on a quarterly basis, with monies not remitted to APHIS until 1 month after the end of the quarter in which they were collected. Since the fourth-quarter fees are not due, and therefore not received, until after the fiscal year is over, we are not able to use those funds to pay for providing AQI services for commercial airlines and international air passengers in the fiscal year in which they are earned. Therefore, we need to maintain the reserve fund at the 25-percent level in order to continue to cover the costs of administering those AQI services for the remainder of the fiscal year while waiting for the fourth-quarter revenues.

A commenter claimed that it was difficult to evaluate the justifications for the increases in fees presented in the supplementary information section of the December 2004 interim rule because there was an insufficient level of detail regarding direct and distributable costs and their allocation. The commenter requested information on the number of airport inspector positions paid for by the preexisting and the adjusted user fees, citing the lack of such a comparison in the interim rule as an example of the insufficient level of detail presented therein.

The supplementary information section of the interim rule did, in fact, include an extensive discussion of AQI program costs and the methods by which they are calculated. The section also included a presentation, in tabular form, of our projected costs for fiscal years 2005 through 2010. As explained in the interim rule, AQI staffing increased by approximately one-third between September 11, 2001, and the publication of that rule in December 2004. The user fee increases contained in the interim rule covered the positions added during that period, but did not provide funding for the hiring of any additional airport inspectors or other AQI staff.

One commenter argued that the interim rule did not take into account the increased productivity and cost savings that should have resulted from the consolidation of AQI functions formerly carried out by APHIS into CBP. The commenter also stated that the information provided in the interim rule did not demonstrate that actual benefits from consolidation, information sharing, cross training, and increased staff would justify the fee increases.

As noted above, we are constantly working to improve our efficiency and cut costs, while carrying out our mission to protect U.S. agriculture from pest and disease outbreaks. The consolidation of AQI functions into CBP is one example of this ongoing effort; we cited others earlier in this document. As noted in the supplementary information section of the interim rule, we review our fees annually and adjust them when appropriate. If the APHIS-CBP consolidation results in future cost savings, the user fees will be adjusted to take this into account.

AQI user fees are based on the actual costs of providing the specified AQI services and maintaining a 25-percent reserve in the AQI account for each service category, as explained above. The cost of providing AQI services rises from year to year due to inflation. Prior to the December 2004 interim rule, our last user fee adjustment had come in October 2001. Since our costs had risen substantially in the interim, as a result of inflation and staffing increases, we were not recovering the full costs of administering our AQI services and were being forced to draw from our reserve funds. Had we continued to do so, we would have exhausted the reserve funds. The AQI accounts would then have gone into deficit status, which would have forced APHIS and CBP to lay off significant numbers of employees and cut back on services. The user fee increases contained in the December 2004 interim rule prevented any possible interruption of AQI services.

It was suggested by two commenters that a consolidated fee, reflecting the consolidation of agriculture, customs, and immigration functions into CBP, be adopted as a means of providing more streamlined and transparent accounting.

While we will not be making any changes to the final rule as a result of this comment, we would note that consolidated APHIS-CBP fees already exist for purchasers of yearly truck decals. We will pursue further consolidation of fees if we determine that doing so would yield the benefits that the commenters suggest.

Two commenters argued that the authority to collect the AQI user fees should be transferred from APHIS to CBP. The statute establishing the Department of Homeland Security (The Homeland Security Act of 2002, Pub. L. 107–296), which transferred many responsibilities from APHIS to CBP, did not transfer the authority to establish and collect AQI user fees.

One commenter suggested that we did not discuss the benefits of AQI services to the general public.

The benefits of AQI services were discussed in a number of places in the interim rule. It may be that the benefits are not immediately apparent to the general public because the chief benefit is the harm prevented by having these inspection services in place. The primary mission of our AQI personnel is to prevent animal and plant pests and

diseases from entering the United States. Such disease and pest introductions could lead to reductions in agricultural yield and productivity, costs to governmental and private entities for pest or disease control and eradication, losses in export revenues due to trade embargoes, and environmental degradation, resulting in immense harm to U.S. agriculture. Another benefit of AQI services is that AQI inspectors prevent trade disruptions by inspecting and clearing cargo on a timely basis. Consumers and taxpayers would certainly feel the negative effects if AQI services were disrupted or reduced.

A commenter stated that the interim rule contained no suggestion that AQI user fees could ever be decreased due to lower traffic volume and less workload.

As we noted in the interim rule and earlier in this document, we review our fees annually and, if necessary, undertake rulemaking to amend them. We will adjust a fee up or down, as appropriate, depending on the actual cost of providing services. We have adjusted user fees downward in the past. In a final rule published in the **Federal Register** on January 19, 1996 (61 FR 2660–2665 Docket No. 94–074–2) and effective on March 1, 1996, we decreased our AQI user fee for commercial aircraft by 13.1 percent after our cost analysis revealed that this fee was too high.

One commenter argued that the AQI user fee increases contained in the interim rule placed a disproportionate economic burden on the U.S. airline industry, undermining its attempts at financial recovery.

We do not agree with this comment. The December 2004 interim rule included user fee adjustments for the inspection of commercial vessels, commercial trucks, and commercial railroad cars, as well as commercial aircraft, reflecting the increased costs of administering AQI services for all these types of conveyances. Had we exempted airlines from the fee increases, we would have placed an unfair burden on operators of other conveyances by forcing them to pay the airlines' share of the increased costs.

One commenter argued that clarification is needed regarding operational and revenue sharing agreements between CBP and APHIS so that air couriers can understand which agency is responsible for providing specific AQI services under particular circumstances and which agency is responsible for billing for those services.

APHIS continues to establish the animal and plant health policies and procedures for the AQI programs, under the authority of the Plant Protection Act, while CBP staff carry out most of these policies and procedures. CBP's agriculture specialists perform the primary inspections. APHIS personnel are still responsible for such functions as pest identification, agricultural product disposal, and fumigations, and are most likely to become involved in the inspection process subsequent to the primary inspection when a treatment is required or a violation of the regulations has occurred. The regulations in § 354.3 contain information on billing and requirements for the remittance of user fees, as well as the tables that list the fees. The December 2004 interim rule included only minor, nonsubstantive changes to the provisions concerning billing and remittances. CBP's regulations pertaining to user fee billing and remittances are located in title 24 of the Code of Federal Regulations. APHIS and CBP do have a revenue-sharing agreement.

Finally, a commenter inquired as to how AQI user fee revenues are distributed between CBP and APHIS.

The distribution is based on the cost to each agency of performing the AQI functions covered by a particular fee. APHIS and CBP have a signed memorandum of understanding that specifies how AQI user fee revenues are to be distributed.

Therefore, for the reasons given in the interim rule and in this document, we are adopting the interim rule as a final rule without change.

This action also affirms the information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12988, and the Paperwork Reduction Act.

Further, this action has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

List of Subjects in 7 CFR Part 354

Animal diseases, Exports, Government employees, Imports, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Travel and transportation expenses.

PART 354—OVERTIME SERVICES RELATING TO IMPORTS AND EXPORTS; AND USER FEES

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 354 and that was published at 69 FR 71660–71683 on December 9, 2004.

Done in Washington, DC, this 18th day of August 2006.

Bruce Knight,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. E6–14041 Filed 8–23–06; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 717

RIN 0560–AH64

Removal of Obsolete Regulations; Holding of Referenda

AGENCY: Farm Service Agency, USDA.

ACTION: Final rule.

SUMMARY: This action removes regulations that have been rendered obsolete by expiration of their statutory authority and the ending of the programs they governed. There are no impacts on past or current program operations.

EFFECTIVE DATE: August 24, 2006.

FOR FURTHER INFORMATION CONTACT: Phillip Elder, Regulatory Review Group, Farm Service Agency, USDA, STOP 0540, 1400 Independence Avenue, SW., Washington, DC 20250–0540; Telephone: (202) 205–5851; e-mail: *Phillip.Elder@usda.gov.*

SUPPLEMENTARY INFORMATION:

Discussion of Final Rule

This rule removes regulations at 7 CFR Part 717, Holding of Referenda. That regulation has been rendered obsolete by repeal of its statutory authority and the ending of it applicable programs. Part 717 was authorized by the Agricultural Adjustment Act of 1938 (1938 Act), as amended, and was applicable to all referenda held pursuant to that Act. This Act required the Secretary of Agriculture to establish national marketing quotas for flue-cured, burley and other types of tobacco in years where producers of such tobacco approved of having a national marketing quota (see 7 U.S.C. 1312 *et seq.* (2000)). The quotas for the respective crops were approved or disapproved by such producers in a referendum conducted as provided in part 717. Sections 611 through 613 of the American Jobs Creation Act of 2004 (Pub. L. 108–357; the 2004 Act) repealed the tobacco marketing quota and related price support programs authorized by Title III of the 1938 Act and the Agricultural Act of 1949. Thus, the Farm Service Agency has no authority

for conducting producer referenda and 7 CFR part 717 is obsolete.

Executive Order 12866

This rule related to internal agency management. Therefore, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity for comment are not required, and this rule may be made effective less than 30 days after publication in the **Federal Register**. Further, because this rule relates to internal agency management, it is exempt from the provisions of Executive Order Nos. 12291 and 12866. Finally, this action is not a rule as defined by the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and is therefore exempt from the provisions of that Act. Accordingly, as authorized by section 808 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 808, this rule may be made effective upon publication.

Paperwork Reduction Act

This rule does not affect any information collections.

List of Subjects in 7 CFR Part 717

Agricultural Commodities, Allotments, Price support programs, Quotas, Tobacco.

PART 717—[REMOVED]

■ Accordingly, under the authority of 5 U.S.C. 301, 7 CFR Chapter VII is amended by removing part 717.

Signed at Washington, DC on August 9, 2006.

Teresa C. Lasseter,

Administrator, Farm Service Agency.

[FR Doc. 06–7159 Filed 8–23–06; 8:45 am]

BILLING CODE 3410–05–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE258; Special Conditions No. 23–198–SC]

Special Conditions: Avcon Industries, Inc.; Learjet Model 23 Series Airplanes; High-Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued to Avcon Industries, Inc., for the Learjet Model 23 series airplanes modified by Avcon Industries, Inc. This airplane as modified by Avcon Industries, Inc., will have a novel or unusual design feature associated with the installation of a new Reduced Vertical Separation Minimum (RVSM) air data system. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of high-intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is August 17, 2006. Comments must be received on or before September 25, 2006.

ADDRESSES: Comments on these special conditions may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE–7, Attention: Rules Docket CE258, 901 Locust, Room 506, Kansas City, Missouri 64106 or delivered in duplicate to the Regional Counsel at the above address. Comments must be marked: CE258. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Ervin Dvorak, Federal Aviation Administration, Aircraft Certification Service, Small Airplane Directorate, ACE–111, 901 Locust, Room 301, Kansas City, Missouri 64106; 816–329–4123; fax 816–329–4090.

SUPPLEMENTARY INFORMATION:

The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the approval design and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective on issuance.

Comments Invited

Interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or special condition number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a self-addressed, stamped postcard on which the following statement is made: ''Comments to CE258.'' The postcard will be date stamped and returned to the commenter.

Background

On June 26, 2006, Avcon Industries, Inc.; P.O. Box 748; Newton, Kansas 67114, applied for a supplemental type certificate (STC) to modify Learjet Model 23 series airplanes currently approved under Type Certificate (TC) No. A5CE. The Learjet 23 series airplanes are normal category airplanes powered by two turbojet engines, with a maximum takeoff weight of 12,500 pounds. These airplanes operate with a 2-person crew and can seat up to 8 passengers. The proposed modification is the installation of an Innovative Solutions & Support Air Data Display Units and Analog Interface Unit. The avionics/electronics and electrical systems installed in this airplane have the potential to be vulnerable to HIRF external to the airplane.

Type Certification Basis

Under the provisions of § 21.101, Avcon Industries, Inc., must show that the Learjet Model 23 series airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A5CE, or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.'' The regulations incorporated by reference in the Type Certificate No. A5CE for the Learjet Model 23 series airplanes includes Civil Air Regulations (CAR), part 3, effective May 15, 1956, as amended by Amendments 3–1 through 3–8, plus special conditions set forth in FAA letter to Learjet, dated November 12, 1963, and Amendment No. 1, dated July 31, 1964, and No. 2, dated March 14, 1966, and Exception No. 352 from compliance with CAR 3.74(a)(2) and (3) for ground operation at a maximum weight of 12,750 pounds.

If the Administrator finds that the applicable airworthiness regulations (*i.e.*, part 23, as amended) do not

contain adequate or appropriate safety standards for the Learjet Model 23 series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

In addition to the applicable airworthiness regulations and special conditions, the Learjet Model 23 series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

Special conditions, as appropriate, as defined in § 11.19, are issued in accordance with § 11.38, and become part of the type certification basis in accordance with § 21.101.

Special conditions are initially applicable to the model for which they are issued. Should Avcon Industries, Inc., apply for a supplemental type certificate to modify any other model included on TC No. A5CE to incorporate the same or a similar novel or unusual design feature, these special conditions would also apply to the other model under the provisions of § 21.101.

Novel or Unusual Design Features

The Learjet Model 23 series airplanes, as modified by Avcon Industries, Inc., will incorporate an Innovative Solutions & Support Air Data Display Units and Analog Interface Unit. The Innovative Solutions & Support Air Data Display Units and Analog Interface Unit perform critical functions. These systems may be vulnerable to HIRF external to the airplane. The current airworthiness standards of part 23 do not contain adequate or appropriate safety standards for the protection of this equipment from the adverse effects of HIRF. Therefore, we consider this system to be a novel or unusual design feature.

Discussion

There is no specific regulation that addresses protection requirements for electrical and electronic systems from HIRF. Increased power levels from ground-based radio transmitters and the growing use of sensitive avionics/electronics and electrical systems to command and control airplanes have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, special conditions are needed for the Learjet Model 23 series airplanes as modified by Avcon Industries, Inc. These special conditions require that new avionics/electronics and electrical systems that perform critical functions be designed and installed to preclude component damage and interruption of function due to both the direct and indirect effects of HIRF.

High-Intensity Radiated Fields (HIRF)

With the trend toward increased power levels from ground-based transmitters, and the advent of space and satellite communications, coupled with electronic command and control of the airplane, the immunity of critical avionics/electronics and electrical systems to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling of electromagnetic energy to cockpit-installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with the HIRF protection special condition is shown with either paragraph 1 *or* 2 below:

1. A minimum threat of 100 volts rms (root-mean-square) per meter electric field strength from 10 KHz to 18 GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the field strengths identified in the table below for the frequency ranges indicated. Both peak and average field strength components from the table are to be demonstrated.

Frequency	Field strength (volts per meter)	
	Peak	Average
10 kHz–100 kHz	50	50
100 kHz–500 kHz	50	50
500 kHz–2 MHz	50	50
2 MHz–30 MHz	100	100
30 MHz–70 MHz	50	50
70 MHz–100 MHz	50	50
100 MHz–200 MHz	100	100
200 MHz–400 MHz	100	100
400 MHz–700 MHz	700	50
700 MHz–1 GHz	700	100
1 GHz–2 GHz	2000	200
2 GHz–4 GHz	3000	200
4 GHz–6 GHz	3000	200
6 GHz–8 GHz	1000	200
8 GHz–12 GHz	3000	300
12 GHz–18 GHz	2000	200
18 GHz–40 GHz	600	200

The field strengths are expressed in terms of peak of the root-mean-square (rms) over the complete modulation period.

The threat levels identified above are the result of an FAA review of existing studies on the subject of HIRF, in light of the ongoing work of the Electromagnetic Effects Harmonization Working Group of the Aviation Rulemaking Advisory Committee.

Applicability

As discussed above, these special conditions are applicable to Learjet Model 23 series airplanes modified by Avcon Industries, Inc. Should Avcon Industries, Inc., apply later for an STC to modify any other model included on TC No. A5CE to incorporate the same novel or unusual design feature, these special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features on the Learjet 23 series airplanes modified by Avcon Industries, Inc. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment procedure in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g); 40113, and 44701; 14 CFR 21.16 and 21.101; and 14 CFR 11.38 and 11.19.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Learjet Model 23 series airplanes modified by Avcon Industries, Inc.

1. *Protection from Unwanted Effects of High-Intensity Radiated Fields (HIRF).* Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to high-intensity radiated fields.

2. For the purpose of these special conditions, the following definition applies:

Critical Functions: Functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Kansas City, Missouri on August 17, 2006.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–13995 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1213

Notice: (06–060)

RIN 2700–AD25

Release of Information to News and Information Media

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: The National Aeronautics and Space Administration (NASA) is amending NASA regulations on release of information to news and information media. These amendments will establish NASA policy, responsibility, and procedure for providing information to news media on NASA activities.

DATES: *Effective Date:* August 24, 2006.

FOR FURTHER INFORMATION CONTACT: R. Andrew Falcon, Associate General Counsel, General Law Practice Group, Office of the General Counsel, NASA Headquarters, telephone (202) 358–2465, fax (202) 358–4355.

SUPPLEMENTARY INFORMATION: These amendments set forth procedures for internal review of public information, updates the designations of officials responsible for the accuracy of information contained in press releases and other forms of public information, and provides guidance to employees on authorities governing the release of information. Since this action concerns matters of internal Agency organization, practice, and procedure, no public comment period is required, and this rule becomes effective on the date of publication. This rule is not subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6) since it will not have a significant impact on a substantial number of small entities. Finally, this rule is not a major Federal action as defined in Executive Order 12866.

List of Subjects in 14 CFR Part 1213

Administrative practice and procedure, News media.

■ For the reasons set out in the preamble, NASA revises part 1213 of title 14 of the Code of Federal Regulations to read as follows:

PART 1213—RELEASE OF INFORMATION TO NEWS AND INFORMATION MEDIA

Sec.

1213.100 Scope.
1213.101 Applicability.
1213.102 Policy.
1213.103 Responsibilities.
1213.104 Public information coordination and concurrence.
1213.105 Interviews.
1213.106 Preventing release of classified information to the media.
1213.107 Preventing unauthorized release of sensitive but unclassified (SBU) information/material to the news media.
1213.108 Multimedia materials.
1213.109 News releases concerning international activities.

Authority: 42 U.S.C. 2473(a)(3).

§ 1213.100 Scope.

This part sets forth policy governing the release of public information, which is defined as information in any form provided to news and information media, especially information that has the potential to generate significant media or public interest or inquiry. Examples include, but are not limited to, press releases, media advisories, news features, and Web postings. Not included under this definition are scientific and technical reports, Web postings designed for technical or scientific interchange, and technical information presented at professional meetings or in professional journals.

§ 1213.101 Applicability.

(a) This policy applies to NASA Headquarters, NASA Centers, and Component Facilities.

(b) In the event of any conflict between this policy and any other NASA policy, directive, or regulation, this policy shall govern and supersede any previous issuance or directive.

(c) The requirements of this part do not apply to the Office of Inspector General regarding its activities.

§ 1213.102 Policy.

(a) NASA, a scientific and technical Agency, is committed to a culture of openness with the media and public that values the free exchange of ideas, data, and information as part of scientific and technical inquiry. Scientific and technical information from or about Agency programs and projects will be accurate and unfiltered.

(b) Consistent with NASA statutory responsibility, NASA will ''provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof.'' Release of public information concerning NASA activities and the results of NASA activities will be made in a timely, equitable, accurate, and complete manner.

(c) To ensure timely release of information, NASA will endeavor to ensure cooperation and coordination among the Agency's scientific, engineering, and public affairs communities.

(d) In keeping with the desire for a culture of openness, NASA employees may, consistent with this policy, speak to the press and the public about their work.

(e) This policy does not authorize or require disclosure of information that is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise restricted by statute, regulation, Executive Order, or other Executive Branch policy or NASA policy (e.g., OMB Circulars, NASA Policy Directives). Examples of information not releasable under this policy include, without limitation, information that is, or is marked as, classified information, procurement sensitive information, information subject to the Privacy Act, other sensitive but unclassified information, and information subject to privilege, such as pre-decisional information or attorney-client communications.

§ 1213.103 Responsibilities.

(a) The Assistant Administrator for Public Affairs is responsible for developing and administering an integrated Agency-wide

communications program, establishing Agency public affairs policies and priorities, and coordinating and reviewing the performance of all Agency public affairs activities. The Assistant Administrator will develop criteria to identify which news releases and other types of public information will be issued nationwide by NASA Headquarters. Decisions to release public information nationwide by NASA Headquarters will be made by the Assistant Administrator for Public Affairs or his/her designee.

(b) NASA's Mission Directorate Associate Administrators and Mission Support Office heads have ultimate responsibility for the technical, scientific, and programmatic accuracy of all information that is related to their respective programs and released by NASA.

(c) Under the direction of the Assistant Administrator for Public Affairs, Public Affairs Officers assigned to Mission Directorates are responsible for the timely and efficient coordination of public information covering their respective programs. This coordination includes review by appropriate Mission Directorate officials. It also includes editing by public affairs staff to ensure that public information products are well written and appropriate for the intended audience. However, such editing shall not change scientific or technical data or the meaning of programmatic content.

(d) Center Public Affairs Directors are responsible for implementing their portion of the Agency's communications program, adhering to Agency policies, procedures, and priorities, and coordinating their activities with Headquarters (and others where appropriate). They are responsible for the quality of public information prepared by Center Public Affairs Officers. They also are responsible for the day-to-day production of public information covering their respective Center activities, which includes obtaining the necessary Center concurrences and coordinating, as necessary, with the appropriate Headquarters Public Affairs Officers.

(e) Center Directors have ultimate responsibility for the accuracy of public information that does not require the concurrence of Headquarters. *See* § 1213.104(d).

(f) All NASA employees are required to coordinate, in a timely manner, with the appropriate Public Affairs Officers prior to releasing information that has the potential to generate significant media or public interest or inquiry.

(g) All NASA Public Affairs Officers are required to notify the appropriate Headquarters Public Affairs Officers, in a timely manner, about activities or events that have the potential to generate significant media or public interest or inquiry.

(h) All NASA public affairs employees are expected to adhere to the following code of conduct:

(1) Be honest and accurate in all communications.

(2) Honor publication embargoes.

(3) Respond promptly to media requests, and respect media deadlines.

(4) Act promptly to notify the public of, and correct, erroneous information, either internally or externally.

(5) Promote the free flow of scientific and technical information.

(6) Protect non-public information.

(i) All NASA employees are responsible for adhering to plans (including schedules) for activities established by public affairs offices and senior management for the coordinated release of public information.

(j) All NASA-funded missions will have a public affairs plan, approved by the Assistant Administrator for Public Affairs, which will be managed by Headquarters and/or a designated NASA Center.

(k) Public affairs activities for NASA-funded missions will not be managed by non-NASA institutions, unless authorized by the Assistant Administrator for Public Affairs.

§ 1213.104 Public information coordination and concurrence.

(a) *General.* All NASA employees involved in preparing and issuing NASA public information are responsible for proper coordination among Headquarters and Center offices to include review and clearance by appropriate officials prior to issuance. Such coordination will be accomplished through procedures developed and published by the NASA Assistant Administrator for Public Affairs.

(b) *Coordination.* To ensure timely release of public information, Headquarters and Center Public Affairs Officers are required to coordinate to obtain review and clearance by appropriate officials, keep each other informed of changes, delays, or cancellation of releases, and provide advance notification of the actual release.

(c) All public information shall be coordinated through the appropriate Headquarters offices, including review by the appropriate Mission Directorate Associate Administrator and Mission Support Office head, or their designees, to ensure scientific, technical, and programmatic accuracy, and review by the Assistant Administrator for Public Affairs or his/her designee to ensure that public information products are well written and appropriate for the intended audience.

(d) Centers may, however, without the full coordination of Headquarters, issue public information that is institutional in nature, of local interest, or has been deemed not to be a Headquarters release. These releases must be coordinated through the appropriate Center offices and approved by the Center Director and Center Public Affairs Director. The Center Public Affairs Director is required to provide proper notification to the Office of Public Affairs, NASA Headquarters, prior to release. The Assistant Administrator for Public Affairs or his/her designee will determine which public information will be issued nationwide by NASA Headquarters and shall publish guidelines for the release of public information that may be issued by Centers without clearance from Headquarters offices.

(e) *Dispute Resolution.* Any dispute arising from a decision to proceed or not proceed with the issuance of a news release or other type of public information will be addressed and resolved by the Assistant Administrator for Public Affairs with the appropriate Mission Directorate Associate Administrator, Mission Support Office head, Center Director, and others, such as Center Public Affairs Directors, as necessary. However, the appropriate Mission Directorate Associate Administrator shall be the arbiter of disputes about the accuracy or characterization of programmatic, technical, or scientific information. Additional appeals may be made to the Chief of Strategic Communications and to the Office of the Administrator. When requested by a Center Public Affairs Director, an explanation of the resolution will be provided in writing to all interested Agency parties.

§ 1213.105 Interviews.

(a) Only spokespersons designated by the Assistant Administrator for Public Affairs, or his/her designee, are authorized to speak for the Agency in an official capacity regarding NASA policy, programmatic, and budget issues.

(b) In response to media interview requests, NASA will offer articulate and knowledgeable spokespersons who can best serve the needs of the media and the American public. However, journalists may have access to the NASA officials they seek to interview, provided those NASA officials agree to be interviewed.

(c) NASA employees may speak to the media and the public about their work.

When doing so, employees shall notify their immediate supervisor and coordinate with their public affairs office in advance of interviews whenever possible, or immediately thereafter, and are encouraged, to the maximum extent practicable, to have a Public Affairs Officer present during interviews. If Public Affairs Officers are present, their role will be to attest to the content of the interview, support the interviewee, and provide post-interview follow up with the media, as necessary.

(d) NASA, as an Agency, does not take a position on any scientific conclusions. That is the role of the broad scientific community and the nature of the scientific process. NASA scientists may draw conclusions and may, consistent with this policy, communicate those conclusions to the media. However, NASA employees who present personal views outside their official area of expertise or responsibility must make clear that they are presenting their individual views—not the views of the Agency—and ask that they be sourced as such.

(e) Appropriated funds may only be used to support Agency missions and objectives consistent with legislative or presidential direction. Government funds shall not be used for media interviews or other communication activities that go beyond the scope of Agency responsibilities and/or an employee's official area of expertise or responsibility.

(f) Media interviews will be ''on-the-record'' and attributable to the person making the remarks, unless the interviewee is authorized to do otherwise by the Assistant Administrator for Public Affairs or Center Public Affairs Director, or their designees. Any NASA employee providing material to the press will identify himself/herself as the source.

(g) Audio recordings may be made by NASA with consent of the interviewee.

(h) NASA employees are not required to speak to the media.

(i) Public information volunteered by a NASA official will not be considered exclusive to any one media source and will be made available to other sources, if requested.

§ 1213.106 Preventing release of classified information to the media.

(a) Release of classified information in any form (*e.g.*, documents, through interviews, audio/visual) to the news media is prohibited. The disclosure of classified information to unauthorized individuals may be cause for prosecution and/or disciplinary action against the NASA employee involved. Ignorance of NASA policy and procedures regarding classified information does not release a NASA employee from responsibility for preventing any unauthorized release. See NPR 1600.1, Chapter 5, Section 5.23 for internal NASA guidance on management of classified information. For further guidance that applies to all agencies, see Executive Order 12958, as amended, ''Classified National Security Information,'' and its implementing directive at 32 CFR parts 2001 and 2004.

(b) Any attempt by news media representatives to obtain classified information will be reported through the Headquarters Office of Public Affairs or Installation Public Affairs Office to the Installation Security Office and Office of Security and Program Protection.

(c) For classified operations and/or programs managed under the auspices of a DD Form 254, *''Contract Security Classification Specification,''* all inquiries concerning this activity will be responded to by the appropriate PAO official designated in Item 12 on the DD Form 254.

(d) For classified operations and/or information owned by other Government agencies (e.g., DOD, DOE), all inquiries will be referred to the appropriate Agency Public Affairs Officer as established in written agreements.

§ 1213.107 Preventing unauthorized release of sensitive but unclassified (SBU) information/material to the news media.

(a) All NASA SBU information requires accountability and approval for release. Release of SBU information to unauthorized personnel is prohibited. Unauthorized release of SBU information may result in prosecution and/or disciplinary action. Ignorance of NASA policy and procedures regarding SBU information does not release a NASA employee from responsibility for unauthorized release. See NPR 1600.1, Chapter 5, Section 5.24 for guidance on identification, marking, accountability and release of NASA SBU information.

(b) Examples of SBU information include: proprietary information of others provided to NASA under nondisclosure or confidentiality agreement; source selection and bid and proposal information; information subject to export control under the International Traffic in Arms Regulations (ITAR) or the Export Administration Regulations (EAR); information subject to the Privacy Act of 1974; predecisional materials such as national space policy not yet publicly released; pending reorganization plans or sensitive travel itineraries; and information that could constitute an indicator of U.S. Government intentions, capabilities, operations, or activities or otherwise threaten operations security.

(c) Upon request for access to information/material deemed SBU, coordination must be made with the information/material owner to determine if the information/material may be released. Other organizations that play a part in SBU information identification, accountability, and release (e.g., General Counsel, External Relations, Procurement) must be consulted for assistance and/or concurrence prior to release.

(d) Requests for SBU information from other Government agencies must be referred to the NASA program or other office responsible for handling the information as SBU.

§ 1213.108 Multimedia materials.

(a) NASA's multimedia material, from all sources, will be made available to the information media, the public, and to all Agency Centers and contractor installations utilizing contemporary delivery methods and emerging digital technology.

(b) Centers will provide the media, the public, and as necessary, NASA Headquarters with:

(1) Selected prints and original or duplicate files of news-oriented imagery and other digital multimedia material generated within their respective areas.

(2) Selected video material in the highest quality format practical, which, in the opinion of the installations, would be appropriate for use as news feed material or features in pre-produced programs and other presentations.

(3) Audio and/or video files of significant news developments and other events of historic or public interest.

(4) Interactive multimedia features that can be incorporated into the Agency's Internet portal for use by internal and external audiences, including the media and the general public.

(5) To the extent practicable, these products will be in forms and media accessible to the public at large, as well as to specific user groups requesting them, if any.

§ 1213.109 News releases concerning international activities.

(a) Releases of information involving NASA activities, views, programs, or projects involving another country or an international organization require prior coordination and approval by the Headquarters offices of External Relations and Public Affairs.

(b) NASA Centers and Headquarters offices will report all visits proposed by

representatives of foreign news media to the Public Affairs Officer of the Office of External Relations for appropriate handling consistent with all NASA policies and procedures.

Michael D. Griffin,

Administrator.

[FR Doc. E6–13980 Filed 8–23–06; 8:45 am]

BILLING CODE 7510–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9272]

RIN 1545–BE81

REMIC Residual Interests-Accounting for REMIC Net Income (Including Any Excess Inclusions) (Foreign Holders); Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to final regulations.

SUMMARY: This document contains corrections to final regulations (TD 9272) that were published in the **Federal Register** on Tuesday, August 1, 2006 (71 FR 43363) relating to income that is associated with a residual interest in a Real Estate Mortgage Investment Conduit (REMIC) and that is allocated through certain entities to foreign persons who have invested in those entities.

DATES: These corrections are effective August 1, 2006.

FOR FURTHER INFORMATION CONTACT: Dale Collinson, (202) 622–3900 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The correction notice that is the subject of this document is under sections 860A, 860G(b), 863, 1441, and 1442 of the Internal Revenue Code.

Need for Correction

As published, final regulations (TD 9272) contain errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the final regulations (TD 9272), which was the subject of FR Doc. E6–12363, is corrected as follows:

1. On page 43364, column 1, in the preamble, under the paragraph heading ''Background and Explanation of Provisions'', first full paragraph of the column, line 6, the language ''furtherance of the congressional'' is corrected to read ''furtherance of the Congressional''.

2. On page 43365, column 1, in the preamble, under the paragraph heading ''Special Analyses'', line 5 from bottom of the paragraph, the language ''Code, these temporary regulations will'' is corrected to read ''the Code, these temporary regulations will''.

LaNita Van Dyke,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E6–14000 Filed 8–23–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9263]

RIN 1545–BE33

Income Attributable to Domestic Production Activities; Correction Notice

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations; correction notice.

SUMMARY: This document contains corrections to final regulations that were published in the **Federal Register** on Thursday, June 1, 2006 (71 FR 31268) concerning the deduction for income attributable to domestic production activities under section 199.

DATES: These corrections are effective June 1, 2006.

FOR FURTHER INFORMATION CONTACT: Concerning § 1.199–1, 1.199–3, 1.199–6, and 1.199–8, Paul Handleman or Lauren Ross Taylor, (202) 622–3040; concerning § 1.199–2, Alfred Kelley, (202) 622–6040; concerning § 1.199–4(c) and (d), Richard Chewning, (202) 622–3850; concerning all other provisions of § 1.199–4, Jeffery Mitchell, (202) 622–4970; concerning § 1.199–7, Ken Cohen, (202) 622–7790; concerning § 1.199–9, Martin Schaffer, (202) 622–3080 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9263) that are the subject of these corrections are under section 199 of the Internal Revenue Code.

Need for Correction

As published, final regulations (TD 9263) contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the final regulations (TD 9263), that was the subject of FR Doc. 06–4829, is corrected as follows:

1. On page 31270, column 3, in the preamble, under the paragraph heading ''*Wage Limitation*'', first paragraph, line 6, the language ''2006–22 (2006–22 I.R.B.) has been'' is corrected to read ''2006–22 (2006–23 I.R.B. 1033) has been''.

2. On page 31274, column 3, in the preamble, under the paragraph heading ''*Derived From a Lease, Rental, License, Sale, Exchange, or Other Disposition*'', first paragraph of the column, line 10 from the bottom of the paragraph, the language ''(3)(l)(1), the preamble example is not'' is corrected to read ''(3)(i)(1), the preamble example is not''.

3. On page 31278, column 1, in the preamble, under the paragraph heading ''*Construction of Real Property*'', first full paragraph of the column, line 4, the language ''exception of § 1.199–3(1)(5)(ii)'' is corrected to read ''exception of § 1.199–3(l)(5)(ii) of the proposed regulations''.

4. On page 31281, column 1, in the preamble, under the paragraph heading ''*Pass-Thru Entities*'', first paragraph of the column, line 26 from the top of the paragraph, the language ''members (and vice versa) for attribution'' is corrected to read ''members for attribution''.

5. On page 31282, column 2, in the preamble, under the paragraph heading ''*Effective Date*'', paragraph 2, line 10 from the top of the paragraph, the language ''(of this chapter) for a taxable year'' is corrected to read ''for a taxable year''.

LaNita Van Dyke,

Acting Branch Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E6–14005 Filed 8–23–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD05–06–062]

RIN 1625–AA00

Safety Zone; Patapsco River, Northwest and Inner Harbors, Baltimore, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone upon certain waters of the Patapsco River, Northwest Harbor, and Inner Harbor during the movement of the historic sloop-of-war USS CONSTELLATION. This action is necessary to provide for the safety of life on navigable waters during the tow of the vessel from its berth at the Inner Harbor in Baltimore, Maryland, to a point on the Patapsco River near the Fort McHenry National Monument and Historic Shrine in Baltimore, Maryland, and return. This action will restrict vessel traffic in portions of the Patapsco River, Northwest Harbor, and Inner Harbor during the event.

DATES: This rule is effective from 2 p.m. through 7 p.m. local time on September 8, 2006.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket CGD05–06–062 and are available for inspection or copying at Commander, U. S. Coast Guard Sector Baltimore, 2401 Hawkins Point Road, Building 70, Waterways Management Division, Baltimore, Maryland, 21226–1791 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald Houck, at Coast Guard Sector Baltimore, Waterways Management Division, at telephone number (410) 576–2674 or (410) 576–2693.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On June 22, 2006, we published a notice of proposed rulemaking (NPRM) entitled ''Safety Zone; Patapsco River, Northwest and Inner Harbors, Baltimore, MD'' in the **Federal Register** (71 FR 35854). We received no letters commenting on the proposed rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register.** The Coast Guard expects a large recreational boating fleet. For safety concerns, it is in the public interest to have a safety zone in place for the event, since immediate action is needed to protect mariners against potential hazards associated with the towing and turn-around of the historic USS CONSTELLATION.

Background and Purpose

The USS CONSTELLATION Museum is planning to conduct a ''turn-around'' ceremony involving the sloop-of-war USS CONSTELLATION in Baltimore, Maryland on Friday, September 8, 2006. Planned events include a three-hour, round-trip tow of the CONSTELLATION in the Port of Baltimore, with an onboard salute with navy pattern cannon while the historic vessel is positioned off Fort McHenry National Monument and Historic Site. The historic Sloop-of-War USS CONSTELLATION will be towed ''dead ship,'' which means that the vessel will be underway without the benefit of mechanical or sail propulsion. The return dead ship tow of the CONSTELLATION to its berth in the Inner Harbor is expected to occur immediately upon execution of a tug-assisted turn-around of the CONSTELLATION on the Patapsco River near Fort McHenry. The Coast Guard anticipates a large recreational boating fleet during this event, scheduled on a late Friday afternoon during the summer in Baltimore, Maryland. Operators should expect significant vessel congestion along the planned route.

The purpose of this rule is to promote maritime safety and protect participants and the boating public in the Port of Baltimore immediately prior to, during, and after the scheduled event. The rule will provide for a clear transit route for the participating vessels, and provide a safety buffer around the participating vessels while they are in transit. The rule will impact the movement of all vessels operating upon certain waters of the Patapsco River, Northwest Harbor and Inner Harbor.

Discussion of Comments and Changes

The Coast Guard received no comments on the proposed rule during the comment period published in the NPRM. No public meeting was requested and none was held. As a result, no change to the proposed regulatory text was made.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 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.

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 rule will not have a significant economic impact on a substantial number of small entities. This rule would affect the following entities, some of which might be small entities: the owners or operators of vessels intending to operate, remain or anchor within certain waters of the Patapsco River, Northwest Harbor and Inner Harbor, in Baltimore, Maryland, from 2 p.m. through 7 p.m. on September 8, 2006. Because the zone is of limited size and duration, it is expected that there will be minimal disruption to the maritime community. Before the effective period, the Coast Guard will issue maritime advisories widely available to users of the river and harbors to allow mariners to make alternative plans for transiting the affected areas. In addition, smaller vessels not constrained by their draft, which are more likely to be small entities, may transit around the safety zone.

Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman

and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

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

Federalism

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 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 rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does 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.

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 5100.1, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation.

A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T05–062 to read as follows:

§ 165.T05–062 Safety Zone; Patapsco River, Northwest and Inner Harbors, Baltimore, MD.

(a) *Definitions.* For the purposes of this section:

(1) *Captain of the Port, Baltimore, Maryland* means the Commander, Coast Guard Sector Baltimore or any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port, Baltimore, Maryland to act on his or her behalf.

(2) *USS CONSTELLATION ''turn-around'' participants* means the USS CONSTELLATION, its support craft and the accompanying towing vessels.

(b) *Location.* The following area is a moving safety zone: all waters from surface to bottom within 200 yards ahead, 100 yards outboard, and 100 yards aft of the historic Sloop-of-War USS CONSTELLATION, while operating in the Inner Harbor, the Northwest Harbor or the Patapsco River.

(c) *Regulations.* (1) The general regulations governing safety zones, found in § 165.23, apply to the safety zone described in paragraph (b) of this section.

(2) With the exception of USS CONSTELLATION ''turn-around'' participants, entry into or remaining in this zone is prohibited, unless authorized by the Captain of the Port, Baltimore, Maryland.

(3) Persons or vessels requiring entry into or passage through the moving safety zone must first request authorization from the Captain of the Port, Baltimore, Maryland to seek permission to transit the area. The

Captain of the Port, Baltimore, Maryland can be contacted at telephone number (410) 576–2693. The Coast Guard vessels enforcing this section can be contacted on Marine Band Radio VHF Channel 16 (156.8 MHz). Upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing light, or other means, the person or vessel shall proceed as directed. If permission is granted, all persons or vessels must comply with the instructions of the Captain of the Port, Baltimore, Maryland, and proceed at the minimum speed necessary to maintain a safe course while within the zone.

(d) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the zone by Federal, State and local agencies.

(e) *Effective period.* This section will be enforced from 2 p.m. through 7 p.m. local time on September 8, 2006.

Dated: August 11, 2006.

Jonathan C. Burton,

Commander, U.S. Coast Guard, Acting Captain of the Port, Baltimore, Maryland.

[FR Doc. E6–14071 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD01–06–108]

RIN 1625–AA00

Safety Zone; Blasting Operations, Demolition of Mattabassett Outfall, Connecticut River, Cromwell, CT

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the demolition of the Mattabassett Outfall from August 9, 2006 through August 30, 2006 in the waters of the Connecticut River off Cromwell, CT. The zone will temporarily close all waters in the vicinity of the Mattabessett Outfall within a three hundred (300) yard radius of the blasting operations. This temporary safety zone is necessary to protect the maritime community transiting the area from the potential safety hazards associated with demolition and blasting operations. The safety zone temporarily prohibits entry into or movement within this portion of the Connecticut River during the closure period, unless authorized by the Captain of the Port (COTP), Long Island Sound or the COTP's designated representative.

DATES: This rule is effective from 7 a.m. EDT August 9, 2006 through 6 p.m. EDT on August 30, 2006.

ADDRESSES: Documents indicated in this preamble as being available in the docket, are part of docket CGD01–06–108 and will be available for inspection or copying at Sector Long Island Sound, New Haven, CT, between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Junior Grade D. Miller, Chief, Waterways Management Division, Coast Guard Sector Long Island Sound at (203) 468–4596.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM because the logistics of the blasting operations were not presented to the Coast Guard with sufficient time to draft and publish an NPRM. Any delay encountered in this regulation's effective date would be contrary to the public interest since the safety zone is needed to prevent traffic from transiting a portion of the Connecticut River during the blasting operations and to provide for the safety of life on navigable waters.

For the same reasons, the Coast Guard finds, under 5 U.S.C. 553(d)(3), that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The zone should have a minimal negative impact on the public and navigation as it will only be enforced for short periods of time during the actual blasting operations and not enforced during the entire effective period, allowing vessels to safely transit the Connecticut River off Cromwell, CT.

Background and Purpose

The Mattabassett Outfall located in Cromwell, CT, is currently being demolished. When detonated, spread of the debris will be minimized by blast matting. The blasting and demolition activities have been approved by the Connecticut Department of Environmental Protection. This blasting will also require a Coast Guard explosives handling permit in accordance with 49 CFR 176 as the explosives being used are being loaded onto vessels prior to being placed on the respective piers. The loading of explosives onto vessels will be monitored by Coast Guard personnel.

Discussion of Rule

This regulation establishes a temporary safety zone on the waters of the Connecticut River, off Cromwell, CT, within a 300-yard radius of the blasting operations being conducted at the Mattabassett Outfall.

This action is intended to prohibit vessel traffic in a portion of the Connecticut River of Cromwell, CT, and to provide for the protection of life and property of the maritime public. The safety zone will be enforced for relatively short periods of time during the actual blasting operations. Therefore, the zone will not be enforced during the entire effective period from 7 a.m. EDT August 9, 2006 through 6 p.m. EDT on August 30, 2006. Marine traffic may transit safely through the safety zone during the period when blasting operations are not underway. All blasting operations shall be preceded 5 minutes before the blast by 3 whistles; an additional 2 whistles will be given 1 minute prior to the blast with a final single whistle after the blast indicating the ''all clear.''

The Captain of the Port anticipates minimal negative impact on vessel traffic as the safety zone will only be enforced for short periods of time during the actual blasting operations and not enforced during the entire effective period. Public notifications will be made prior to the effective period via local notice to mariners and marine information broadcasts.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 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.

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. This rule will have minimal impact on the public for the following reasons: This zone covers only a small portion of the waters of the Connecticut River, and there is no impact on commercial vessels. Additionally, the safety zone will only be enforced for relatively short periods during blasting operations.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule will have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small

businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in those portions of the Connecticut River covered by the safety zone. For the reasons outlined in the Regulatory Evaluation section above, this rule will not have a significant impact on a substantial number of small entities.

Assistance for Small Entities

Under subsection 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 rule so that they can better evaluate its effects on them and participate in the rulemaking. If this rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call Lieutenant Junior Grade D. Miller, Chief, Waterways Management Division, Sector Long Island Sound, at (203) 468–4596.

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

Collection of Information

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

Federalism

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 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 rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.1D and Department of Homeland Security Management Directive 5100.1, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of the categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation.

A final ''Environmental Analysis Check List'' and a final ''Categorical Exclusion Determination'' will be available in the docket where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add temporary § 165.T01–108 to read as follows:

§ 165.T01–108 Safety Zone; Blasting Operations, Demolition of Mattabassett Outfall, Connecticut River, Cromwell, CT.

(a) *Location.* The following area is a safety zone: All waters of the Connecticut River, from surface to bottom, within a three hundred (300) yard radius of the blasting operations at Mattabassett Outfall located off Cromwell, CT.

(b) *Enforcement period.* This rule is effective from 7 a.m. EDT August 9, 2006 through 6 p.m. EDT on August 30, 2006.

(c) *Definitions.* (1) As used in this section, designated representative means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port (COTP).

(2) [Reserved]

(d) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into or movement within this zone by any person or vessel is prohibited unless authorized by the Captain of the Port (COTP), Long Island Sound or the COTP's designated representative.

(2) The safety zone is closed to all vessel traffic during blasting operations, except as may be permitted by the COTP or the COTP's designated representative.

(3) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or the COTP's designated representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or the COTP's designated representative.

Dated: August 3, 2006.

P. J. Boynton,

Captain, U.S. Coast Guard, Captain of the Port, Long Island Sound.

[FR Doc. E6–14069 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 242

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 100

RIN 1018–AU70

Subsistence Management Regulations for Public Lands in Alaska, Subpart A; Makhnati Island Area

AGENCIES: Forest Service, Agriculture; Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This rule revises the jurisdiction of the Federal Subsistence Management Program by adding submerged lands and waters in the area of Makhnati Island, near Sitka, Alaska. This would then allow Federal subsistence users to harvest marine resources in this area under seasons, harvest limits, and methods specified in Federal Subsistence Management regulations.

DATES: This rule will be effective September 25, 2006.

FOR FURTHER INFORMATION CONTACT: Chair, Federal Subsistence Board, c/o U.S. Fish and Wildlife Service, Attention: Peter J. Probasco, Office of Subsistence Management; (907) 786–3888. For questions specific to National Forest System lands, contact Steve Kessler, Regional Subsistence Program Leader, USDA, Forest Service, Alaska Region, (907) 786–3888.

ADDRESSES: You may obtain additional information by contacting the Office of Subsistence Management, 3601 C Street, Suite 1030, Anchorage, Alaska 99503.

SUPPLEMENTARY INFORMATION:

Background

In Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111–3126), Congress found that ''the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses * * *'' and that ''continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened * * * .'' As a result, Title VIII requires, among other things, that the Secretary of the Interior and the Secretary of Agriculture (Secretaries) implement a program to provide for rural Alaska residents a priority for the taking for subsistence uses of fish and wildlife resources on public lands in Alaska, unless the State of Alaska enacts and implements laws of general applicability that are consistent with ANILCA and that provide for the subsistence definition, priority, and participation specified in Sections 803, 804, and 805 of ANILCA.

The State implemented a program that the Department of the Interior previously found to be consistent with ANILCA. However, in December 1989, the Alaska Supreme Court ruled in *McDowell* v. *State of Alaska* that the rural priority in the State subsistence statute violated the Alaska Constitution. The Court's ruling in *McDowell* caused the State to delete the rural priority from the subsistence statute, an action which therefore negated State compliance with ANILCA. The Court stayed the effect of the decision until July 1, 1990. As a result of the McDowell decision, the Department of the Interior and the Department of Agriculture (Departments) assumed, on July 1, 1990, responsibility for implementation of Title VIII of ANILCA on public lands. On June 29, 1990, the Departments published the Temporary Subsistence Management Regulations for Public Lands in Alaska in the **Federal Register** (55 FR 27114). Permanent regulations were jointly published on May 29, 1992 (57 FR 22940), and have been amended since then.

As a result of this joint process between Interior and Agriculture, these regulations can be found in the Code of Federal Regulations (CFR) both in title 36, ''Parks, Forests, and Public Property,'' and title 50, ''Wildlife and Fisheries,'' at 36 CFR 242.1–28 and 50 CFR 100.1–28, respectively. The regulations contain the following subparts: Subpart A, General Provisions; Subpart B, Program Structure; Subpart C, Board Determinations; and Subpart D, Subsistence Taking of Fish and Wildlife.

Consistent with Subparts A, B, and C of these regulations, as revised May 7, 2002 (67 FR 30559), and December 27, 2005 (70 FR 76400), the Departments established a Federal Subsistence Board (Board) to administer the Federal Subsistence Management Program, as established by the Secretaries. The Board's composition includes a Chair appointed by the Secretary of the Interior with concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; the Alaska Regional Director, U.S. National Park Service; the Alaska State Director, U.S. Bureau of

Land Management (BLM); the Alaska Regional Director, U.S. Bureau of Indian Affairs; and the Alaska Regional Forester, USDA Forest Service. Through the Board, these agencies participated in the development of regulations for Subparts A, B, and C, and the annual Subpart D regulations.

Jurisdictional Perspective

Federal Subsistence Management Regulations (50 CFR 100.3 and 36 CFR 242.3) currently specify that ''The public lands described in paragraphs (b) and (c) of this section remain subject to change through rulemaking pending a Department of the Interior review of title and jurisdictional issues regarding certain submerged lands beneath navigable waters in Alaska.'' In April 2005, the Board requested a review by the U.S. Department of the Interior's Office of the Solicitor to determine whether a Federal interest presently exists in certain areas of southeastern Alaska. The specific areas were originally identified by the Sitka Tribe of Alaska and presented before the Southeast Alaska Subsistence Regional Advisory Council, who forwarded a request for review to the Board. In November 2005, the Office of the Solicitor responded that the Makhnati Island area withdrawal in Executive Order 8877 (August 29, 1941) was not rescinded until after statehood, so the submerged land did not transfer to the State at statehood. Since this submerged land is not included in any other withdrawal, reservation, or administrative setaside, the marine submerged lands, including any filled lands owned by the United States, are under the administration of the BLM. Accordingly, the Solicitor's Office indicated that this area should be included within the jurisdiction of the Federal Subsistence Management Program. See 70 FR 76400 (December 27, 2005).

Public Review and Comment

The Secretaries published a proposed rule (71 FR 25528) on May 1, 2006, soliciting comments through June 15, 2006, on the proposed revision to jurisdiction in the Makhnati Island area. During a May 10, 2006, teleconference, the Southeast Alaska Regional Advisory Council (Council) provided the public an opportunity to offer comments so that the Council could develop its recommendation to the Board. During the public comment period, the Secretaries (we) received four comments: one from a State entity, one from a Native organization, one from a private citizen, and one from a Regional Council. All concurred with the proposal to include the Makhnati Island area under jurisdiction of the Federal Subsistence Management Program, and none offered comments needing to be addressed herein.

Therefore, we are amending the Federal Subsistence Management Regulations for Public Lands in Alaska to reflect Federal subsistence management jurisdiction in the area of Makhnati Island, near Sitka, Alaska.

The specific area encompasses approximately 610 acres of land and water adjacent to Japonski Island. Whiting Harbor and numerous small islands are included within the boundary of the withdrawal. The Board recommends the inclusion of this area in the Federal Subsistence Management Program. A map is available for this area. The purpose of this map is to provide to the subsistence user an overall graphic representation of the extent of the area. To view the map, go to the Office of Subsistence Management Web site at *http://alaska.fws.gov/asm/home.html.* If you do not have access to the Internet, you may contact the Office of Subsistence Management at the phone number or address shown at **FOR FURTHER INFORMATION CONTACT** or **ADDRESSES**, respectively, and we will send the map to you.

We are amending § __.3(b), which includes those areas where marine waters are included, and where the regulations contained in 50 CFR 100 and 36 CFR 242 apply to both navigable and non-navigable waters. If additional marine submerged lands are determined in the future to be held by the United States, those additional lands would be the subject of future rulemakings.

Because the Federal Subsistence Management Program relates to public lands managed by an agency or agencies in both the Departments of Agriculture and the Interior, we would propose to incorporate identical text into 36 CFR part 242 and 50 CFR part 100.

Required Determinations

Regulatory Planning and Review (E.O. 12866), Regulatory Flexibility Act (5 U.S.C. 601 et seq.), and Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

An economic analysis is not necessary for this rule because this rule will not have an economic impact on any entities, large or small. This rule is not a significant rule under E.O. 12866 and, therefore, was not reviewed by the Office of Management and Budget.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act:

(a) This rule will not '''significantly or uniquely''' affect small governments. A Small Government Agency Plan is not required.

(b) This rule will not produce a Federal mandate of $100 million or greater in any year; that is, it is not a '''significant regulatory action''' under the Unfunded Mandates Reform Act.

Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications. A takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Government-to-Government Relations

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), 512 DM 2, and E.O. 13175, we have evaluated possible effects on Federally recognized Indian tribes and have determined that there are no effects. The Bureau of Indian Affairs is a participating agency in this rulemaking.

Energy Effects

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, or use. This Executive Order requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As this rule is not a significant regulatory action under Executive Order 13211, affecting energy supply, distribution, or use, this action is not a significant action and no Statement of Energy Effects is required.

Paperwork Reduction Act (44 U.S.C. 3501 et seq.)

This rule does not contain any new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995. Federal Agencies 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

An environmental assessment was prepared in 1997 on the expansion of Federal jurisdiction over fisheries and is available by contacting the office listed under **FOR FURTHER INFORMATION CONTACT**. The Secretary of the Interior with the concurrence of the Secretary of Agriculture determined that the expansion of Federal jurisdiction did not constitute a major Federal action significantly affecting the human environment, and therefore, signed a Finding of No Significant Impact. We have determined that an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 need not be prepared for this rule. This rule does not constitute a major Federal action significantly affecting the quality of the human environment.

Compliance With Section 810 of ANILCA

The intent of all Federal subsistence regulations is to accord subsistence uses of fish and wildlife on public lands a priority over the taking of fish and wildlife on such lands for other purposes, unless restriction is necessary to conserve healthy fish and wildlife populations. A Section 810 analysis was completed as part of the FEIS process. The final Section 810 analysis determination appeared in the April 6, 1992, ROD, which concluded that the Federal Subsistence Management Program may have some local impacts on subsistence uses, but that the program is not likely to significantly restrict subsistence uses.

William Knauer drafted these regulations under the guidance of Peter J. Probasco of the Office of Subsistence Management, Alaska Regional Office, U.S. Fish and Wildlife Service, Anchorage, Alaska. Dennis Tol and Chuck Ardizzone, Alaska State Office, Bureau of Land Management; Greg Bos, Carl Jack, and Jerry Berg, Alaska Regional Office, U.S. Fish and Wildlife Service; Sandy Rabinowitch and Nancy Swanton, Alaska Regional Office, National Park Service; Dr. Warren Eastland, Pat Petrivelli, and Dr. Glenn Chen, Alaska Regional Office, Bureau of Indian Affairs; and Steve Kessler, Alaska Regional Office, USDA-Forest Service provided additional guidance.

List of Subjects

36 CFR Part 242

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

50 CFR Part 100

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

■ For the reasons set out in the preamble, the Secretaries amend title 36, part 242, and title 50, part 100, of the Code of Federal Regulations, as set forth below.

PART __—SUBSISTENCE MANAGEMENT REGULATIONS FOR PUBLIC LANDS IN ALASKA

■ 1. The authority citation for both 36 CFR part 242 and 50 CFR part 100 continues to read as follows:

Authority: 16 U.S.C. 3, 472, 551, 668dd, 3101–3126; 18 U.S.C. 3551–3586; 43 U.S.C. 1733.

Subpart A—General Provisions

■ 2. In Subpart A of 36 CFR part 242 and 50 CFR part 100, § __.3 is revised by adding paragraph (b)(5) to read as follows:

§ __.3 Applicability and scope.

* * * * *

(b) * * *

(5) Southeastern Alaska—Makhnati Island Area: Land and waters beginning at the southern point of Fruit Island, 5°02′35″north latitude, 135°21′07″ west longitude as shown on United States Coast and Geodetic Survey Chart No. 8244, May 21, 1941; from the point of beginning, by metes and bounds; S. 58° W., 2500 feet, to the southern point of Nepovorotni Rocks; S. 83° W., 5600 feet, on a line passing through the southern point of a small island lying about 150 feet south of Makhnati Island; N. 6° W., 4200 feet, on a line passing through the western point of a small island lying about 150 feet west of Makhnati Island, to the northwestern point of Signal Island; N. 24° E., 3000 feet, to a point, 5°03′15″ north latitude, 135°23′07″ west longitude; East, 2900 feet, to a point in course No. 45 in meanders of U.S. Survey No. 1496, on west side of Japonski Island; Southeasterly, with the meanders of Japonski Island, U.S. Survey No. 1496 to angle point No. 35, on the southwestern point of Japonski Island; S. 60° E., 3300 feet, along the boundary line of Naval reservation described in Executive Order No. 8216, July 25, 1939, to the point beginning.

* * * * *

Dated: August 9, 2006.

Dirk Kempthorne,

Secretary of the Interior, Department of the Interior.

Dated: August 15, 2006.

Dennis E. Bschor,

Regional Forester, USDA-Forest Service.

[FR Doc. 06–7119 Filed 8–23–06; 8:45 am]

BILLING CODE 3410–11–P; 4310–55–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[Docket No. EPA–R08–OAR–2004–MT–0001, FRL–8202–1]

Approval and Promulgation of Air Quality Implementation Plans; Montana; Revisions to the Administrative Rules of Montana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving State Implementation Plan (SIP) revisions submitted by the State of Montana on April 18, 2003. The revisions modify the open burning rules and references to federal regulations in the Administrative Rules of Montana. The intended effect of this action is to make federally enforceable those provisions that EPA is approving. This action is being taken under section 110 of the Clean Air Act.

EFFECTIVE DATE: This final rule is effective September 25, 2006.

ADDRESSES: EPA has established a docket for this action under Docket No. EPA–R08–OAR–2004–MT–0001. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. EPA requests that if at all possible, you contact the individual listed in the **FOR**

FURTHER INFORMATION CONTACT section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Laurie Ostrand, Air and Radiation Program, Mailcode 8P–AR, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 200, Denver, Colorado 80202–2466, (303) 312–6437, *ostrand.laurie@EPA.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. Final Action
III. Statutory and Executive Order Reviews

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *Montana* mean the State of Montana, unless the context indicates otherwise.

I. Background

On July 20, 2004 (69 FR 43371), EPA published a notice of proposed rulemaking partially approving and partially disapproving SIP revisions submitted by the State of Montana on April 18, 2003 and August 20, 2003. The April 18, 2003 revisions modify the open burning rules and references to federal regulations and other materials in the Administrative Rules of Montana. EPA finalized action on portions of the August 20, 2003 submittal on January 24, 2006 (71 FR 3776).

A. April 18, 2003 Submittal

On April 18, 2003, the Governor submitted a SIP revision that contains amendments to open burning rules at the Administrative Rules of Montana (ARM) 17.8.601, 17.8.604, 17.8.605, 17.8.606, 17.8.610, 17.8.612 and 17.8.614 and an amendment to the incorporation by reference at 17.8.302(f). The amendments allow certain minor open burning to occur in the winter that had previously been prohibited; change the timeframe a permit to burn untreated wood waste at a landfill is valid from 30 days to one year and add the requirement that the department or its designated representative inspect burn piles at licensed landfills prior to every burn to ensure that no prohibited materials are in the piles; allow the open burning of the detonation of unexploded ordnance; clarify the materials prohibited from open burning; revise the conditional open burning permit requirements and make minor editorial and grammatical changes. The submittal also contains amendments to ARM 17.8.302(f)—Incorporation by Reference. The Montana Board of Environmental Review (Board) adopted the amendments on December 6, 2002.

We proposed to approve all of the April 18, 2003 submittal except for a phrase in ARM 17.8.604(1)(a). See our July 20, 2004 proposal notice, 69 FR 43371 at 43373. We are finalizing our approval at this time, except that we are not taking final action on ARM 17.8.604(1)(a).

With the April 18, 2003 submittal, among other things, the state is revising ARM 17.8.604(1) to clarify the material that may not be disposed of by open burning. In our proposed rulemaking we indicated that we did not believe the changes impact the stringency of the rule. However, with the changes, we indicted that the state is adding a department discretion provision. Specifically, ARM 17.8.604(1)(a) indicates that waste moved from the premises where it was generated may not be disposed of by open burning except as provided by other provisions in the rule or ''or unless approval is granted by the department on a case-by-case basis.'' The phrase ''or unless approval is granted by the department on a case-by-case basis'' is considered a department discretion. A department discretion provision allows the Department to revise the SIP without completing a formal SIP revision. In our proposal we indicated that we could not approve department discretion provisions because they are inconsistent with section 110(i) of the Act. Therefore, we proposed to approve the changes to ARM 17.8.604(1) except that we proposed to disapprove the phrase ''or unless approval is granted by the department on a case-by-case basis'' in ARM 17.8.604(1)(a). EPA's final notice on ARM 17.8.604(1)(a) will be addressed in a separate action.

II. Final Action

EPA is approving the following changes to the Administrative Rules of Montana (ARM) that were submitted on April 18, 2003 and effective on December 27, 2002: ARM 17.8.302(1)(f); 17.8.601(1), (7) and (10); 17.8.604(1) (except paragraph (1)(a)); 17.8.605(1); 17.8.606(3) and (4); 17.8.610(4); 17.8.612(4) and (5); and 17.8.614(1).

EPA is not acting on the revisions to ARM 17.8.604(1)(a) that were submitted on April 18, 2003 and effective on December 27, 2002. These revisions will be addressed in a separate action.

Section 110(l) of the Clean Air Act states that a SIP revision cannot be approved if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress towards attainment of the NAAQS or any other applicable requirements of the Act. The Montana SIP revisions that are the subject of this document do not interfere with the maintenance of the NAAQS or any other applicable requirement of the Act. See our proposed approval of the changes to the State's open burning rules. Therefore, section 110(l) requirements are satisfied.

III. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and

responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 23, 2006. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: July 11, 2006.

Kerrigan G. Clough,

Acting Regional Administrator, Region 8.

■ 40 CFR part 52 is amended to read as follows:

PART 52—[AMENDED]

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

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

Subpart BB—Montana

■ 2. Section 52.1370 is amended by adding paragraph (c)(63) to read as follows:

§ 52.1370 Identification of plan.

* * * * *

(c) * * *

(63) Revisions to State Implementation Plan were submitted by the State of Montana on April 18, 2003. The revisions modify the open burning rules and references to federal regulations in the Administrative Rules of Montana.

(i) Incorporation by reference.

(A) Administrative Rules of Montana (ARM) sections: ARM 17.8.302(1)(f); 17.8.601(1), (7) and (10); 17.8.604(1) (except paragraph 604(1)(a)); 17.8.605(1); 17.8.606(3) and (4); 17.8.610(4); 17.8.612(4) and (5); and 17.8.614(1), effective December 27, 2002.

[FR Doc. E6–14052 Filed 8–23–06; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06–1572; MB Docket No. 04–115; RM–10926]

Radio Broadcasting Services; Huntsville, MO

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division grants a Petition for Rule Making filed by American Family Association, requesting the reservation of vacant Channel 278C2 at Huntsville, Missouri for noncommercial educational use. A staff engineering analysis determines that Channel *278C2 can be allotted at Huntsville in compliance with the Commission's minimum distance spacing requirements at reference coordinates 39–29–45 NL and 92–25–05 WL.

EFFECTIVE DATE: September 18, 2006.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MB Docket No. 04–115, adopted August 2, 2006, and released August 4, 2006. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY–A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

■ As stated in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Missouri, is amended by removing Channel 278C2 and by adding Channel *278C2 at Huntsville.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E6–13747 Filed 8–23–06; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 060216044–6044–01; I.D. 081606A]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Non-American Fisheries Act Crab Vessels Catching Pacific Cod for Processing by the Inshore Component in the Central and Western Regulatory Areas of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by non-American Fisheries Act (AFA) crab vessels catching Pacific cod for processing by the inshore component in the Central and Western Regulatory Areas of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2006 Pacific cod sideboard limits apportioned to non-AFA crab vessels catching Pacific cod for processing by the inshore component of the Central and Western Regulatory Areas of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), August 21, 2006, until 2400 hrs, A.l.t., December 31, 2006.

FOR FURTHER INFORMATION CONTACT: Jennifer Hogan, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2006 Pacific cod sideboard limits apportioned to non-AFA crab vessels catching Pacific cod for processing by the inshore component is 587 metric tons (mt) for the Central Regulatory Area of the GOA and 981 mt for the Western Regulatory Area of the GOA, as established by the 2006 and 2007 harvest specifications for groundfish of the GOA (71 FR 10888, March 3, 2006).

In accordance with § 680.22(e)(2)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2006 harvest limit of Pacific cod apportioned to non-AFA crab vessels catching Pacific cod for processing by the inshore component of the Central and Western Regulatory Areas of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a sideboard directed fishing allowance for Pacific cod as 562 mt in the Central Regulatory Area, and 956 mt in the Western Regulatory Area. The remaining 25 mt in the Central Regulatory Area and 25 mt in the Western Regulatory Area will be set aside as bycatch to support other anticipated groundfish fisheries. In accordance with § 680.22(e)(3), the Regional Administrator finds that this sideboard directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by non-AFA crab vessels catching Pacific cod for processing by the inshore component in the Central and Western Regulatory Areas of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the sideboard directed fishing closure of Pacific cod apportioned to non-AFA crab vessels catching Pacific cod for processing by the inshore component of the Central and Western Regulatory Areas of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of August 17, 2006.

The AA also finds good cause to waive the 30 day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 680.22 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 18, 2006.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 06–7123 Filed 8–21–06; 12:29 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 71, No. 164
Thursday, August 24, 2006

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.

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1407

Portable Generators; Notice of Proposed Rulemaking; Proposed Labeling Requirements; Request for Comments and Information

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document the Consumer Product Safety Commission (Commission or CPSC) proposes to require manufacturers to label portable generators with performance and technical data related to performance and safety. The warning label would inform purchasers that: ''Using a generator indoors will kill you in minutes;'' ''Exhaust contains carbon monoxide, a poison gas you cannot see or smell;'' ''Never use in the home or in partly enclosed areas such as garages;'' ''Only use outdoors and far from open windows, doors, and vents.'' The warning label will also include pictograms. The Commission believes that providing this labeling information will help reduce risks to consumers. The Commission invites public comment on this proposal.[1]

DATES: Written comments in response to this notice must be received by November 7, 2006.

ADDRESSES: Comments should be e-mailed to cpsc-os@cpsc.gov, and should be captioned ''PORTABLE GENERATOR NPR.'' Comments may also be mailed, preferably in five copies, to the Office of the Secretary, Consumer Product Safety Commission, Room 502, 4330 East-West Highway, Bethesda, MD 20814, or delivered to the same address (telephone (301) 504–0800). Comments also may be filed by facsimile to (301) 504–0127.

[1] Acting Chairman Nancy A. Nord and Commissioner Thomas H. Moore each filed a statement. The statements are available from the Office of the Secretary or on the Commission's Web site at *http://www.cpsc.gov*.

FOR FURTHER INFORMATION CONTACT: Janet L. Buyer, Project Manager, Directorate for Engineering Sciences, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD; telephone (301) 504–7542 or e-mail: *jbuyer@cpsc.gov*.

SUPPLEMENTARY INFORMATION:

A. Background

The total yearly estimated non-fire related carbon monoxide (CO) deaths for each of the years 1999 through 2002 are 109, 138, 130 and 188, respectively. Since 1999, the percentage of estimated CO poisoning deaths specifically associated with generators has been increasing annually. In 1999, generators were associated with 7 (6%) of the total yearly estimated CO poisoning deaths for that year. In 2000, 2001 and 2002, they were associated with 19 (14%), 22 (17%) and 46 (24%) deaths out of the total estimates for each of those years.

On October 12, 2005, Commission Chairman Hal Stratton sent a memorandum to the Executive Director directing the staff to undertake a thorough review of the status of portable generator safety. As part of this review, Chairman Stratton requested that the staff address the sufficiency of warning labels to address the CO poisoning hazard posed by portable generators that are used within or near residences.

B. The Product

Portable generators offer a portable means of providing electrical power to a location that either temporarily lacks it or is not provided with electrical service at all. A portable generator has an internal combustion engine to produce rotational energy, which is used to generate electricity. The engine may be fueled by gasoline, diesel, natural gas, or liquid propane. It is the engine that is the source of carbon monoxide.

Estimates of sales of portable generators for consumer use vary, but could be more than a million units annually. The most popular of these generators are gasoline-powered and are priced in the $500 to $800 range. The output of the majority of light duty generators sold to consumers in 2005 was in the 3.5 kW to 6.5 kW range. This is the size of most of the units involved in the fatal CO poisoning incidents CPSC staff investigated in which the rating of the involved generator was identified.

C. Relevant Statutory Provisions

Section 27(e) of the Consumer Product Safety Act (CPSA) authorizes the Commission, by rule, to ''require any manufacturer of consumer products to provide the Commission with such performance and technical data related to performance and safety as may be required to carry out the purposes of this Act, and to give such notification of such performance and technical data at the time of original purchase to prospective purchasers and to the first purchaser of such product for purposes other than resale, as it determines necessary to carry out the purposes of this Act.'' As provided in section 2(b)(1) of the Consumer Product Safety Act (15 U.S.C. 2051(b)(1)), one purpose of the CPSA is ''to protect the public against unreasonable risks of injury associated with consumer products.''

D. Development of Proposed Rule

In 2002, CPSC staff assessed the effectiveness of current CO poisoning warnings found on the product and within the owner's manuals of several models of portable generators found on store shelves. Staff found that the guidance provided for avoiding the hazard was typically twofold: (1) Do not use in a confined or enclosed space, and (2) provide proper ventilation. None of the evaluated warnings defined ''confined or enclosed space'' or ''proper ventilation.''

The Commission believes these ambiguous instructions and warnings do not adequately advise the user how to avoid the CO poisoning hazard. Furthermore, the incident data includes fatalities where it appears that the victims attempted to provide adequate ventilation, to open confined areas, or to do both by, for example, opening doors, opening windows, and running exhaust fans. Prior research has shown that tools with gasoline-powered engines produce CO that ''can rapidly accumulate, even in areas that appear to be well-ventilated, resulting in dangerous and fatal concentrations within minutes.'' [2] Thus, evidence suggests that the methods consumers typically use to

[2] Earnest, G.S., *Carbon Monoxide Poisonings from Small, Gasoline-Powered, Internal Combustion Engines: Just What is a ''Well-Ventilated Area''?*, American Industrial Hygiene Association Journal, November 1997.

provide ventilation or to open confined areas are insufficient to prevent hazardous levels of CO buildup. Even locating a generator outdoors can be insufficient if the generator is near enough to openings to the home or other occupied structure to allow CO to permeate and subsequently accumulate indoors. CPSC is aware of at least five deaths that occurred when the generator was situated outdoors but near openings to the home. In addition, the Centers for Disease Control and Prevention recently reported the results of a study of post-hurricane related generator use in 2005 that found up to 50 percent of non-fatal CO poisoning incidents involved generators operated outdoors but within one to seven feet from the home.[3]

The staff believes that there are too many unknown variables to be able to recommend one single safe distance for the location of a portable generator relative to a home or dwelling. Variables such as the wind speed and direction relative to openings to indoor spaces, relative proximity of other structures in the area that could create wind vortices, direction in which the engine exhaust is pointing, and a multitude of other factors complicate attempts to define a safe distance. Notwithstanding the issue of defining a safe operating distance, the staff believes that warning labels must instruct consumers to keep generators outdoors and away from air intakes during use.

In 2003, the staff developed recommended warning language for engine-driven tools, with particular focus on portable generators, as a follow-up to the staff's assessment of the inadequacy of current warnings. This was later provided to the Underwriters Laboratories (UL) voluntary standard development committee. In February 2006, staff developed a further refined warning label for portable generators and presented it to UL in response to their request for CPSC staff comments on a proposed UL Outline of Investigation. UL incorporated staff's proposed warning label into their Outline of Investigation, which became effective April 2006 and serves as the requirements with which a product must conform in order to be eligible to bear the UL mark. This document is not a consensus standard. The Commission believes the proposed rule is needed to ensure that all products will bear the proposed warning label as opposed to only those that seek UL's mark.

[3] CDC, *Carbon Monoxide Poisoning After Two Major Hurricanes—Alabama and Texas*, August–October 2005, MMWR March 10, 2006; 55(09); 236–239.

E. Description of the Proposal

The proposed warning label appears at fig. 1 (and fig. 3 for the on-package label). The warning label provides technical data, *i.e.*, it indicates the presence of carbon monoxide in the portable generator exhaust and informs that carbon monoxide is a gas you cannot see or smell. The label uses the phrase ''you cannot see or smell'' rather than terms such as ''odorless'' and ''colorless,'' because the latter terminology may be less familiar and understandable to some consumers.

The label also includes statements which connect the technical data with safety concerns. Specifically, the label warns: ''Using a generator indoors WILL KILL YOU IN MINUTES.'' The phrase ''in minutes'' is intended to emphasize the imminence of the carbon monoxide poisoning hazard to provide consumers with a better understanding of the speed with which incapacitation can occur. In addition, research indicates that information about hazard scenarios affects consumers' risk judgments. Thus, the label includes a description not just of the hazard, carbon monoxide, but of the primary hazard scenario associated with CO-poisoning deaths, *i.e.*, using a generator indoors. The label also warns, ''NEVER use in the home or in partly enclosed areas such as garages.'' The label warns specifically against use in the home and in garages, since these are known places in which consumers use generators. Furthermore, the use of a more wide-reaching phrase, ''partly enclosed,'' is intended to broaden the perceived range of potentially dangerous areas in which to operate a generator, since this range does include partly enclosed areas. The label includes prescriptive advice to ''ONLY use outdoors and far from open windows, doors, and vents,'' so consumers can know what positive action they can take to avoid the hazard, rather than focusing exclusively on prohibited behaviors, or what consumers should not do. This is consistent with the requirements of ANSI Z535.4–2002, which is the primary U.S. voluntary consensus standard on product safety signs and labels, and with warning design guidelines in general. The accompanying pictograms are based on the pictograms developed by the Underwriters Laboratories Standards Technical Panel. Research shows that labels with pictograms tend to capture a consumer's attention more readily than a label without pictograms.

F. Unreasonable Risk of Injury

Portable generators are powered by gasoline, diesel, or propane engines and exhaust CO. If the generator is used in enclosed or even partially enclosed spaces, the CO can very quickly build to hazardous levels. Serious injury can also result when the generator is placed outdoors but near an open window or vent and the exhaust is pulled into a house. In the 6-year period from 2000 through 2005, CPSC staff is aware of at least 222 deaths related to CO poisoning associated with generators.[4] Non-fatal CO injuries can have serious consequences since permanent brain or neurological damage can result.

A well-designed warning label could inform the consumer of the CO hazard associated with generators and how to avoid the hazard while using the generator. A label placed in a prominent position on the generator could reinforce this information each time the consumer used the generator. For example, the proposed label reminds the consumer that generator exhaust contains CO, which cannot be seen or smelled, and can quickly kill. The label also clarifies that a generator should only be used outside and away from windows and vents and should not be used in partly enclosed spaces such as garages. This information is important since some consumers have apparently been aware that a CO hazard was associated with generators, but believed that they would avoid the hazard by running the generator in a garage with the door open or outside the house, but did not understand that it was necessary to place it away from open windows and vents.[5] The costs of a warning label include the one-time cost of designing the label and the continuing costs of printing and applying the labels to the generators and packages. These costs are expected to be low—less than one dollar per generator. The Commission therefore preliminarily concludes that there is an unreasonable risk of injury associated with portable generators and

[4] Natalie E. Marcy and Debra S. Ascone, ''Incidents, Deaths and In-Depth Investigations Associated with Carbon Monoxide from Engine-Driven Generators and other Engine-Driven Tools, 1990–2004,'' CPSC Memorandum to Janet Buyer, Directorate for Engineering Sciences, U.S. Consumer Product Safety Commission, Washington, DC (1 December 2005) and Robin L. Ingle, ''Non-fire Carbon Monoxide Fatalities Associated with Engine-Driven Generators and Other Engine Driven Tools in 2004 and 2005,'' CPSC Memorandum to Janet Buyer, Directorate for Engineering Sciences, U.S. Consumer Product Safety Commission, Washington, DC (3 January 2006).

[5] Timothy P. Smith, ''Human Factors Assessment for the Small Engine-Driven Tools Project,'' CPSC Memorandum to Janet L. Buyer, U.S. Consumer Product Safety Commission, Washington, DC (18 June 2002).

that providing the information required by the proposed rule will help reduce the rising CO death toll associated with consumer use of portable generators.

G. Environmental Considerations

Labeling requirements are not expected to have an adverse impact on the environment and are considered to be ''categorical exclusions'' for the purposes of the National Environmental Policy Act according to the CPSC regulations that cover its ''environmental review'' procedures (16 CFR part 1021.5(c)(2)).

H. Impact on Small Business

CPSC staff has identified more than 40 suppliers of generators to the U.S. consumer market. Although a few large firms dominate the market, a number of these suppliers are likely to be small businesses. The small businesses include firms that import generators from foreign manufacturers as well as equipment assemblers, which assemble generator sets from purchased components. The small manufacturers will be responsible for ensuring that their generators are properly labeled. However, the labeling requirement is not expected to pose a significant burden to small business because the cost of adding the labels per generator is expected to be less than a dollar per generator set.

I. Effective Date

The proposed effective date of Part 1407, which requires labeling for portable generators, is 90 days from issuance of any final regulation in the **Federal Register**. The labeling requirement would apply to all portable generators imported or introduced into commerce after the 89th day following publication of any final regulation in the **Federal Register**.

J. Request for Information and Comments

Interested persons are invited to submit comments regarding this proposal. The Commission specifically seeks comments on whether the proposed new warning label should be required or permitted to appear in a second language. If such dual language labeling is required or permitted, the Commission seeks further comments on the most effective manner to implement the second language warning. Comments should be e-mailed to *cpsc-os@cpsc.gov* and should be captioned ''PORTABLE GENERATOR NPR.'' Comments may also be mailed, preferably in five copies, to the Office of the Secretary, Consumer Product Safety Commission, Room 502, 4330 East-West Highway, Bethesda, MD 20814, or delivered to the same address (telephone (301) 504–0800). Comments also may be filed by telefacsimile to (301) 504–0127. All comments and submissions should be received no later than November 7, 2006.

K. Conclusion and Proposal

On the basis of the information discussed above, the Commission preliminarily finds that there is an unreasonable risk of injury associated with portable generators, and concludes that a requirement for a carbon monoxide identification and warning statement on portable generators is necessary to help protect the public against the risk of CO poisoning associated with such products.

Therefore, under provision of the Consumer Product Safety Act (section 27(e), 86 Stat. 1227–9, as amended; 15 U.S.C. 2076(e)), the Commission proposes that Title 16, Chapter II, be amended by adding to Subchapter B the following new Part 1407:

List of Subjects in 16 CFR Part 1407

Consumer protection, labeling.

PART 1407—PORTABLE GENERATORS: REQUIREMENTS TO PROVIDE PERFORMANCE AND TECHNICAL DATA BY LABELING

Sec.

1407.1 Purpose, Scope, and Effective Date.
1407.2 Definitions.
1407.3 Providing performance and technical data to purchasers by labeling.

Authority: 15 U.S.C. 2076(e).

§ 1407.1 Purpose, Scope, and Effective Date.

This part 1407 establishes requirements under section 27(e) of the Consumer Product Safety Act (15 U.S.C. 2076(e)) for manufacturers to provide consumers with a specified notification concerning the carbon monoxide poisoning hazard associated with the use of portable generators. The notification is intended to provide consumers with technical and performance information related to the safety of portable generators. This part becomes effective [90 DAYS FROM ISSUANCE OF FINAL RULE].

§ 1407.2 Definitions.

(a) The definitions in section 3 of the Consumer Product Safety Act (15 U.S.C. 2052) apply to this part 1407.

(b) A portable generator is an internal combustion engine-driven electric generator, which is intended to be moved for temporary use at a location where utility-supplied electric power is not available. It has receptacle outlets for the alternating-current output circuits and may also have a direct current (DC) battery charging outlet.

§ 1407.3 Providing performance and technical data to purchasers by labeling.

(a) *Notice to purchasers.* Manufacturers of portable generators shall give notification of performance and technical data related to performance and safety to prospective purchasers of such products at the time of original purchase and to the first purchaser of such product for purposes other than resale, in the manner set forth below.

(1) *On-product label.* The CO poisoning hazard label shown in fig. 1 shall be used on the product. A different representation of the generator may be substituted for accuracy if consumers are more likely to recognize the substituted representation as the generator to which this label is affixed.

(i) The signal word ''DANGER'' shall be in letters not less than 0.15 inch (3.8 mm) high. The remaining text shall be in type whose uppercase letters are not less than 0.1 inch (2.5 mm) high.

(ii) The signal word ''DANGER'' shall appear in white letters on a safety red background. The safety alert symbol shown in fig. 2 shall appear immediately before and next to the signal word and be no smaller than the height of the signal word with the base of the triangle on the same horizontal line as the base of the signal word. The solid portion of the triangle (within the lines of the triangle, around the exclamation mark) shall be white and the exclamation mark shall be safety red. The prohibition ''X''s shall be safety red.

(iii) The on-product hazard label shown in fig. 1 shall be located:

(A) On a part of the portable generator that, if removed, would impair the operation of the generator assembly, and

(B) On a location that is prominent and conspicuous to an operator while performing at least two of the following actions: filling the fuel tank, accessing the receptacle panel, and starting the engine.

(iv) The on-product hazard label shown in fig. 1 shall be designed to remain permanently affixed, intact, legible, and largely unfaded in the environment in which the product is expected to be operated and stored over the life of the product.

(2) *Carbon monoxide poisoning hazard label for package.* The CO poisoning hazard label shown in fig. 3 shall be affixed to the principal display panel(s) of the package, as well as the surface containing the top flaps of the package. The principal display panel(s)

of the package is the portion(s) of the outer packaging that is designed to be most prominently displayed, shown, presented, or examined under conditions of retail sale. Any panel of the package that includes text in a language other than English shall also include a CO poisoning hazard label in that language. Alternate-language versions of this label may also appear on the top flaps of the package as long as they are physically separate from one another. A different representation of the generator may be substituted for accuracy if consumers are more likely to recognize the substituted representation as the generator contained within the packaging.

(i) The signal word ''DANGER'' shall be in letters not less than 0.15 inch (3.8 mm) high. The remaining text shall be in type whose uppercase letters are not less than 0.1 inch (2.5 mm) high.

(ii) The signal word ''DANGER'' shall appear in white letters on a safety red background. The safety alert symbol shown in fig. 2 shall appear immediately before and next to the signal word and be no smaller than the height of the signal word with the base of the triangle on the same horizontal line as the base of the signal word. The solid portion of the triangle (within the lines of the triangle, around the exclamation mark) shall be white and the exclamation mark shall be safety red. The prohibition ''X''s shall be safety red.

Figure 1 On-product carbon monoxide poisoning hazard label

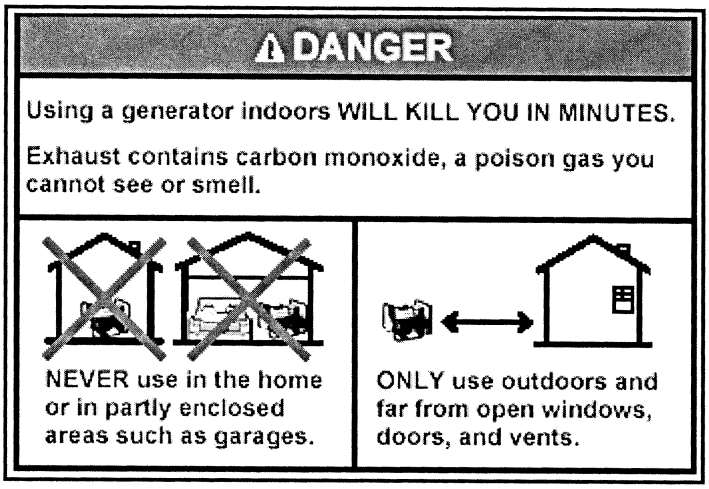
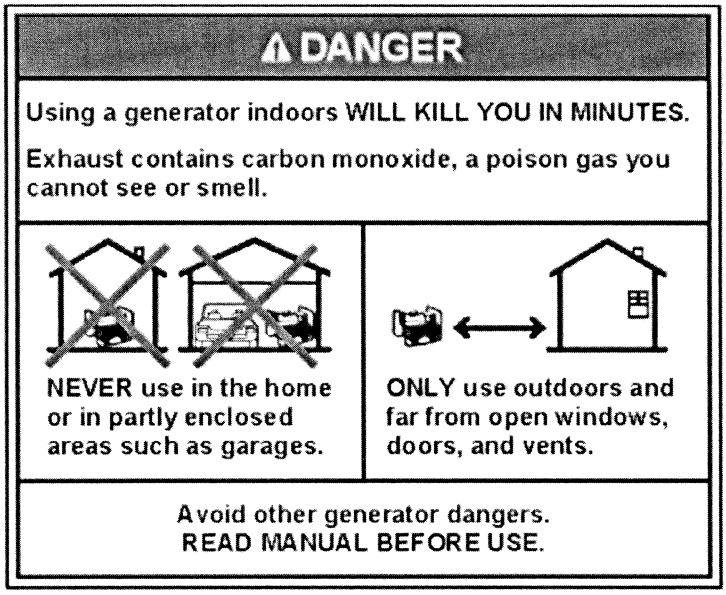


Figure 2 Safety Alert Symbol



Figure 3 Carbon monoxide poisoning hazard label for package



Dated: August 17, 2006.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 06–7069 Filed 8–23–06; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–109367–06]

RIN 1545–BF52

Section 1221(a)(4) Capital Asset Exclusion for Accounts and Notes Receivable

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction notice.

SUMMARY: This document corrects a notice of proposed rulemaking (REG–109367–06) that was published in the **Federal Register** on Monday, August 7, 2006 (71 FR 44600) clarifying the circumstances in which accounts or notes receivable are ''acquired * * * for services rendered'' within the meaning of section 1221(a)(4) of the Internal Revenue Code.

FOR FURTHER INFORMATION CONTACT: K. Scott Brown (202) 622–7454 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking (REG–109367–06) that is the subject of this correction is under section 1221 of the Internal Revenue Code.

Need for Correction

As published, REG–109367–06 contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the proposed regulations (REG–109367–06) which was the subject of FR Doc. E6–12789, is corrected as follows:

1. On page 44600, column 1, in the preamble, under the caption **FOR FURTHER INFORMATION CONTACT**, line 2, the language ''Scott Brown (202) 622–3920 (not a toll-'' is corrected to read ''Scott Brown (202) 622–7454 (not a toll-''.

Guy Traynor,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E6–14003 Filed 8–23–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–158677–05]

RIN 1545–BF24

Effect of Election on Corporation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Proposed regulations and notice of public hearing.

SUMMARY: These proposed regulations clarify that if a bank is an S corporation within the meaning of section 1361(a)(1), its status as an S corporation does not affect the applicability of the special rules for banks under the Internal Revenue Code.

DATES: Written or electronic comments and requests for a public hearing must be received by November 22, 2006.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–158677–05), Room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington DC 20044. Alternatively, taxpayers may submit comments electronically via the IRS Internet site at *http://www.irs.gov/regs* or via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS—REG–158677–05). If a public hearing is requested, the public hearing will be held in the Auditorium, New Carrollton Federal Building, 5000 Ellin Road, Lanham, MD.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Laura Fields at (202) 622–3050; concerning submissions and requests for a hearing, *Richard.A.Hurst@irscounsel.treas.gov*, (202) 622–7180 (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 1361(b)(2) describes corporations that are ineligible to be S corporations (ineligible corporations). Until 1996, section 1361(b)(2)(A) treated as ineligible corporations financial institutions to which section 585 applied (without regard to section 585(c)), which included primarily all banks within the meaning of section 581 (section 581 banks). In 1996, Congress revised section 1361(b)(2)(A) to allow certain banks to be S corporations. Under current section 1361(b)(2)(A), a section 581 bank is eligible to be an S corporation only if it does not use the reserve method of accounting for bad debts described in section 585, which is otherwise available to certain banks.

The proposed regulations address issues regarding the application, to S corporation banks, of the special rules applicable to banks under the Internal Revenue Code (Code) (the special bank rules).

First, questions have arisen regarding whether certain language in section 1363(b), enacted in 1982, may prevent S corporation banks from being subject to the special bank rules. Subject to certain exceptions, the general rule of section 1363(b) requires that ''[t]he taxable income of an S corporation shall be computed in the same manner as in the case of an individual * * *.'' The special bank rules, however, apply only to corporations, because section 581 banks must be corporations for Federal tax purposes.

Second, questions have also arisen regarding the impact of section 1363(b)(4), which also pre-dates the 1996 legislation allowing banks to be S corporations. Section 1363(b)(4) applies section 291 to certain S corporations even if they would not otherwise be subject to it. Specifically, section 1363(b)(4) provides, ''Section 291 shall apply if the S corporation (or any predecessor) was a C corporation for any of the 3 immediately preceding taxable years.'' Section 291(a)(3) and (e)(1)(B) is a special bank rule that reduces by 20 percent the amount allowable as a deduction with respect to the portion of a bank's interest expense that is allocable to qualified tax-exempt obligations as defined in section 265(b)(3)(B). This portion of a bank's interest expense is the amount that bears the same ratio to the taxpayer's interest expense as the taxpayer's average adjusted bases of those tax-exempt obligations bears to the taxpayer's average adjusted bases of all its assets.

Explanation of Provisions

The proposed regulations clarify that neither the general rule of section 1363(b), nor paragraph (4) of that section, prevents the special bank rules from applying to banks that are S corporations. When Congress allowed banks to become S corporations, it did not intend to deny them the benefits, or shield them from the burdens, ordinarily applicable to banks. This is reflected in the existing regulations under section 1361. See § 1.1361–4(a)(3) (''If an S corporation is a bank, or if an S corporation makes a valid QSub election for a subsidiary that is a bank, any special rules applicable to banks under the Internal Revenue Code continue to apply separately to the bank parent or bank subsidiary * * * (except as other published guidance may apply section 265(b) and section 291(a)(3) and (e)(1)(B) not only to the bank parent or bank subsidiary but also to any QSub * * *).'').

The only special bank rule that Congress made inapplicable to S corporation banks was the section 585 reserve method for bad debts. The restriction in section 1361(b)(2)(A) regarding use of that method would be superfluous if the special bank rules were rendered inapplicable by section 1363(b). The section 585 reserve method is available only to banks, and those banks must be corporations. In amending section 1361(b)(2)(A), therefore, Congress did not expect the pre-existing general rule of section 1363(b) to prevent the special bank rules from applying to S corporation banks. The section 585 reserve method is a special bank rule, and it would have been unnecessary for Congress to make that rule inapplicable to S corporation banks if the special bank rules did not apply to them generally because of section 1363(b).

Section 1363(b)(4) historically subjected certain nonbank S corporations to section 291 if the S corporation (or any predecessor) was a C corporation for any of the 3 immediately preceding taxable years, even if section 291 would not otherwise apply. Section 1363(b)(4) does not provide that section 291 shall not apply in any other circumstance. When Congress enacted section 1363(b)(4) in 1984, banks could not yet be S corporations, and thus section 1363(b)(4) had no applicability to section 291(a)(3) and (e)(1)(B) (which applies only to banks). After the 1996 amendments to subchapter S, the general rule of section 1363(b) does not prevent the special bank rules from applying to S corporations. Thus, if section 291(a)(3) and (e)(1)(B) applies to an S corporation bank in the absence of section 1363(b)(4), section 1363(b)(4) does not affect the continuing application to that bank of section 291(a)(3) and (e)(1)(B).

Effective Date

These regulations are proposed to apply to taxable years of corporations beginning on or after August 24, 2006. No inference should be drawn from this effective date regarding prior taxable years.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Laura Fields, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the

IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *.

Par. 2. Paragraph (b) of § 1.1363–1 is amended as follows:

1. Paragraph (b) is revised.

2. Paragraph (d) is amended by removing the language ''This section applies'' and adding the language ''This section (except for paragraph (b)(2) of this section) applies'' in its place.

3. The paragraph heading for (d) is revised.

4. A sentence is added at the end of paragraph (d).

The revision and additions read as follows:

§ 1.1363–1 Effect of election on corporation.

* * * * *

(b) *Computation of corporate taxable income*—(1) *In general.* The taxable income of an S corporation is computed as described in section 1363(b).

(2) *Treatment of banks.* Section 1363(b) (concerning computation of an S corporation's taxable income) does not affect an S corporation's status as a bank within the meaning of section 581, and it does not prevent the application to such an S corporation bank of any special rule applicable to banks under the Internal Revenue Code, such as sections 582(c) and 291(a)(3) and (e)(1)(B). See § 1.1361–4(a)(3) regarding application under subchapter S of the special rules applicable to banks. Further, section 1363(b)(4) causes section 291 to apply to an S corporation if the S corporation (or any predecessor) was a C corporation for any of the three immediately preceding taxable years, but section 1363(b)(4) does not prevent section 291 from applying to an S corporation to which section 291 otherwise applies.

(3) *Example.* The following example illustrates the application of this paragraph (b)(2):

Example. (i) *Facts. X* is described in section 581 and is an S corporation. Neither *X* nor any of *X*'s predecessors was a C corporation for any of the three immediately preceding taxable years. During the current taxable year, *X* sold debt instrument *DI* at a loss. At the time of the sale, *X*'s holding period in *DI* was more than one year and, but for section 582(c), the loss on the sale of *DI* would be capital. During the same taxable year, *X* held debt instrument *QD,* which it acquired after August 7, 1986. *QD* is a qualified tax-exempt obligation within the meaning of section 265(b)(3)(B).

(ii) *X* is described in section 581, and section 1363(b) does not affect *X*'s status under section 581. Accordingly, *X* qualifies as a bank within the meaning of section 581. Also, section 1363(b) does not prevent any special rule applicable to banks under the Internal Revenue Code from applying to *X.* Thus, section 582(c), which is a special rule applicable to banks, imposes ordinary character on the loss that *X* recognized from the sale of debt instrument *DI.*

(iii) Because *QD* is a qualified tax-exempt obligation that was acquired after August 7, 1986, section 265(b)(3)(A) causes *QD* to be treated for purposes of section 291(e)(1)(B) as having been acquired on that date. For that reason, if section 291(e)(1)(B) applies to *X,* a portion of the interest expense that *X* incurs during the taxable year is interest on indebtedness incurred or continued to purchase or carry qualified tax-exempt obligations and thus is a financial institution preference item. Section 291(a)(3) and (e)(1)(B) is a special rule applicable to banks, and thus section 1363(b) does not prevent section 291(a)(3) and (e)(1)(B) from applying to *X* unless some other authority prevents that result.

(iv) *S*ection 1363(b)(4) does not prevent section 291 from applying in situations in which section 291 otherwise applies. Therefore, section 1363(b)(4) does not prevent section 291(a)(3) and (e)(1)(B) from applying to *X.* It is irrelevant that neither *X* nor any predecessor of *X* was a C corporation for any of the three immediately preceding taxable years. *X*'s status as a bank under section 581 causes section 291(a)(3) and (e)(1)(B) to apply.

* * * * *

(d) *Effective dates.* * * * Paragraph (b)(2) of this section applies to taxable years of corporations beginning on or after August 24, 2006.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. E6–14004 Filed 8–23–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CCGD05–06–079]

RIN 1625–AA00

Safety Zone; Yorktown Day Celebration Evening Fireworks, York River, Yorktown, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a 1200 foot safety zone in the vicinity of National Park Service Beach at Yorktown, VA on October 19, 2006 in support of the Yorktown Day Celebration Evening Fireworks. This action is intended to restrict vessel traffic on York River as necessary to protect mariners from the hazards associated with fireworks displays.

DATES: Comments and related material must reach the Coast Guard on or before September 24, 2006.

ADDRESSES: You may mail comments and related material to Commander, Sector Hampton Roads, Norfolk Federal Building, 200 Granby St., 7th Floor, Attn: Lieutenant Bill Clark, Norfolk, VA 23510. Sector Hampton Roads 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 the Norfolk Federal Building between 9 a.m. and 2 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Bill Clark, Chief, Waterways Management Division, Sector Hampton Roads at (757) 668–5580.

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 (CGD05–06–079), 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 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 the Commander, Sector Hampton Roads 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 later notice in the **Federal Register**.

Background and Purpose

On October 19, 2006, the Yorktown Day Celebration Evening Fireworks will be held at the National Park Service Beach at Yorktown, VA. Due to the need to protect mariners and spectators from the hazards associated with fireworks displays, vessel traffic will be temporarily restricted within a 1200 foot radius of the display.

Discussion of Proposed Rule

The Coast Guard is establishing a 1200 foot safety zone on specified waters of York River at the National Park Service Beach at Yorktown, VA. This regulated area will be established in the interest of public safety during the Yorktown Day Celebration Evening Fireworks and will be enforced from 8 p.m. to 9 p.m. on October 19, 2006. General navigation in the safety zone will be restricted during the event. Except for participants and vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 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.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this regulation restricts access to the regulated area, the effect of this rule will not be significant because the safety zone will be in effect for a limited duration of time and the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed 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 because the zone will only be in place for a limited duration of time and maritime advisories will be issued allowing the mariners to adjust their plans accordingly. However, this rule may affect the following entities, some of which may be small entities: the owners and operators of vessels intending to transit or anchor in that portion of the York River from 8 p.m. to 9 p.m. on October 19, 2006.

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 rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Bill Clark, Chief, Waterways Management Division, Sector Hampton Roads at (757) 668–5580.

The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

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 effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This 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.

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. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, we believe that this rule should be categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation.

A preliminary ''Environmental Analysis Check List'' is available in the docket where indicated under **ADDRESSES**. Comments on this section will be considered before we make the final decision on whether this rule should be categorically excluded from further environmental review.

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. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6 and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

2. Add temporary § 165.T05–079, to read as follows:

§ 165.T05–079 Safety Zone; Yorktown Day Celebration Evening Fireworks, York River, Yorktown, VA.

(a) *Location.* The following area is a safety zone: All waters on the York River, from surface to bottom, within 1200 feet of the National Park Service Beach in Yorktown, VA.

(b) *Definitions. Designated representative* means any U.S. Coast Guard commissioned, warrant or petty officer who has been authorized by the Captain of the Port, Hampton Roads, Virginia to act on his behalf.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port, Hampton Roads or his designated representative.

(2) Vessel operators desiring to enter or operate within the safety zone must contact the COTP or the COTP's representative to obtain permission to do so. Vessel operators given permission to enter or operate in the safety zone, and the operators of any vessels in the immediate vicinity of this safety zone, must comply with all directions given to them by any commissioned, warrant or petty officer on shore or on board a vessel that is displaying a U.S. Coast Guard Ensign.

(3) The Captain of the Port, Hampton Roads and the Sector Duty Officer at Sector Hampton Roads in Portsmouth, Virginia can be contacted at telephone number (757) 668–5555 or (757) 484–8192.

(4) The designated representatives enforcing the safety zone can be contacted on VHF–FM 13 and 16.

(d) *Effective date.* This regulation is effective from 8 p.m. to 9 p.m. on October 19, 2006.

Dated: August 11, 2006.

Patrick B. Trapp,

Captain, U.S. Coast Guard, Captain of the Port, Hampton Roads.

[FR Doc. E6–14062 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 7, 12, and 39

[FAR Case 2005–041; Docket 2006–0020; Sequence 7]

RIN 9000–AK57

Federal Acquisition Regulation; FAR Case 2005–041, Internet Protocol Version 6 (IPv6)

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to require Internet Protocol Version 6 (IPv6) capable products be included in information technology procurements to the maximum extent practicable.

DATES: Interested parties should submit written comments to the FAR Secretariat on or before October 23, 2006 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2005–041 by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Search for this document at the ''Federal Acquisition Regulation'' agency and review the ''Document Title'' column; click on the Document ID number. Click on ''add comments''.

You may also search for any document using the ''Advanced search/document search'' tab, selecting from the agency field ''Federal Acquisition Regulation'', and typing the FAR case number in the keyword field.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2005–041 in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219–0202. The TTY Federal Relay Number for further information is 1–800–877–8973. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAR case 2005–041.

SUPPLEMENTARY INFORMATION:

A. Background

The internet protocol is one of the primary mechanisms that define how and where information moves across networks, *e.g.*, voice, video, and text. Currently Internet Protocol Version 4 (IPv4) is the industry standard used and has about 4.3 billion address spaces. Key characteristics of IPv6 are designed to significantly increase internet address space, promote flexibility and functionality, and enhance security. Agencies can reduce costly upgrades and the complexity of transitioning to IPv6 by proactively integrating IPv6 requirements into Federal contracts.

On August 2, 2005, OMB issued a memo (Memorandum M–05–22, *Transition Planning for Internet Protocol Version 6 (IPv6)*) giving guidance to agencies to transition from IPv4 to IPv6, and required agencies to implement full use of IPv6 in network backbones by June 2008. OMB further requires, to the maximum extent practicable, all new IT procurements include IPv6 capable products and systems. Any exceptions to the use of IPv6 will require advance written approval from the agency CIO.

This rule proposes amending the FAR by—

1. Adding a new paragraph (A)(2) in FAR 7.105 (b)(4)(ii) to ensure agency planners comply with the Internet Protocol Version 6 (IPv6) capability requirements as a part of acquisition planning;

2. Adding paragraph (e) to FAR 12.202 to state that requirements documents for information technology shall include Internet Protocol Version 6 (IPv6) capable products and services; and

3. Adding paragraph (e) to FAR 39.101 to state when acquiring information technology, agencies shall include the appropriate requirements for Internet Protocol Version 6 (IPv6) capable products and services, and for agencies to establish procedures for granting exceptions.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because IPv6 requires use of commercially available products, and no new standards or testing is required. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 7, 12, and 39 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2005–041), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 7, 12, and 39

Government procurement.

Dated: August 16, 2006.

Ralph De Stefano,

Director, Contract Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 7, 12, and 39 as set forth below:

1. The authority citation for 48 CFR parts 7, 12, and 39 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 7—ACQUISITION PLANNING

2. Amend section 7.105 by revising paragraph (b)(4)(ii)(A) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(4) * * *

(ii) * * *

(A) For information technology acquisitions—

(*1*) How the capital planning and investment control requirements of 40 U.S.C. 11312 and OMB Circular A–130 will be met (see 7.103(t) and Part 39); and

(*2*) How the acquisition will comply with the Internet Protocol Version 6 (IPv6) capability requirements as outlined in OMB Memorandum M–05–22, Transition Planning for Internet Protocol Version 6 (IPv6), and additional requirements for IPv6 at *http://www.cio.gov*.

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 12.202 by adding paragraph (e) to read as follows:

12.202 Market research and description of agency need.

* * * * *

(e) Requirements documents for information technology solutions must include Internet Protocol Version 6 (IPv6) capability as outlined in the OMB Memorandum M–05–22, Transition Planning for Internet Protocol Version 6 (IPv6), and additional requirements for IPv6 at *http://www.whitehouse.gov/omb/memoranda/fy2005/m05-22.pdf*.

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

4. Amend section 39.101 by adding paragraph (e) to read as follows:

39.101 Policy.

* * * * *

(e) In acquiring information technology solutions, agencies must include the appropriate Internet Protocol Version 6 (IPv6) capability requirements as outlined in the OMB Memorandum M–05–22, Transition Planning for Internet Protocol Version 6 (IPv6). Agencies must establish procedures for exceptions.

[FR Doc. 06–7126 Filed 8–23–06; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 060731206–6206–01; I.D. 072806A]

RIN 0648–AS67

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 26

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule that would implement Amendment 26 to the Fishery Management Plan for the Reef Fish Fishery of the Gulf of Mexico (FMP). Amendment 26 would establish an individual fishing quota (IFQ) program for the commercial red snapper sector of the reef fish fishery in the Gulf of Mexico. Initial participants in the IFQ program would receive percentage shares of the commercial quota of red snapper based on specified historical landings criteria. The percentage shares of the commercial quota would equate to annual IFQ allocations. Both shares and IFQ allocations would be transferable. The intended effect of this rule is to manage the commercial red snapper sector of the reef fish fishery to preserve its long-term economic viability and to achieve optimum yield from the fishery.

DATES: Written comments must be received on or before September 28, 2006.

ADDRESSES: You may submit comments on the proposed rule by any of the following methods:

- E-mail: *0648-AS67.Proposed@noaa.gov*. Include in the subject line the following document identifier: *0648-AS67*.
- Federal e-Rulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Mail: Phil Steele, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.
- Fax: 727–824–5308; Attention: Phil Steele.

Copies of Amendment 26, which includes a supplemental environmental impact statement (SEIS), a regulatory impact review (RIR), and an initial regulatory flexibility analysis (IRFA), may be obtained from the Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: 813–348–1630; fax: 813–348–1711; e-mail: gulfcouncil@gulfcouncil.org. In addition, copies of the final SEIS, a revised RIR, and a revised IRFA, prepared by NMFS are also available from the Council at the address above. Copies of all of these documents may also be downloaded from the Council's website at *www.gulfcouncil.org*.

Comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted in writing to Jason Rueter at the Southeast Regional Office address (above) and to David Rostker, Office of Management and Budget (OMB), by e-mail at *David__Rostker@omb.eop.gov*, or by fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Phil Steele, telephone 727–824–5305; fax 727–824–5308; e-mail *Phil.Steele@noaa.gov*.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the FMP. The FMP was prepared by the Gulf of Mexico Fishery Management Council (Council) and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Act.

Background

A red snapper individual transferable quota (ITQ) program, proposed in Amendment 8 to the FMP and approved by NMFS in 1995, was never implemented because of action taken through the 1996 Sustainable Fisheries Act to place a moratorium on the development or implementation of new ITQ programs until October 1, 2000. The Council and commercial fishermen remained concerned about the continuing problems associated with overcapacity in the fishery and the adverse impacts associated with the derby fishery, i.e., the competitive race for available fish. This proposed rule would implement an IFQ program to address these issues.

IFQ Program

Scope

The provisions of this IFQ program would apply to Gulf red snapper in or from the Gulf EEZ and, for a person aboard a vessel with a Gulf red snapper IFQ vessel endorsement or for a person with a Gulf red snapper IFQ dealer endorsement, these provisions would apply to Gulf red snapper regardless of where harvested or possessed.

Duration

The IFQ program would remain in effect until it is modified or terminated; however, the program would be evaluated by the Council every 5 years.

Electronic System Requirements, Account Setup, and Information

The administrative functions associated with this IFQ program, e.g., registration and account setup, landing transactions, and transfers, are designed to be accomplished online; therefore, a participant would have to have access to a computer and Internet access and set up an appropriate IFQ online account to participate. Assistance with online functions would be available from IFQ Customer Service by calling 1–866–425–7627 Monday through Friday between 8 a.m. and 4:30 p.m. eastern time.

The IFQ program would provide for use of paper-based components for basic required functions as a backup only during catastrophic conditions. The Regional Administrator, Southeast Region, NMFS, (RA) would determine when catastrophic conditions exist, the duration of the catastrophic conditions, and which participants or geographic areas are deemed affected by the catastrophic conditions. The RA would provide timely notice to affected participants via publication of notification in the **Federal Register**, NOAA weather radio, fishery bulletins, and other appropriate means and would authorize the affected participants' use of paper-based components for the duration of the catastrophic conditions. NMFS would provide each IFQ dealer the necessary paper forms. The paper forms would also be available from the RA. The program functions available to participants or geographic areas deemed affected by catastrophic conditions would be limited under the paper-based system. There would be no mechanism for transfers of IFQ shares or allocation under the paper-based system in effect during catastrophic conditions. Assistance in complying with the requirements of the paper-based system would be available via IFQ Customer Service 1–866–425–7627 Monday through Friday between 8 a.m. and 4:30 p.m. eastern time.

As soon as possible after publication of the final rule that would implement Amendment 26, the RA would mail an IFQ information package to eligible IFQ participants. The package would include information for accessing the online IFQ system at *ifq.sero.nmfs.noaa.gov* and establishing an online account, general instructions related to online transaction procedures and requirements, and where appropriate, information regarding historical landings and initial IFQ shares and allocation.

IFQ Shares and Allocation

An IFQ share is the percentage of the commercial quota of red snapper proportioned to each eligible person based on specified landings data. An IFQ allocation is the actual poundage of red snapper, measured in gutted weight, each IFQ shareholder is ensured the opportunity to land during a given fishing year. The allocation granted each IFQ shareholder would be derived by multiplying their IFQ share times the annual red snapper commercial quota. A person would be required to have an annual allocation or portion thereof, to harvest, possess, or sell red snapper. IFQ shares and annual allocations can be transferred separately or together to other eligible persons.

Adjustments in Commercial Quota and Allocation

The Council periodically reviews and adjusts the commercial quota for Gulf red snapper in response to new data and information, which generally take the form of new or updated red snapper stock assessments. As the quota is adjusted, shareholder's IFQ allocations would be proportionately adjusted based on the IFQ share each shareholder has at the time of the adjustment.

Special Procedure for Initial Calculation of 2007 IFQ Allocations

Because of uncertainty regarding the 2007 commercial quota for Gulf red snapper and the timing of its implementation and to avoid the possibility of having to revoke some proportion of initial allocation if the quota was subsequently reduced, the RA may initially calculate the 2007 IFQ allocations based on a proxy commercial quota. If a commercial quota adjustment for Gulf red snapper has not been submitted for review by the Secretary of Commerce in time for calculation of 2007 IFQ allocations, the RA would initially calculate 2007 allocations based on a proxy commercial quota of 2.55 million lb (1.16 million kg). Alternatively, if a commercial quota adjustment for Gulf red snapper has been submitted for review by the Secretary of Commerce in time to allow calculation of 2007 allocations, the RA would base 2007 IFQ allocations on the proposed quota. Under either scenario, as soon as the actual 2007 commercial quota is final, but no later than July 1, 2007, the RA would adjust the 2007 IFQ allocations, as necessary, consistent with the actual quota.

IFQ Share Eligibility and Share Calculation

Eligibility for initial issuance of IFQ shares would be restricted to persons who own a Class 1 or Class 2 license as of the date of publication of the final rule implementing Amendment 26. An owner of a license is defined as the person who actually controls transfer of the Class 1 or Class 2 license and is listed as the qualifier on the face of the license. NMFS would calculate initial IFQ shares based on the highest average annual landings of Gulf red snapper associated with each shareholder's current Class 1 or Class 2 license(s) during the applicable landings history unless the shareholder selects other years of landings consistent with the applicable landing history. For a Class 1 license holder whose license was not issued based on historical captain status, the 10 consecutive years between 1990 and 2004 with the highest average landings would be used. For a Class 1 license holder whose license was issued on the basis of historical captain status, all years of landings data from 1998 through 2004 would be used. For a Class 2 license holder, the 5 years between 1998 and 2004 with the highest average landings would be used.

All landings associated with a current Class 1 or Class 2 license for the applicable landings history, including those reported by a person who held the license prior to the current license owner, would be attributed to the current license owner. Only legal landings reported in compliance with applicable state and Federal regulations would be accepted. Each shareholder's initial IFQ share would be derived by dividing the shareholder's highest average annual landings during the applicable landings history by the sum of the highest average annual landings of all shareholders during the respective applicable landings histories. Initial IFQ shares would not be issued in denominations of less than 0.0001 percent.

Appeals Process

The only items subject to appeal under this IFQ system would be initial eligibility for IFQ shares based on ownership of a Class 1 or Class 2 license, the accuracy of the amount of landings, and correct assignment of landings to the license owner. The RA would review, evaluate, and render final decisions on appeals. Appeals would have to be submitted to the RA postmarked no later than 90 days after the effective date of the final regulations implementing the IFQ program and would have to contain documentation supporting the basis for appeal. Hardship arguments would not be considered. Landings data from 1990 through 1992 would not be subject to appeal. Landings records appeals for 1993–2004 would be based on NMFS logbook data. If NMFS logbooks are not available; state landings records or data submitted on or before June 30, 2005, could be used. During the first year of the IFQ program only, the RA initially would reserve a 3–percent IFQ share, prior to initial distribution of shares, to be used to resolve appeals. Any portion of the 3–percent share reserve remaining after the appeals process has been completed would be proportionately distributed back to the initial recipients as soon as possible that year. If resolution of appeals requires more than a 3–percent share, the shares of all initial shareholders would be reduced proportionately to accommodate the required shares in excess of the 3–percent reserve.

IFQ Share Cap—NMFS Solicits Public Comment

To prevent any entity from obtaining excessive shares under this IFQ program, as mandated by National Standard 4 of the Magnuson–Stevens Act, a share cap would be established. No person would be allowed to own at any time IFQ shares exceeding the maximum share initially issued to any person for the 2007 fishing year, as of the date appeals are resolved and shares are adjusted accordingly. NMFS estimates this would cap ownership of shares at approximately 8 percent of total shares. If an ownership cap is too high, market power may become too consolidated and produce an unduly anti–competitive market. However, setting the limit too low can also have adverse effects on the price of fish. This can happen in cases where it is less costly overall for fewer entities to each catch more fish than it is for lots of entities to each catch smaller amounts of fish.

Aside from considerations of controlling the undue consolidation of market power and maintaining a fair level of competition, Section 303(b)(6) of the Magnuson-Stevens Act requires consideration of several factors in establishing a limited access program such as the red snapper IFQ program. Those factors include, but are not limited to: present participation in the fishery, historical fishing practices in, and dependence on, the fishery; the economics of the fishery; and the cultural and social framework relevant to the fishery and any affected fishing communities. Although the approximately 8 percent cap may not result in consolidation that rises to the level of presenting an undue concentration of market power or chilled competition, a higher cap could result in levels of consolidation producing effects that are problematic under the Magnuson-Stevens Act. Examples would include potentially eliminating numerous small-scale historical participants, adversely affecting the social and cultural framework of the fishery by adversely affecting working conditions and wages for crew, and potentially adversely affecting prices.

NMFS is seeking comments on whether the proposed cap of approximately 8 percent is appropriate. According to the''Horizontal Merger Guidelines'' (Guidelines) issued jointly by the Department of Justice and the Federal Trade Commission (*http://www.usdoj.gov/atr/public/guidelines/*

hmg.pdf, see especially pp 15–17), even under conservative assumptions a limit of 10 percent (or possibly higher under less restrictive assumptions) would be unlikely to have adverse competitive effects. Accordingly, NMFS seeks specific comments on the appropriateness and magnitude of the proposed ownership cap.

Permit and IFQ Endorsement Requirements

For a person aboard a vessel, for which a commercial vessel permit for Gulf reef fish has been issued, to fish for, possess, or land Gulf red snapper, regardless of where harvested or possessed, a Gulf red snapper IFQ vessel endorsement would have to be issued to the vessel and be on board, and such person would have to hold or be assigned sufficient IFQ allocation to account for all red snapper on board or landed. As a condition of the IFQ vessel endorsement, a person aboard such vessel would have to comply with the requirements of the IFQ program regardless of where red snapper are harvested or possessed.

All dealers who purchase red snapper from an IFQ share/allocation holder would be required to possess a valid Federal dealer permit for Gulf reef fish and a red snapper IFQ dealer endorsement without which possessing, transporting, selling, purchasing, or processing red snapper would be prohibited.

The red snapper IFQ vessel endorsement and red snapper IFQ dealer endorsement would be available for download from the IFQ website, ifq.sero.nmfs.noaa.gov, at no cost to those individuals who possess a valid Gulf reef fish permit or a valid Gulf reef fish dealer permit, respectively, and request the endorsements. If such individuals do not have an IFQ online account, they would have to first contact IFQ Customer Service at 1–866–425–7627 to obtain information necessary to access the IFQ website and establish an IFQ online account. The red snapper IFQ vessel endorsement and dealer endorsement would remain valid as long as the individual possesses a valid Gulf reef fish permit or reef fish dealer permit, respectively, abides by all reporting and cost recovery requirements of the IFQ program, and is not subject to sanctions under 15 CFR part 904. The IFQ vessel endorsement and the dealer endorsement are not transferable.

Fleet Management and Assignment of Allocation

An IFQ shareholder or IFQ allocation holder who owns more than one vessel with a valid Gulf reef fish vessel permit and a valid Gulf red snapper IFQ vessel endorsement may assign IFQ allocation to a person aboard such vessel and provide that person the IFQ account information necessary to conduct landing transactions. This assignment of allocation, which does not constitute a transfer or sale of allocation, can be accomplished by the shareholder or allocation holder online via the IFQ website.

Electronic Reporting of IFQ Transactions

IFQ share and allocation transactions would be tracked using an online accounting system developed by NMFS, in which the IFQ share/allocation holder, IFQ dealer, and appropriate NOAA personnel would participate. The IFQ share/allocation holder and IFQ dealer accounts would record IFQ share/allocation transactions into the online system using unique user ID numbers and personal identification numbers (PIN) issued to them by NMFS. Transaction approval codes obtained from NMFS via the online accounting system would be required for the following transactions: (1) share transfers; (2) allocation transfers; and (3) landings/sales transactions. The transaction approval code would verify the IFQ share/allocation holders involved in the transaction are eligible participants and, in the case of landings/sale, have sufficient allocation to conduct the sales transaction.

Data managed through the online accounting system would include, but not be limited to:

1. The identities and certificate numbers of IFQ share holders and their associated vessel ID numbers;
2. The identities of persons and corporations holding and fishing IFQ allocations and their associated vessel ID numbers;
3. The dates, times, and types of IFQ share and allocation transactions;
4. The identities and locations of IFQ dealerships;
5. The dates, times, and places of landing/sales transactions;
6. The identities of the dealers and fishermen conducting landing/sales transactions;
7. The price of red snapper recorded during each landing/sales transaction; and
8. The biological data recorded during each landing/sales transaction.

Landings/Sale Transactions

At the time of landing/sale of IFQ red snapper, the dealer would be responsible for initiating transactions in the online accounting system. The fisherman would validate the transaction online by entering his unique PIN number at the point of transaction submittal. The information required to be recorded in the online accounting system for each landing/sale transaction at the point of sale would include, but not be limited to:

1. The date and time of landing/sale;
2. The weight of red snapper purchased;
3. The share/allocation holder account number from which the catch should be debited;
4. The ID number of the vessel used to harvest the fish;
5. The IFQ endorsement number of the authorized dealer;
6. The PIN numbers of both the dealer and fishermen; and
7. The actual ex-vessel unit price of the red snapper.

Limited Landings Overage Allowance

On the last fishing trip of the fishing year permitted by the shareholder's annual allocation, a shareholder would be permitted to land up to 10 percent more than the remaining allocation, without purchasing additional allocation. Any such overages would be deducted from the next year's allocation associated with the shareholder's IFQ share.

This carryover provision would not apply to a person who only possesses IFQ allocation and no IFQ shares because there would be no reliable mechanism for compensating for the overage in the following fishing year. Such a person would not be permitted to land any red snapper in excess of his/her current allocation.

Cost Recovery

Section 304(d)(2)(A) of the Magnuson-Stevens Act requires the Secretary of Commerce to establish a fee to assist in recovering the actual costs directly related to the management and enforcement of any IFQ program. Currently, such a fee may not exceed 3 percent of the ex-vessel value of fish harvested under any such program, and must be collected at either the time of landing, filing of a landing report, or sale of such fish during a fishing season or in the last quarter of the calendar year in which the fish is harvested. Fees collected must be in addition to any other fees charged under the Magnuson-Stevens Act and must be deposited in the Limited Access System Administration Fund (LASAF) established under Section 305(h)(5)(B) of the Magnuson-Stevens Act. Initially, the fee would be 3 percent of the actual ex-vessel value of Gulf red snapper landed under the IFQ program, as

documented at the time of sale in each landings transaction report. The RA would review the cost recovery fee annually to determine if a downward adjustment is warranted. Factors considered in the review would include the catch subject to the IFQ cost recovery, projected ex-vessel value of the catch, costs directly related to the management and enforcement of the IFQ program, the projected IFQ balance in the LASAF, and expected non-payment of fee liabilities. If the RA determines that a fee adjustment is warranted, the RA would publish a notification of the fee adjustment in the **Federal Register**.

The IFQ shareholder or allocation holder whose IFQ allocation is debited for a Gulf red snapper landing would be responsible for paying the associated IFQ cost recovery fees. The IFQ dealer who receives such landing would be responsible for collecting the applicable fee from the shareholder/allocation holder and submitting the applicable fee to NMFS using *pay.gov* via the IFQ system no later than 30 days after the end of each calendar-year quarter; however, fees may be submitted at any time before that deadline. Authorized payment methods would be credit card, debit card, or automated clearing house (ACH). Payment by check would be authorized only if the RA has determined that the geographical area or an individual(s) is affected by catastrophic conditions. Fees not received by the deadline would be considered delinquent and would be resolved through the fee reconciliation process as specified in § 622.16(c)(2)(iv) of this proposed rule. Failure to resolve payment of delinquent fees may result in annulment of the applicable IFQ permit and/or IFQ endorsement and submission of the matter to appropriate authorities for resolution.

IFQ Share/Allocation Transferability

During the first 5 years of the IFQ program, IFQ shares or allocations could only be transferred to a person with a valid commercial vessel permit for Gulf reef fish; thereafter, shares and allocations could be transferred to U.S. citizens and permanent resident aliens.

Share Transfer Transactions

IFQ share transfers would require NMFS' approval of a share transfer application. The person transferring the share would be responsible for initiating the transfer request by using the online red snapper IFQ website at ifq.sero.nmfs.noaa.gov. Following the instructions provided on the website, the transferor would be required to enter pertinent information regarding the transfer request including, but not limited to:

1. The name, address, and certificate number of the individual or corporation transferring the IFQ share;

2. The identity of the purchaser or transferee;

3. The amount of the IFQ share being transferred; and

4. The monetary value of the transfer.

If the information is accepted, the online system would send the transferor an initial transaction approval code and make an application for share transfer available for downloading and printing. The transferor and transferee would be required to complete the application, have their signatures notarized, and mail the signed application to the RA at least 30 days prior to the date on which the applicant desires to have the transfer effective. Share transfers would be prohibited during December of each year to allow NMFS the time necessary for end-of-year program management; therefore, any signed application would have to be received by the RA prior to December 1. If the RA approves the application for transfer, the online system would send the transferor and transferee an electronic message acknowledging the approval; a transfer would be effective upon receipt of the message. The adjusted shares resulting from a transfer could be viewed online by each shareholder. If the RA does not approve the transfer application, the RA would return the application to the transferor with an explanation and instructions for correcting any deficiencies.

Allocation Transfer Transactions

Unlike share transfers which require a notarized application for transfer, allocation transfers could be accomplished online via the red snapper IFQ website. An allocation holder could initiate an allocation transfer by logging on to the red snapper IFQ website at *ifq.sero.nmfs.noaa.gov*, and entering the required information including, but not be limited to:

1. The name, address, and share certificate number (if applicable) of the individual or corporation transferring the IFQ allocation;

2. The identity of the eligible purchaser or transferee;

3. The amount of the IFQ allocation being transferred; and

4. The monetary value of the transfer.

An allocation transfer would be valid only for the remainder of the fishing year in which it occurs; it would not carry over to the subsequent fishing year. Transfer of allocation is not prohibited during December. Any allocation that is unused at the end of the fishing year would be void.

Redistribution of Shares Resulting from Permanent Permit or Endorsement Revocation

If a shareholder's commercial vessel permit for Gulf reef fish or Gulf red snapper IFQ vessel endorsement has been permanently revoked under provisions of 15 CFR part 904, the RA would redistribute the IFQ shares held by that shareholder proportionately among remaining shareholders based upon the amount of shares each held just prior to the redistribution. During December of each year, the RA would determine the amount of revoked shares, if any, to be redistributed, and the shares would be distributed at the beginning of the subsequent fishing year.

Annual Recalculation and Notification of IFQ Shares and Allocation

On or about January 1 each year, IFQ shareholders would be notified, via the IFQ website, of their IFQ share and allocation for the upcoming fishing year. These updated share values would reflect the results of applicable share transfers and any redistribution of shares resulting from permanent revocation of applicable permits or endorsements under 15 CFR part 904. Allocation is calculated by multiplying IFQ share times the annual red snapper commercial quota. Updated allocation values would reflect any change in IFQ share, any change in the annual commercial quota for Gulf red snapper, and any debits required as a result of prior fishing year overages. IFQ participants would be able to monitor the status of their shares and allocation throughout the year via the IFQ website.

Measures to Enhance Enforceability

The following measures are proposed to enhance enforceability of the IFQ program. Fishermen participating in the IFQ program would be required to offload their red snapper landings to permitted IFQ dealers and only between 6 a.m. and 6 p.m. daily. Any person landing IFQ red snapper would be required to notify NMFS' Office of Law Enforcement by calling 1–866–425–7627, at least 3 hours in advance of landing and specify the time and location of landing and the name and address of the dealer where the fish would be received. Possession of IFQ red snapper from the time of transfer from a vessel through possession by a dealer would be prohibited unless the IFQ red snapper are accompanied by a transaction approval code verifying a legal transaction of the amount of IFQ

red snapper in possession. For red snapper offloaded to a truck for transportation to a dealer, this would require on-site capability to accurately weigh the fish and to connect electronically to the online IFQ system to complete the transaction and obtain the transaction approval code. At-sea or dockside vessel-to-vessel transfers of fish on board IFQ vessels would be prohibited.

Changes Proposed by NMFS

In this proposed rule, NMFS has clarified the distinction between IFQ shareholders and IFQ allocation holders, and more clearly distinguished the roles and responsibilities of these two IFQ participant types. This clarification was necessary for proper implementation of the IFQ program.

NMFS has also determined that it is not necessary to prohibit transfer of allocation during December as Amendment 26 proposed. Allocation is only valid for a given fishing year; does not carry over to the subsequent year; and, thus, does not affect agency calculations and implementation for the following year. Therefore, consistent with the Council's intent to maximize flexibility among eligible participants, NMFS has modified the proposed rule to only prohibit transfer of IFQ shares during December of each year.

In addition, NMFS has structured the proposed rule to require an IFQ vessel endorsement rather than an IFQ endorsement issued to an individual as discussed by the Council. The primary purpose of the endorsement requirement is to enhance enforceability. NMFS has determined that a vessel endorsement would provide the necessary enforceability; be less restrictive for participants; and be consistent with endorsement provisions in current regulations for other fisheries in the Southeast Region.

NMFS also has clarified in this proposed rule that the IFQ allocation holder specified in the landing transaction report is responsible for payment of the applicable cost recovery fee, not necessarily the shareholder. In some cases, the shareholder may also be the allocation holder, but in other cases, the shareholder may have transferred allocation to a non-shareholder. In all cases, the allocation holder is ultimately responsible for payment of the fee.

Finally, this proposed rule does not include the vessel monitoring system (VMS) requirement for vessels with a Gulf reef fish vessel permit that was proposed in Amendment 26. Amendment 26 acknowledged that a comparable VMS requirement was proposed in Amendment 18A to the FMP. Amendment 26 stated that the VMS requirement in Amendment 26 would be unnecessary if Amendment 18A was approved by NMFS. NMFS has approved Amendment 18A and the associated VMS requirement; therefore, this proposed rule would not implement any additional VMS requirement.

Classification

At this time, NMFS has not determined that Amendment 26 is consistent with the Magnuson-Stevens Act and other applicable laws. NMFS, in making that determination, will take into account the data, views, and comments received during the comment periods on Amendment 26 and this proposed rule.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared a final supplemental environmental impact statement (FSEIS) for this amendment; a notice of availability was published on August 2, 2006 (71 FR 43706).

NMFS prepared an IRFA, as required by section 603 of the Regulatory Flexibility Act, for this proposed rule. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of the full analysis is available from the Council (see **ADDRESSES**). A summary of the IRFA follows.

The Magnuson-Stevens Act provides the statutory basis for the proposed rule. The proposed rule will establish an IFQ program for the commercial red snapper fishery in the Gulf. Specifics for this IFQ program include the following: (1) no limit on the duration of the program, but a program evaluation is required every 5 years; (2) maximum IFQ share ownership equal to the maximum percentage issued to any initial recipient of IFQ shares; (3) restriction on initial eligibility only to owners of Class 1 or Class 2 license holders; (4) proportionate allocation of initial IFQ shares based on average annual landings for 10 consecutive years during 1990–2004 for Class 1, all years of landings during 1998–2004 for Class 1 historical captains, and any 5 years during 1998–2004 for Class 2; (5) establishment of an appeals process and a set-aside of a 3–percent IFQ share to resolve appeals; (6) restriction on transfers of IFQ shares/allocations only to those with a valid commercial reef fish permit during the first 5 years and to U.S. citizens and permanent resident aliens thereafter; (7) proportionate allocation of commercial quota adjustments based on percentage of IFQ share holdings at the time of the adjustment and phased-in issuance of IFQ allocations for the 2007 season; and, (8) provision for IFQ cost recovery fees to be paid by IFQ allocation holders who land IFQ red snapper but collected and submitted to NMFS by registered IFQ dealers.

The main objectives of the proposed rule are to address the excess capacity and derby problems in the commercial red snapper fishery. The proposed rule would generally impact two types of businesses in the Gulf reef fish fishery, namely, commercial fishing vessels (including recreational for-hire vessels with commercial reef fish permits) and fish dealers.

At present, the Gulf of Mexico (GOM) commercial reef fish permits are under a limited access program. Commercial reef fish permits are renewable every year subject to the condition the applicant meets the income requirement. Also, the commercial red snapper fishery is presently under a two-tier license limitation program. A Class 1 license entitles the holder a trip limit of 2,000 lb (907.2 kg) of red snapper while a Class 2 license entitles the holder a lower trip limit of 200 lb (90.7 kg). Each type of license is allowed only one trip per day. The proposed IFQ program would replace this two-tier license limitation system in the commercial red snapper fishery, but the limited access program for commercial reef fish permits remains unchanged.

No duplicative, overlapping, or conflicting Federal rules have been identified.

There are 1,118 active commercial reef fish permits and 91 others that are currently expired but may be renewed within a year. Thus, a total of 1,209 vessels may be considered to comprise the universe of commercial harvest operations in the GOM reef fish fishery. Of the 1,209 commercial permittees, 136 entities hold red snapper Class 1 licenses and 628 entities hold red snapper Class 2 licenses. Of the 136 Class 1 licenses, seven have been issued on the basis of the historical captain criterion. All original owners of Class 1 historical captain licenses have sold their licenses. Reported average annual gross receipts (in 2004 dollars) of commercial reef fish vessels in the GOM range from $24,095 for low-volume vertical line vessels to $116,989 for high-volume longline vessels which primarily target grouper. The corresponding annual net incomes range from $4,479 for low-volume vertical line vessels to $28,466 for high-volume vertical line vessels. Permit records

indicate there are 17 Class 1 fleet operations owning a total of 58 licenses. In 2004, the top three fleet operations landed a total of 987,532 lb (447,937 kg) of red snapper, or an average of 329,177 lb (149,312 kg) per fleet operation. At the 2004 average red snapper ex-vessel price of $2.83 per pound, the average pounds landed convert to ex-vessel revenues of $931,571. No fleet information is available for Class 2 licenses, but it is reasonable under the circumstances to assume that if ever a Class 2 fleet operation exists, it would generate much less revenues than its Class 1 counterparts.

There currently exists a permitting requirement for dealers to buy or sell reef fish, including red snapper, caught in the GOM. This permitting requirement remains under the proposed IFQ program, but in addition a red snapper endorsement would be required of dealers to buy or sell red snapper. Based on the permits file, there are 227 dealers possessing permits to buy and sell reef fish species. However, based on logbook records, there are 154 reef fish dealers actively buying and selling red snapper. It is possible, though, that some of the 227 dealers may be handling red snapper in one year but not in another. Dealers in Florida purchased about $1.8 million of red snapper, followed by dealers in Louisiana with purchases of $1.4 million and dealers in Texas with purchases of $1.3 million. Dealers in Mississippi purchased $174,000 worth of red snappers and those in Alabama, $88,000. These dealers may hold multiple types of permits, and because we do not know 100 percent of the business revenues, it is not possible to determine what percentage of their business comes from buying and selling red snapper.

Average employment information per reef fish dealer in the GOM is unknown. Although dealers and processors are not synonymous entities, a recent study reported total employment for reef fish processors in the Southeast at approximately 700 individuals, both part and full time. NMFS assumes all processors must be dealers, yet a dealer need not be a processor. Further, processing is a much more labor intensive operation than dealing. Therefore, given the employment estimate for the processing sector, it is likely the average dealer employment would be low.

The Small Business Administration (SBA) defines a business as a small business if it is independently owned and operated and not dominant in its field of operation, and if it has annual receipts not in excess of $4.0 million in the case of commercial harvesting entities or $6.5 million in the case of for-hire entities, or if it has fewer than 500 employees in the case of fish processors, or fewer than 100 employees in the case of fish dealers. Based on the gross revenue and employment profiles presented above, all permitted commercial reef fish vessels (including fleet operations) and reef fish dealers affected by the proposed regulations may be classified as small entities.

The proposed rule would introduce additional reporting and record-keeping requirements involving the tracking of IFQ shares and the corresponding red snapper landings. An electronic reporting system is the planned approach to track IFQ shares and corresponding red snapper landings. The reporting burden would mainly fall on the dealers. An IFQ dealer endorsement would be required of any dealer purchasing red snapper. The IFQ dealer endorsement would be issued at no cost to those individuals who possess a valid GOM reef fish dealer permit and request the endorsement. Although the current GOM reef fish dealer permit must be renewed annually at a cost of $50 for the initial permit ($12.50 for each additional permit), the IFQ dealer endorsement would remain valid as long as the individual possesses a valid GOM reef fish dealer permit, abides by all reporting and cost recovery requirements of the IFQ program, and is not subject to sanctions under 15 CFR part 904. As an integral part of the electronic monitoring system, an IFQ dealer would be required to have access to computers and the Internet for inputting, among other data, pounds and value of red snapper purchased by the dealer from an IFQ shareholder. If a dealer does not have current access to computers and the Internet, he or she may have to expend approximately $1,500 for computer equipment and accessories (one-time cost) and $300 annual cost for Internet access. Dealers would need some basic computer and Internet skills to input information for all red snapper purchases into the IFQ electronic reporting system. Dealers also have to remit to NMFS on a quarterly basis, the cost recovery fees equivalent to 3 percent of the actual ex-vessel value of red snapper purchased from IFQ shareholders/allocation holders. Although IFQ allocation holders pay this fee, it is the responsibility of dealers to collect and remit these fees to NMFS. In addition to this quarterly remittance, dealers would be required to submit to NMFS a year-end report summarizing all transactions involving the purchase of red snapper. There is currently no available information to determine how many of the 227 reef fish dealers or of the current 154 red snapper dealers have the necessary electronic capability to participate in the IFQ program. However, demonstration of this capability would be necessary for IFQ program participation by any dealer.

IFQ shareholders/allocation holders also have to use the electronic reporting system to report transfer/assignment of shares and allocation as well as to monitor their outstanding IFQ shares and allocations. Similar skills and equipment needs for dealers also apply to IFQ shareholders/allocation holders. There would be 95 IFQ shareholders based on Class 1 license qualification and as many as 482 IFQ shareholders based on Class 2 license qualification. Over time under the IFQ program, the number of IFQ shareholders is expected to decline.

The 764 vessels (136 Class 1 licenses plus 628 Class 2 licenses) that have Class 1 or Class 2 licenses comprise 64 percent of all vessels with GOM commercial reef fish permits. Also, at least 154, or 68 percent, of the 227 permitted reef fish dealers would be affected. Therefore, the proposed rule would affect a substantial number of small entities.

Because all affected vessel and dealer operations are small entities, the proposed rule would not result in disproportionate impacts where small entities are placed at a significant competitive disadvantage to large entities. Some vessel operations are relatively larger than others. In particular, 17 fleet operations account for as much as 40 percent of the entire commercial quota for red snapper. These 17 fleet operations and another 78 single vessel operations would initially receive about 90 percent of IFQ shares. The other 482 smaller operations would receive the rest of the IFQ shares. And 146 Class 2 vessel operations would likely not receive any initial IFQ shares, because they have no landings history during the qualifying period of 1998–2004 for these licenses.

The proposed rule has varying effects on the profitability of the affected vessel operations. Most likely, it has minimal effects on the profits of the 146 Class 2 vessel operations that have no red snapper landings. These vessels would mainly lose their relatively low-cost entry into the red snapper fishery should the need arise. Under the proposed rule, they would have to buy shares/allocations even if they intend to fish only on a limited basis. Some of the 482 Class 2 vessel operations that may have increasingly relied on red snapper to supplement their overall harvests

may receive small IFQ shares. They would either have to buy more shares/allocations to continue fishing for red snapper or sell their shares. Either way, their overall profits may decline, at least initially, although in selling their IFQ shares they would receive some remuneration. The 136 Class 1 vessel operations and some Class 2 vessel operations that have relatively large red snapper landings are expected to benefit most from the IFQ program. As discussed in the RIR, an IFQ system is expected to improve the profitability of these vessels. This improvement would generally take time, since fishermen would have to adjust their operations in order to achieve the most profitable position. Such adjustment may involve consolidation of multiple vessel operations to lower costs, scheduling of harvests to take advantage of market and weather conditions, negotiation with purchasers to strike a long-term deal at relatively stable prices, or some other arrangements that take advantage of a relatively certain share of a season's quota at the start of the season. Some entities may be successful in making adjustments while others may not. For those that cannot, there is always the option to sell their shares. They may leave the red snapper fishery, but would receive some remuneration for doing so.

The extent to which the IFQ monitoring system, including the collection and remittance of the cost recovery fees, would affect dealers' profitability cannot be determined at this time. For the relatively established dealers, the monetary cost requirement under an electronic monitoring system is probably small, especially if they already have computer systems in place. Smaller operations, however, may totally stay out of the red snapper fishery. On top of the cost the dealer defrays to collect and remit cost recovery fees, participating dealers are also exposed to possibilities of temporarily or permanently losing their red snapper business in the event there are problems with their collection and/or remittance of the full amount of cost recovery fees. To mitigate this potential adverse impact, dealers are granted a 30-day grace period from the end of the quarter to reconcile their cost recovery fee accounts. Arrears in cost recovery fees not settled within the 30-day grace period would lead to suspension of the dealer red snapper endorsement. In this eventuality, dealers are granted another 30 days to settle their accounts before their dealer endorsement is annulled. Note, however, that payment of arrears is sufficient to reinstate the dealer endorsement within a certain period of time.

This amendment considered several alternatives to the proposed rule. An alternative to the IFQ program is the current limited access and license limitation system. Under this system, overcapacity and derby effects have substantially constrained the profitability of the commercial harvest industry. The proposed IFQ program is expected to effectively address these major issues/problems in the fishery. To partly cushion the impacts of unintended IFQ allocation overruns that may result in penalties, IFQ shareholders are allowed to land up to 10 percent more than their remaining allocations for the fishing year's last fishing trip without having to purchase additional allocation. However, any overages would be deducted from the next year's allocation associated with their IFQ shares.

There are two other alternatives with respect to the duration of the IFQ program. One specifies no duration while the other imposes a term limit on the program. The former has similar effects as the proposed rule, but it does not contain a mandatory evaluation of the program every 5 years. A sunset provision, as in the latter alternative, offers a lower likelihood for the IFQ program to achieve its intended objectives. Also, it would introduce uncertainties into the program due to potential changes in the ''rules of the game.''

With respect to an ownership cap, two other alternatives have been considered. One places no cap on ownership of IFQ shares while the other places a cap ranging from 2 to 15 percent of the commercial quota. The first alternative provides a fertile ground for consolidation of IFQ shares, but it can also lead to concentration of ownership to a select few at the expense of eliminating historically small-scale operations in the fishery. The second alternative may be too liberal (e.g., 15 percent) as to lead to over-consolidation or too restrictive (e.g., 2 percent) as to penalize the more efficient operations.

Two other alternatives have been considered on the issue of initially eligible persons. The first one does not specify persons eligible to receive initial IFQ shares, and, thus, does not provide guidance for initially allocating IFQ shares. The second restricts initial eligibility to Class 1 license holders. This is too restrictive as to disallow at least 482 Class 2 license holders from continued participation in the fishery at the start of the IFQ program.

Regarding allocating initial IFQ shares, two other alternatives have been considered. The first does not specify a methodology for allocating initial IFQ shares, and, thus, does not provide guidance for allocating IFQ shares to eligible participants. The second allocates initial IFQ shares equally among all eligible participants. This alternative would penalize the highliners and reward the small-scale operations in the fishery. There are more participants who would benefit from this alternative, but the magnitude of adverse impacts on at least 136 operations would be relatively large.

Regarding the appeals process, three other alternatives have been considered. The first does not establish an appeals process, and, thus, would not provide fishermen an avenue to contest landings information used by NMFS to determine their IFQ shares. The second establishes an appeals board composed of state directors/designees who would advise the RA on appeals. The third establishes an advisory panel composed of IFQ shareholders. The proposed rule is simple and more straightforward than any of the alternatives that establish an appeals board.

There are five other alternatives regarding the transfer of IFQ shares/allocations. The first provides no limit on transfer; the second limits transfers only to those with valid commercial reef fish permits; the third limits transfers only to IFQ shareholders; the fourth allows transfers to U.S. citizens and permanent resident aliens; and, the fifth limits transfers only to IFQ shareholders during the first five years of the IFQ program and those with valid commercial reef fish permits thereafter. With the exception of the first alternative, all others would tend to limit the price an IFQ seller gets, so the resulting IFQ prices would not capture the true value of the resource. In addition, such limitations would constrain the entry of potentially more efficient producers. The proposed rule would be less restrictive than these alternatives but still would be more restrictive than the first alternative that does not impose limits on transfer. However, the proposed rule addresses concerns relative to the preservation of the historical and current participation in the fishery.

On the issue of allocating adjustments in the commercial quota, three other alternatives have been considered. The first does not specify a method for allocating adjustments, so it does not provide adequate guidance for allocating quota changes. The second would allocate quota changes equally among IFQ share holders, and the third would allocate quota changes equally for 50 percent of the change and

proportionately for the other 50 percent. The second alternative would provide smaller operations larger benefits with quota increases and also larger losses with quota decreases. The third alternative would favor smaller operations at the expense of larger operations. One should note, however, that both large and small vessel operations have been considered small entities for SBA purposes.

The proposed rule regarding a cost recovery fee is intended to abide by the § 304(d)(2)(A) provision of the Magnuson-Stevens Act. One other alternative considered in this respect is not to impose a fee, which would not be in compliance with the noted provision. Another alternative considered is similar to the proposed rule, except that collection and submission of fees reside on the IFQ holders and not on the dealers. Under this alternative and the proposed rule, a small entity bears the cost of collecting and remitting the fees. The proposed rule, however, affords a better accounting control for the government. Copies of the RIR and IRFA are available (see **ADDRESSES**).

This proposed rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The collection-of-information requirements and associated public reporting burdens, in minutes, are as follows: (1) Dealer account activation--5; (2) Dealer transaction report--7; (3) Shareholder account activation--5; (4) Allocation holder account activation--10; (5) Advance notification of landing--3; (6) Transfer of share--15; and (7) Transfer of allocation--5. These requirements have been submitted to OMB for approval. These estimates of the public reporting burdens include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information. Public comment is sought regarding: Whether these proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the burden estimates; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collections of information, including through the use of automated collection techniques or other forms of information technology. Send comments regarding the burden estimates or any other aspect of the collection-of-information requirements, including suggestions for reducing the burden, to NMFS and to OMB (see **ADDRESSES**).

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: August 18, 2006.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 622.1, revise paragraph (a) and the first sentence in paragraph (b), and Table 1 entry ''FMP for the Reef Fish Resources of the Gulf of Mexico'', and add footnote 5 to read as follows:

§ 622.1 Purpose and scope.

(a) The purpose of this part is to implement the FMPs prepared under the Magnuson-Stevens Act by the CFMC, GMFMC, and/or SAFMC listed in Table 1 of this section.

(b) This part governs conservation and management of species included in the FMPs in or from the Caribbean, Gulf, Mid-Atlantic, South Atlantic, or Atlantic EEZ, unless otherwise specified, as indicated in Table 1 of this section. * * *

TABLE 1—FMPS IMPLEMENTED UNDER PART 622

FMP title	Responsible fishery management council(s)	Geographical area
* *	* *	*
FMP for the Reef Fish Resources of the Gulf of Mexico	GMFMC	Gulf.[1,5]

TABLE 1—FMPS IMPLEMENTED UNDER PART 622—Continued

FMP title	Responsible fishery management council(s)	Geographical area
* *	* *	*

[5] Regulated area includes adjoining state waters for Gulf red snapper harvested or possessed by a person aboard a vessel with a Gulf red snapper IFQ vessel endorsement or possessed by a dealer with a Gulf red snapper IFQ dealer endorsement.

3. In § 622.2, definitions of ''Actual ex-vessel value'' and ''IFQ'' are added in alphabetical order to read as follows:

§ 622.2 Definitions and acronyms.

* * * * *

Actual ex-vessel value means the total monetary sale amount a fisherman receives for IFQ landings from a registered IFQ dealer.

* * * * *

IFQ means individual fishing quota.

* * * * *

4. Section 622.4 is amended by:

A. Adding introductory text to the section.

B. Adding a new sentence after the first sentence of paragraph (a)(2)(v).

C. Revising paragraphs (a)(2)(ix), (a)(4), the first sentence of paragraph (d), paragraph (g)(1), and the first sentence of paragraph (h)(1).

D. Removing and reserving paragraph (p).

The additions and revisions read as follows:

§ 622.4 Permits and fees.

Paragraphs (p)(1) through (3) and (p)(5) through (6) of this section will no longer be in effect as of January 1, 2007, and paragraph (p)(4) of this section will no longer be in effect as of [DATE OF PUBLICATION OF THE FINAL RULE].

(a) * * *

(2) * * *

(v) * * * See paragraph (a)(2)(ix) of this section regarding an additional IFQ vessel endorsement required to fish for, possess, or land Gulf red snapper. * * *

* * * * *

(ix) *Gulf red snapper IFQ vessel endorsement.* For a person aboard a vessel, for which a commercial vessel permit for Gulf reef fish has been issued, to fish for, possess, or land Gulf red snapper, regardless of where harvested or possessed, a Gulf red snapper IFQ vessel endorsement must have been issued to the vessel and must be on board. As a condition of the IFQ vessel endorsement issued under this

paragraph (a)(2)(ix), a person aboard such vessel must comply with the requirements of § 622.16 regardless of where red snapper are harvested or possessed. An owner of a vessel with a commercial vessel permit for Gulf reef fish can download an IFQ vessel endorsement from the NMFS IFQ website at *ifq.sero.nmfs.noaa.gov*. If such owner does not have an IFQ online account, the owner must first contact IFQ Customer Service at 1–866–425–7627 to obtain information necessary to access the IFQ website and establish an IFQ online account. There is no fee for obtaining this endorsement. The vessel endorsement remains valid as long as the vessel permit remains valid and the vessel owner is in compliance with all Gulf reef fish and Gulf red snapper IFQ reporting requirements, has paid all IFQ fees required under paragraph (c)(2) of this section, and is not subject to sanctions under 15 CFR part 904. The endorsement is not transferable. See § 622.16 regarding other provisions pertinent to the Gulf red snapper IFQ system.

* * * * *

(4) *Dealer permits, endorsements, and conditions* —(i) *Permits.* For a dealer to receive Gulf reef fish, golden crab harvested from the South Atlantic EEZ, South Atlantic snapper-grouper, rock shrimp harvested from the South Atlantic EEZ, dolphin or wahoo harvested from the Atlantic EEZ, or wreckfish, a dealer permit for Gulf reef fish, golden crab, South Atlantic snapper-grouper, rock shrimp, Atlantic dolphin and wahoo, or wreckfish, respectively, must be issued to the dealer.

(ii) *Gulf red snapper IFQ dealer endorsement.* In addition to the requirement for a dealer permit for Gulf reef fish as specified in paragraph (a)(4)(i) of this section, for a dealer to receive Gulf red snapper subject to the Gulf red snapper IFQ program, as specified in § 622.16(a)(1), or for a person aboard a vessel with a Gulf red snapper IFQ vessel endorsement to sell such red snapper directly to an entity other than a dealer, such persons must also have a Gulf red snapper IFQ dealer endorsement. A dealer with a Gulf reef fish dealer permit can download a Gulf red snapper IFQ dealer endorsement from the NMFS IFQ website at *ifq.sero.nmfs.noaa.gov*. If such persons do not have an IFQ online account, they must first contact IFQ Customer Service at 1–866–425–7627 to obtain information necessary to access the IFQ website and establish an IFQ online account. There is no fee for obtaining this endorsement. The endorsement remains valid as long as the Gulf reef fish dealer permit remains valid and the dealer is in compliance with all Gulf reef fish and Gulf red snapper IFQ reporting requirements, has paid all IFQ fees required under paragraph (c)(2) of this section, and is not subject to sanctions under 15 CFR part 904. The endorsement is not transferable. See § 622.16 regarding other provisions pertinent to the Gulf red snapper IFQ system.

(iii) *State license and facility requirements.* To obtain a dealer permit or endorsement, the applicant must have a valid state wholesaler's license in the state(s) where the dealer operates, if required by such state(s), and must have a physical facility at a fixed location in such state(s).

* * * * *

(d) * * * Unless specified otherwise, a fee is charged for each application for a permit, license, or endorsement submitted under this section, for each request for transfer or replacement of such permit, license, or endorsement, and for each fish trap or sea bass pot identification tag required under § 622.6(b)(1)(i)(B). * * *

* * * * *

(g) * * *

(1) *Vessel permits, licenses, and endorsements and dealer permits.* A vessel permit, license, or endorsement or a dealer permit or endorsement issued under this section is not transferable or assignable, except as provided in paragraph (m) of this section for a commercial vessel permit for Gulf reef fish, in paragraph (n) of this section for a fish trap endorsement, in paragraph (o) of this section for a king mackerel gillnet permit, in paragraph (q) of this section for a commercial vessel permit for king mackerel, in paragraph (r) of this section for a charter vessel/headboat permit for Gulf coastal migratory pelagic fish or Gulf reef fish, in paragraph (s) of this section for a commercial vessel moratorium permit for Gulf shrimp, in § 622.17(c) for a commercial vessel permit for golden crab, in § 622.18(e) for a commercial vessel permit for South Atlantic snapper-grouper, or in § 622.19(e) for a commercial vessel permit for South Atlantic rock shrimp. A person who acquires a vessel or dealership who desires to conduct activities for which a permit, license, or endorsement is required must apply for a permit, license, or endorsement in accordance with the provisions of this section and other applicable sections of this part. If the acquired vessel or dealership is currently permitted, the application must be accompanied by the original permit and a copy of a signed bill of sale or equivalent acquisition papers. In those cases where a permit, license, or endorsement is transferable, the seller must sign the back of the permit, license, or endorsement and have the signed transfer document notarized.

* * * * *

(h) * * *

(1) * * * Unless specified otherwise, a vessel owner or dealer who has been issued a permit, license, or endorsement under this section must renew such permit, license, or endorsement on an annual basis.

* * * * *

5. In § 622.7, paragraphs (gg) and (hh) are added to read as follows:

§ 622.7 Prohibitions.

* * * * *

(gg) Fail to comply with any provision related to the Gulf red snapper IFQ program as specified in § 622.16.

(hh) Falsify any information required to be submitted regarding the Gulf red snapper IFQ program as specified in § 622.16.

6. The stay of § 622.16 is lifted and the section is revised to read as follows:

§ 622.16 Gulf red snapper individual fishing quota (IFQ) program.

(a) *General.* This section establishes an IFQ program for the commercial fishery for Gulf red snapper. Under the IFQ program, the RA initially will assign eligible participants IFQ shares equivalent to a percentage of the annual commercial red snapper quota, based on their applicable historical landings. Shares determine the amount of Gulf red snapper IFQ allocation, in pounds gutted weight, a shareholder is initially authorized to possess, land, or sell in a given calendar year. Shares and annual IFQ allocation are transferable. See § 622.4(a)(2)(ix) regarding a requirement for a vessel landing red snapper subject to this IFQ program to have a Gulf red snapper IFQ vessel endorsement. See § 622.4(a)(4)(ii) regarding a requirement for a Gulf red snapper IFQ dealer endorsement. Details regarding eligibility, applicable landings history, account setup and transaction requirements, constraints on transferability, and other provisions of this IFQ system are provided in the following paragraphs of this section.

(1) *Scope.* The provisions of this section apply to Gulf red snapper in or from the Gulf EEZ and, for a person aboard a vessel with a Gulf red snapper IFQ vessel endorsement as required by § 622.4(a)(2)(ix) or for a person with a Gulf red snapper IFQ dealer endorsement as required by § 622.4(a)(4)(ii), these provisions apply

to Gulf red snapper regardless of where harvested or possessed.

(2) *Duration*. The IFQ program established by this section will remain in effect until it is modified or terminated; however, the program will be evaluated by the Gulf of Mexico Fishery Management Council every 5 years.

(3) *Electronic system requirements*. (i) The administrative functions associated with this IFQ program, e.g., registration and account setup, landing transactions, and transfers, are designed to be accomplished online; therefore, a participant must have access to a computer and Internet access and must set up an appropriate IFQ online account to participate. Assistance with online functions is available from IFQ Customer Service by calling 1–866–425–7627 Monday through Friday between 8 a.m. and 4:30 p.m. eastern time.

(ii) The RA will mail initial shareholders and dealers with Gulf reef fish dealer permits information and instructions pertinent to setting up an IFQ online account. Other eligible persons who desire to become IFQ participants by purchasing IFQ shares or allocation or by obtaining a Gulf red snapper IFQ dealer endorsement must first contact IFQ Customer Service at 1–866–425–7627 to obtain information necessary to set up the required IFQ online account. Each IFQ participant must monitor his/her online account and all associated messages and comply with all IFQ online reporting requirements.

(iii) During catastrophic conditions only, the IFQ program provides for use of paper-based components for basic required functions as a backup. The RA will determine when catastrophic conditions exist, the duration of the catastrophic conditions, and which participants or geographic areas are deemed affected by the catastrophic conditions. The RA will provide timely notice to affected participants via publication of notification in the **Federal Register**, NOAA weather radio, fishery bulletins, and other appropriate means and will authorize the affected participants' use of paper-based components for the duration of the catastrophic conditions. NMFS will provide each IFQ dealer the necessary paper forms, sequentially coded, and instructions for submission of the forms to the RA. The paper forms will also be available from the RA. The program functions available to participants or geographic areas deemed affected by catastrophic conditions will be limited under the paper-based system. There will be no mechanism for transfers of IFQ shares or allocation under the paper-based system in effect during catastrophic conditions. Assistance in complying with the requirements of the paper-based system will be available via IFQ Customer Service 1–866–425–7627 Monday through Friday between 8 a.m. and 4:30 p.m. eastern time.

(b) *Procedures for initial implementation*—(1) *Determination of eligibility for initial IFQ shares*. To be eligible as an initial IFQ shareholder a person must own a Class 1 or Class 2 Gulf red snapper license as of the date of publication of the final rule implementing this IFQ system. For the purposes of this paragraph, an owner of a license is defined as the person who controls transfer of the license and is listed as the qualifier on the face of the license. NMFS' permit records are the sole basis for determining eligibility based on Class 1 or Class 2 license history. No more than one initial eligibility will be granted based upon a given Class 1 or Class 2 license.

(2) *Calculation of initial IFQ shares and allocation*—(i) *IFQ shares*. The RA will calculate initial IFQ shares based on the highest average annual landings of Gulf red snapper associated with each shareholder's current Class 1 or Class 2 license during the applicable landings history. The applicable landings history for a Class 1 license owner whose license was not issued based on historical captain status includes any 10 consecutive years of landings data from 1990 through 2004; for a Class 1 license owner whose license was issued on the basis of historical captain status, all years of landings data from 1998 through 2004; and for a Class 2 license holder, any 5 years of landings data from 1998 through 2004. All landings associated with a current Class 1 or Class 2 license for the applicable landings history, including those reported by a person who held the license prior to the current license owner, will be attributed to the current license owner. Only legal landings reported in compliance with applicable state and Federal regulations will be accepted. Each shareholder's initial share is derived by dividing the shareholder's highest average annual landings during the applicable landings history by the sum of the highest average annual landings of all shareholders during the respective applicable landings histories. Initial IFQ shares will not be issued in denominations of less than 0.0001 percent.

(ii) *Initial share set-aside to accommodate resolution of appeals*. During the first year of implementation of this IFQ program only, the RA will reserve a 3–percent IFQ share, prior to the initial distribution of shares, to accommodate resolution of appeals, if necessary. Any portion of the 3–percent share remaining after the appeals process is completed will be distributed as soon as possible among initial shareholders in direct proportion to the percentage share each was initially allocated. If resolution of appeals requires more than a 3–percent share, the shares of all initial shareholders would be reduced accordingly in direct proportion to the percentage share each was initially allocated.

(iii) *IFQ allocation*. IFQ allocation is the amount of Gulf red snapper, in pounds gutted weight, an IFQ shareholder or allocation holder is authorized to possess, land, or sell during a given fishing year. IFQ allocation is derived at the beginning of each year by multiplying a shareholder's IFQ share times the annual commercial quota for Gulf red snapper.

(iv) *Special procedure for initial calculation of 2007 IFQ allocations*. Because of uncertainty regarding the 2007 commercial quota for Gulf red snapper and the timing of its implementation and to avoid the possibility of having to revoke some proportion of initial allocation if the quota was subsequently reduced, the RA may initially calculate the 2007 IFQ allocations based on a proxy commercial quota. If a commercial quota adjustment for Gulf red snapper has not been submitted for review by the Secretary of Commerce in time for calculation of 2007 IFQ allocations, the RA will initially calculate 2007 allocations based on a proxy commercial quota of 2.55 million lb (1.16 million kg). Alternatively, if a commercial quota adjustment for Gulf red snapper has been submitted for review by the Secretary of Commerce in time to allow calculation of 2007 allocations, the RA will base 2007 IFQ allocations on the proposed quota. Under either scenario, as soon as the actual 2007 commercial quota is final, but no later than July 1, 2007, the RA will adjust the 2007 IFQ allocations, as necessary, consistent with the actual quota.

(3) *Shareholder notification regarding landings history, initial determination of IFQ shares and allocations, and IFQ account setup information*. (i) As soon as possible after the date of publication of the final rule implementing this IFQ program, the RA will mail each Class 1 or Class 2 red snapper license owner information pertinent to the IFQ program. This information will include—

(A) Gulf red snapper landings associated with the owner's license

during each year of the applicable landings history;

(B) The highest average annual red snapper landings based on the owner's applicable landings history;

(C) The owner's initial IFQ share based on the highest average annual landings associated with the owner's applicable landings history;

(D) The initial IFQ allocation;

(E) Instructions for appeals;

(F) General instructions regarding procedures related to the IFQ online system, including how to set up an online account; and

(G) A user identification number—the personal identification number (PIN) will be provided in a subsequent letter.

(ii) The RA will provide this information, via certified mail return receipt requested, to the license owner's address of record as listed in NMFS' permit files. A license owner who does not receive such notification from the RA within 30 days after the date of publication of the final rule implementing this IFQ system must contact the RA to clarify eligibility status and landings and initial share information.

(iii) The initial share information provided by the RA is based on the highest average landings associated with the owner's applicable landings history; however, a license owner may select a different set of years of landings, consistent with the owner's applicable landings history, for the calculation of the initial IFQ share. The license owner must submit that information to the RA postmarked no later than 30 days after the date of publication of the final rule implementing this IFQ system. If alternative years, consistent with the applicable landings history, are selected, revised information regarding shares and allocations will be posted on the online IFQ accounts no later than January 1, 2007. A license owner who disagrees with the landings or eligibility information provided by the RA may appeal the RA's initial determinations.

(4) *Procedure for appealing IFQ eligibility and/or landings information.* The only items subject to appeal under this IFQ system are initial eligibility for IFQ shares based on ownership of a Class 1 or Class 2 license, the accuracy of the amount of landings, and correct assignment of landings to the license owner. Appeals based on hardship factors will not be considered. Appeals must be submitted to the RA postmarked no later than 90 days after the effective date of the final rule implementing this IFQ system and must contain documentation supporting the basis for the appeal. The RA will review all appeals, render final decisions on the appeals, and advise the appellant of the final decision.

(i) *Eligibility appeals.* NMFS' records of Class 1 and Class 2 licenses are the sole basis for determining ownership of such licenses. A person who believes he/she meets the permit eligibility criteria based on ownership of a vessel under a different name, as may have occurred when ownership has changed from individual to corporate or vice versa, must document his/her continuity of ownership.

(ii) *Landings appeals.* Landings data for 1990 through 1992 are not subject to appeal. Appeals regarding landings data for 1993 through 2004 will be based solely on NMFS' logbook records. If NMFS' logbooks are not available, state landings records or data that were submitted in compliance with applicable Federal and state regulations, on or before June 30, 2005, can be used.

(5) Dealer notification and IFQ account setup information. As soon as possible after the date of publication of the final rule implementing this IFQ program, the RA will mail each dealer with a valid Gulf reef fish dealer permit information pertinent to the IFQ program. Any such dealer is eligible to receive a red snapper IFQ dealer endorsement which can be downloaded from the IFQ website at*ifq.sero.nmfs.noaa.gov* once an IFQ account has been established. The information package will include general information about the IFQ program and instructions for accessing the IFQ website and establishing an IFQ dealer account.

(c) *IFQ operations and requirements*—(1) *IFQ Landing and transaction requirements.* (i) Gulf red snapper subject to this IFQ program can only be possessed or landed by a vessel with a Gulf red snapper IFQ vessel endorsement. Such red snapper can only be received by a dealer with a Gulf red snapper IFQ dealer endorsement. The person landing the red snapper must hold or be assigned IFQ allocation at least equal to the pounds of red snapper landed, except as provided in paragraph (c)(1)(ii) of this section.

(ii) An IFQ shareholder or his agent or employee assigned to land the shareholder's allocation can legally exceed, by up to 10 percent, the shareholder's allocation remaining on the last fishing trip of the fishing year. Any such overage will be deducted from the shareholder's allocation for the subsequent fishing year.

(iii) The dealer is responsible for completing a landing transaction report for each landing and sale of Gulf red snapper via the IFQ website at *ifq.sero.nmfs.noaa.gov* at the time of the transaction in accordance with reporting form and instructions provided on the website. This report includes, but is not limited to, date, time, and location of transaction; weight and actual ex-vessel value of red snapper landed and sold; and information necessary to identify the fisherman, vessel, and dealer involved in the transaction. The fisherman must validate the dealer transaction report by entering his unique PIN number when the transaction report is submitted. After the dealer submits the report and the information has been verified, the website will send a transaction approval code to the dealer and the allocation holder.

(2) *IFQ cost recovery fees.* As required by section 304(d)(2)(A)(i) of the Magnuson-Stevens Act, the RA will collect a fee to recover the actual costs directly related to the management and enforcement of the Gulf red snapper IFQ program. The fee cannot exceed 3 percent of the ex-vessel value of Gulf red snapper landed under the IFQ program. Such fees will be deposited in the Limited Access System Administration Fund (LASAF). Initially, the fee will be 3 percent of the actual ex-vessel value of Gulf red snapper landed under the IFQ program, as documented in each landings transaction report. The RA will review the cost recovery fee annually to determine if adjustment is warranted. Factors considered in the review include the catch subject to the IFQ cost recovery, projected ex-vessel value of the catch, costs directly related to the management and enforcement of the IFQ program, the projected IFQ balance in the LASAF, and expected non-payment of fee liabilities. If the RA determines that a fee adjustment is warranted, the RA will publish a notification of the fee adjustment in the **Federal Register**.

(i) *Payment responsibility.* The IFQ allocation holder specified in the documented red snapper IFQ landing transaction report is responsible for payment of the applicable cost recovery fees.

(ii) *Collection and submission responsibility.* A dealer who receives Gulf red snapper subject to the IFQ program is responsible for collecting the applicable cost recovery fee for each IFQ landing from the IFQ allocation holder specified in the IFQ landing transaction report. Such dealer is responsible for submitting all applicable cost recovery fees to NMFS on a quarterly basis. The fees are due and must be submitted, using *pay.gov* via the IFQ system, no later than 30 days after the end of each calendar-year quarter; however, fees

may be submitted at any time before that deadline. Fees not received by the deadline are delinquent.

(iii) *Fee payment procedure*. For each IFQ dealer, the IFQ system will post, on individual message boards, an end-of-quarter statement of cost recovery fees that are due. The dealer is responsible for submitting the cost recovery fee payments using *pay.gov* via the IFQ system. Authorized payments methods are credit card, debit card, or automated clearing house (ACH). Payment by check will be authorized only if the RA has determined that the geographical area or an individual(s) is affected by catastrophic conditions.

(iv) *Fee reconciliation process—delinquent fees*. The following procedures apply to an IFQ dealer whose cost recovery fees are delinquent.

(A) On or about the 31st day after the end of each calendar-year quarter, the RA will send the dealer an electronic message via the IFQ website and official notice via mail indicating the applicable fees are delinquent; the dealer's IFQ account has been suspended pending payment of the applicable fees; and notice of intent to annul the dealer's IFQ endorsement.

(B) On or about the 61st day after the end of each calendar-year quarter, the RA will mail to a dealer whose cost recovery fee payment remains delinquent, official notice documenting the dealer's IFQ endorsement has been annulled.

(C) On or about the 91st day after the end of each calendar-year quarter, the RA will refer any delinquent IFQ dealer cost recovery fees to the appropriate authorities for collection of payment.

(v) *Annual IFQ dealer ex-vessel value report*. The IFQ online system will generate an annual IFQ Dealer Ex-Vessel Value Report for each IFQ dealer. The report will include quarterly and annual information regarding the amount and value of IFQ red snapper received by the dealer, the associated cost recovery fees, and the status of those fees. The dealer's acceptance of this report constitutes compliance with the annual dealer IFQ reporting requirement.

(3) *Measures to enhance IFQ program enforceability*—(i) *Advance notice of landing*. The owner or operator of a vessel landing IFQ red snapper is responsible for calling NMFS Office of Law Enforcement at 1–866–425–7627 at least 3 hours in advance of landing to report the time and location of landing and the name and address of the IFQ dealer where the red snapper are to be received.

(ii) *Time restriction on landing and offloading*. IFQ red snapper may be landed and offloaded only between 6 a.m. and 6 p.m., local time.

(iii) *Restrictions on transfer of IFQ red snapper*. At-sea or dockside transfer of IFQ red snapper from one vessel to another vessel is prohibited.

(iv) *Requirement for transaction approval code*. Possession of IFQ red snapper from the time of transfer from a vessel through possession by a dealer is prohibited unless the IFQ red snapper are accompanied by a transaction approval code verifying a legal transaction of the amount of IFQ red snapper in possession.

(4) *Transfer of IFQ shares and allocation*. Through the date 5 years after the effective date of the final rule implementing this IFQ program, IFQ shares and allocations can be transferred only to a person who holds a valid commercial vessel permit for Gulf reef fish; thereafter, IFQ shares and allocations can be transferred to any U.S. citizen or permanent resident alien. However, a valid commercial permit for Gulf reef fish, a Gulf red snapper IFQ vessel endorsement, and Gulf red snapper IFQ allocation are required to possess, land or sell Gulf red snapper subject to this IFQ program.

(i) *Share transfers*. Share transfers are permanent, i.e., they remain in effect until subsequently transferred. Transfer of shares will result in the corresponding allocation being automatically transferred to the person receiving the transferred share beginning with the fishing year following the year the transfer occurred. However, within the fishing year the share transfer occurs, transfer of shares and associated allocation are independent--unless the associated allocation is transferred separately, it remains with the transferor for the duration of that fishing year. A share transfer transaction that remains in pending status, i.e., has not been completed and verified with a transaction approval code, after 30 days from the date the shareholder initiated the transfer will be cancelled, and the pending shares will be re-credited to the shareholder who initiated the transfer.

(ii) *Share transfer procedures*. A shareholder must initiate the request for the RA to transfer IFQ shares by using the online Gulf red snapper IFQ website at *ifq.sero.nmfs.noaa.gov*. Following the instructions provided on the website, the shareholder must enter pertinent information regarding the transfer request including, but not limited to, amount of shares to be transferred, which must be a minimum of 0.0001 percent; name of the eligible transferee; and the value of the transferred shares. For the first 5 years this IFQ program is in effect, an eligible transferee is a person who has a valid commercial vessel permit for Gulf reef fish; is in compliance with all reporting requirements for the Gulf reef fish fishery and the red snapper IFQ program; is not subject to sanctions under 15 CFR part 904; and who would not be in violation of the share cap as specified in paragraph (c)(6) of this section. Thereafter, share transferee eligibility will be extended to include U.S. citizens and permanent resident aliens who are otherwise in compliance with the provisions of this section. NMFS will evaluate and verify the information entered. If the information is not accepted, NMFS will send the shareholder an electronic message explaining the reason(s). If the information is accepted, NMFS will send the shareholder an initial transaction approval code and make an application for share transfer available for downloading and printing. The shareholder and eligible transferee must complete the application, have their signatures notarized, and mail the signed application to the RA at least 30 days prior to the date on which the applicant desires to have the transfer effective. The signed application must be received by the RA prior to December 1. See paragraph (c)(4)(v) of this section regarding a prohibition on transfer during December of each year. If the RA approves the application for transfer, the online system will send the shareholder and the transferee an electronic message acknowledging the approval; a transfer is effective upon receipt of the message. The adjusted shares resulting from a transfer may be viewed online by each shareholder. If the RA does not approve the transfer application, the RA will return the application to the shareholder with an explanation and instructions for correcting any deficiencies.

(iii) *Allocation transfers*. An allocation transfer is valid only for the remainder of the fishing year in which it occurs; it does not carry over to the subsequent fishing year. Any allocation that is unused at the end of the fishing year is void.

(iv) *Allocation transfer procedures*. Unlike share transfers which require a notarized application for transfer, allocation transfers can be accomplished online via the red snapper IFQ website. An IFQ allocation holder can initiate an allocation transfer by logging on to the red snapper IFQ website at *ifq.sero.nmfs.noaa.gov*, entering the required information, including but not limited to, name of an eligible transferee and amount of IFQ allocation to be transferred and price, and submitting

the transfer electronically. If the transfer is approved, the website will provide a transaction approval code to the transferor and transferee confirming the transaction.

(v) *Prohibition of transfer of shares during December each year.* No IFQ shares may be transferred during December of each year. This period is necessary to provide the RA sufficient time to reconcile IFQ accounts, adjust allocations for the upcoming year if the commercial quota for Gulf red snapper has changed, and update shares and allocations for the upcoming fishing year.

(5) *Fleet management and assignment of IFQ allocation.* An IFQ shareholder or IFQ allocation holder who owns more than one vessel with a valid Gulf reef fish vessel permit and a valid Gulf red snapper IFQ vessel endorsement may assign IFQ allocation to a person aboard such vessel and provide that person the IFQ account information necessary to conduct landing transactions.

(6) *IFQ share cap.* No person, including a corporation or other entity, may individually or collectively hold IFQ shares in excess of the maximum share initially issued to a person for the 2007 fishing year, as of the date appeals are resolved and shares are adjusted accordingly. For the purposes of considering the share cap, a corporation's total IFQ share is defined as the sum of the IFQ shares held by the corporation and the IFQ shares held by individual shareholders of the corporation. A corporation must identify the shareholders of the corporation and their percent of shares in the corporation.

(7) *Redistribution of shares resulting from permanent permit or endorsement revocation.* If a shareholder's commercial vessel permit for Gulf reef fish or Gulf red snapper IFQ vessel endorsement has been permanently revoked under provisions of 15 CFR part 904, the RA will redistribute the IFQ shares held by that shareholder proportionately among remaining shareholders based upon the amount of shares each held just prior to the redistribution. During December of each year, the RA will determine the amount of revoked shares, if any, to be redistributed, and the shares will be distributed at the beginning of the subsequent fishing year.

(8) *Annual recalculation and notification of IFQ shares and allocation.* On or about January 1 each year, IFQ shareholders will be notified, via the IFQ website at *ifq.sero.nmfs.noaa.gov*, of their IFQ share and allocation for the upcoming fishing year. These updated share values will reflect the results of applicable share transfers and any redistribution of shares resulting from permanent revocation of applicable permits or endorsements under 15 CFR part 904. Allocation is calculated by multiplying IFQ share times the annual red snapper commercial quota. Updated allocation values will reflect any change in IFQ share, any change in the annual commercial quota for Gulf red snapper, and any debits required as a result of prior fishing year overages as specified in paragraph (c)(1)(ii) of this section. IFQ participants can monitor the status of their shares and allocation throughout the year via the IFQ website.

§ 622.34 [Amended]

7. In § 622.34, paragraph (l) is removed and reserved.

8. In § 622.42, paragraph (a)(1)(i) is revised to read as follows.

§ 622.42 Quotas.

* * * * *

(a) * * *

(1) * * *

(i) Red snapper—4.65 million lb (2.11 million kg), round weight.

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§ 622.44 [Amended]

9. In § 622.44, paragraph (d) is removed and reserved.

[FR Doc. 06–7122 Filed 8–23–06; 8:45 am]

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Notices

Federal Register
Vol. 71, No. 164
Thursday, August 24, 2006

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

Animal and Plant Health Inspection Service

[Docket No. APHIS–2006–0128]

Availability of an Environmental Assessment for Field Testing Fowl Laryngotracheitis-Marek's Disease Vaccine, Serotype 3, Live Marek's Disease Vector

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment concerning authorization to ship for the purpose of field testing, and then to field test, an unlicensed Fowl Laryngotracheitis-Marek's Disease Vaccine, Serotype 3, Live Marek's Disease Vector. The environmental assessment, which is based on a risk analysis prepared to assess the risks associated with the field testing of this vaccine, examines the potential effects that field testing this veterinary vaccine could have on the quality of the human environment. Based on the risk analysis, we have reached a preliminary determination that field testing this veterinary vaccine will not have a significant impact on the quality of the human environment, and that an environmental impact statement need not be prepared. We intend to authorize shipment of this vaccine for field testing following the close of the comment period for this notice unless new substantial issues bearing on the effects of this action are brought to our attention. We also intend to issue a U.S. Veterinary Biological Product license for this vaccine, provided the field test data support the conclusions of the environmental assessment and the issuance of a finding of no significant impact and the product meets all other requirements for licensing.

DATES: We will consider all comments that we receive on or before September 25, 2006.

ADDRESSES: You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov* and, in the lower ''Search Regulations and Federal Actions'' box, select ''Animal and Plant Health Inspection Service'' from the agency drop-down menu, then click on ''Submit.'' In the Docket ID column, select APHIS–2006–0128 to submit or view public comments and to view supporting and related materials available electronically. Information on using Regulations.gov, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link.
- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. APHIS–2006–0128, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2006–0128.

Reading Room: You may read environmental assessment, the risk analysis (with confidential business information removed), and any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Albert P. Morgan, Section Leader, Operational Support Section, Center for Veterinary Biologics, Policy, Evaluation, and Licensing, VS, APHIS, 4700 River Road Unit 148, Riverdale, MD 20737–1231; phone (301) 734–8245, fax (301) 734–4314.

For information regarding the environmental assessment or the risk analysis, or to request a copy of the environmental assessment (as well as the risk analysis with confidential business information removed), contact Dr. Patricia L. Foley, Risk Manager, Center for Veterinary Biologics, Policy, Evaluation, and Licensing VS, APHIS, 510 South 17th Street, Suite 104, Ames, IA 50010; phone (515) 232–5785, fax (515) 232–7120.

SUPPLEMENTARY INFORMATION: Under the Virus-Serum-Toxin Act (21 U.S.C. 151 *et seq.*), a veterinary biological product must be shown to be pure, safe, potent, and efficacious before a veterinary biological product license may be issued. A field test is generally necessary to satisfy prelicensing requirements for veterinary biological products. Prior to conducting a field test on an unlicensed product, an applicant must obtain approval from the Animal and Plant Health Inspection Service (APHIS), as well as obtain APHIS' authorization to ship the product for field testing.

To determine whether to authorize shipment and grant approval for the field testing of the unlicensed product referenced in this notice, APHIS conducted a risk analysis to assess the potential effects of this product on the safety of animals, public health, and the environment. Based on the risk analysis, APHIS has prepared an environmental assessment (EA) concerning the field testing of the following unlicensed veterinary biological product:

Requester: Intervet, Inc.

Product: Fowl Laryngotracheitis-Marek's Disease Vaccine, Serotypes 3, Live Marek's Disease Vector.

Field Test Locations: Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kentucky, Missouri, Pennsylvania, Tennessee, Texas, and Washington.

The above-mentioned product is a live recombinant virus consisting of the avirulent turkey herpesvirus (HVT) vector expressing two genes of infectious laryngotracheitis virus. The vaccine is for use in chickens as an aid in the prevention of disease caused by virulent Marek's disease virus and infectious laryngotracheitis virus.

The EA has been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provision

of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Unless substantial issues with adverse environmental impacts are raised in response to this notice, APHIS intends to issue a finding of no significant impact (FONSI) based on the EA and authorize shipment of the above product for the initiation of field tests following the close of the comment period for this notice.

Because the issues raised by field testing and by issuance of a license are identical, APHIS has concluded that the EA that is generated for field testing would also be applicable to the proposed licensing action. Provided that the field test data support the conclusions of the original EA and the issuance of a FONSI, APHIS does not intend to issue a separate EA and FONSI to support the issuance of the product license, and would determine that an environmental impact statement need not be prepared. APHIS intends to issue a veterinary biological product license for this vaccine following completion of the field test provided no adverse impacts on the human environment are identified and provided the product meets all other requirements for licensing.

Authority: 21 U.S.C. 151–159; 7 CFR 2.22, 2.80, and 371.4.

Done in Washington, DC, this 21st day of August 2006.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E6–14040 Filed 8–23–06; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Resource Advisory Committee, Sundance, WY

AGENCY: Notice of Resource Advisory Committee, Sundance, Wyoming, USDA Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Black Hills National Forests' Crook County Resource Advisory Committee will meet Monday, September 11th, 2006 in Sundance, Wyoming for a business meeting. The meeting is open to the public.

SUPPLEMENTARY INFORMATION: The business meeting on September 11 will begin at 6:30 p.m., at the USFS Bearlodge Ranger District office, 121 South 21st Street, Sundance, Wyoming. Agenda topics will include a review of previously funded projects and consideration of FY 2007 project proposals. A public forum will begin at 8 p.m. (MT).

FOR FURTHER INFORMATION CONTACT: Steve Kozel, Bearlodge District Ranger and Designated Federal Officer at (307) 283–1361.

Dated: August 18, 2006.

Steven J. Kozel,

District Ranger, Bearlodge Ranger District.

[FR Doc. 06–7118 Filed 8–23–06; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 020306A]

Small Takes of Marine Mammals Incidental to Specified Activities; Seismic Surveys in the Beaufort and Chukchi Seas off Alaska

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

ACTION: Notice of Issuance of an Incidental Harassment Authorization.

SUMMARY: In accordance with regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that an Incidental Harassment Authorization (IHA) to take small numbers of marine mammals, by harassment, incidental to conducting a marine geophysical program, including deep seismic surveys, on oil and gas lease blocks located on Outer Continental Shelf (OCS) waters in the mid- and eastern-Beaufort Sea and on pre-lease areas in the Northern Chukchi Sea has been issued to Shell Offshore, Inc. (Shell) and WesternGeco, Inc.

DATES: Effective from July 10, 2006 through December 31, 2006.

ADDRESSES: The application, a list of references used in this document, and the IHA are available by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225, or by telephoning one of the contacts listed here. A copy of the application and/or the research monitoring plan (LGL, 2006) is also available at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#iha*. Documents cited in this document, that are not available through standard public (inter-library loan) access, may be viewed, by appointment, during regular business hours at this address.

A copy of the Minerals Management Service's (MMS) Programmatic Environmental Assessment (PEA) is available on-line at: *http://www.mms.gov/alaska/ref/pea__be.htm*.

FOR FURTHER INFORMATION CONTACT: Kenneth Hollingshead or Jolie Harrison, Office of Protected Resources, NMFS, (301) 713–2289.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses and the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which

(i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including,

but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

On November 16, 2005, NMFS received two applications from Shell for the taking, by Level B harassment, of several species of marine mammals incidental to conducting a marine seismic survey program during 2006 in the mid- and eastern-Beaufort and northern Chukchi seas. The deep seismic survey component of the program will be conducted from WesternGeco's vessel the *M/V Gilavar*. Detailed specifications on this seismic survey vessel are provided in Shell's application (Seismic Survey, Overview/Description). These specifications include: (1) complete descriptions of the number and lengths of the streamers which form the airgun and hydrophone arrays; (2) airgun size and sound propagation properties; and (3) additional detailed data on the *M/V Gilavar*'s characteristics. In summary, the *M/V Gilavar* will tow two source arrays, comprising three identical subarrays each, which will be fired alternately as the ship sails downline in the survey area. The *M/V Gilavar* will tow up to 6 hydrophone streamer cables up to 5.4 kilometers (km)(3.4 mi) long. With this configuration each pass of the *Gilavar* can record 12 subsurface lines spanning a swath of up to 360 meters (m; 1181 ft). The seismic data acquisition vessel will be supported by the *M/V Alex Gordon*, which will serve to resupply and re-fuel the *M/V Gilavar*. The *M/V Alex Gordon* is also capable of ice management should that be required. The *M/V Alex Gordon* will not deploy seismic acquisition gear.

Plan for Seismic Operations

It is planned that the *M/V Gilavar* will be in the Chukchi Sea in early July to begin deploying the acquisition equipment. Seismic acquisition will not begin before July 15, 2006. The approximate areas of operations are shown in Appendix 4 in Shell's IHA application. Acquisition will continue in the Chukchi Sea until ice conditions permit a transit into the Beaufort Sea around early August. Seismic acquisition is planned to continue in the Beaufort at one of three 3–D areas until early October depending on ice conditions. These 3–D areas are shown in Appendix 5 in Shell's application. For each of the 3–D areas, the *M/V Gilavar* will traverse the area multiple times until data on the area of interest has been recorded. At the conclusion of seismic acquisition in the Beaufort Sea, the *M/V Gilavar* will return to the Chukchi Sea and resume recording data there until all seismic lines are completed or weather prevents data collection.

The proposed Beaufort Sea deep seismic, site clearance, shallow hazard surveys and geotechnical activities are proposed to commence in August (if ice conditions allow) and continue until weather precludes further seismic work. In addition to deep seismic surveys, Shell plans to conduct site clearance and shallow hazard surveys of potential exploratory drilling locations within Shell's lease areas in the Beaufort Sea. The *M/V Henry Christoffersen* will be conducting the shallow-hazard seismic survey program in the Beaufort Sea while the *M/V Gilavar* conducts the deep seismic survey. The site clearance surveys are confined to very small specific areas within defined lease blocks. Also, very small and limited geophysical survey energy sources will be employed to measure bathymetry, topography, geo-hazards and other seabed characteristics. On the *M/V Henry Christoffersen*, the following acoustic instrumentation will be used: (1) a dual frequency subbottom profiler (Datasonics CAP6000 Chirp II (2–7kHz or 8–23kHz)); (2) a medium penetration subbottom profiler (Datasonics SPR–1200 Bubble Pulser (400Hz)); (3)a hi-resolution multi-channel seismic system (240cu in (4X60) gun array (0–150 Hz)); (4) a multi-beam bathymetric sonar (Seabat 8101 (240 kHz)); and (5) a side-scan sonar system (Datasonics SIS–1500 (190kHz - 210 kHz)). The timing is scheduled to avoid any conflict with the Beaufort Sea subsistence hunting conducted by the Alaska Eskimo Whaling Commission's (AEWC) villages.

In summary, the proposed Chukchi deep seismic survey will occur in two phases. Phase 1 will commence sometime after July 15, 2006, as sea ice coverage conditions allow and will continue through July to early August, 2006. Phase 2 of the Chukchi deep seismic survey will occur upon completion of the Beaufort Sea survey sometime after mid-October and continue until such time as sea ice and weather conditions preclude further work, probably sometime in mid- to late-November, 2006. Shell plans to run approximately 5556 km (3452 mi) of surveys in the Chukchi Sea and a similar survey length in the Beaufort Sea.

Alternatively, if ice conditions preclude seismic operations in the Beaufort Sea, Shell proposes to continue its seismic program in the Chukchi Sea through mid- to late-November, 2006, or approximately 5.5 months. This scenario takes into account that approximately twice as many seismic line miles would be completed during this time in the Chukchi Sea. Under this scenario approximately 6000 nm (6905 stat mi; 11,112 km) of seismic line miles could be completed in the Chukchi Sea.

A detailed description of the work proposed by Shell for 2006 is contained in the two applications which are available for review (see **ADDRESSES**).

Description of Marine 3–D Seismic Data Acquisition

In the seismic method, reflected sound energy produces graphic images of seafloor and sub-seafloor features. The seismic system consists of sources and detectors, the positions of which must be accurately measured at all times. The sound signal comes from arrays of towed energy sources. These energy sources store compressed air which is released on command from the towing vessel. The released air forms a bubble which expands and contracts in a predictable fashion, emitting sound waves as it does so. Individual sources are configured into arrays. These arrays have an output signal, which is more desirable than that of a single bubble, and also serve to focus the sound output primarily in the downward direction, which is useful for the seismic method. This array effect also minimizes the sound emitted in the horizontal direction.

The downward propagating sound travels to the seafloor and into the geologic strata below the seafloor. Changes in the acoustic properties between the various rock layers result in a portion of the sound being reflected back toward the surface at each layer. This reflected energy is received by detectors called hydrophones, which are housed within submerged streamer cables which are towed behind the seismic vessel. Data from these hydrophones are recorded to produce seismic records or profiles. Seismic profiles often resemble geologic cross-sections along the course traveled by the survey vessel.

Description of WesternGeco's Air-Gun Array

Shell will use WesternGeco's 3147 in^3 Bolt-Gun Array for its 3–D seismic survey operations in the Chukchi and

Beaufort Seas. WesternGeco's source arrays are composed of 3 identically tuned Bolt-gun sub-arrays operating at an air pressure of 2,000 psi. In general, the signature produced by an array composed of multiple sub-arrays has the same shape as that produced by a single sub-array while the overall acoustic output of the array is determined by the number of sub-arrays employed.

The gun arrangement for each of the three 1049–in^3 sub-array is detailed in Shell's application. As indicated in the application's diagram, each sub-array is composed of six tuning elements; two 2–gun clusters and four single guns. The standard configuration of a source array for 3D surveys consists of one or more 1049–in^3 sub-arrays. When more than one sub-array is used, as here, the strings are lined up parallel to each other with either 8 m or 10 m (26 or 33 ft) cross-line separation between them. This separation was chosen so as to minimize the areal dimensions of the array in order to approximate point source radiation characteristics for frequencies in the nominal seismic processing band. For the 3147 in^3 array the overall dimensions of the array are 15 m (49 ft) long by 16 m (52.5 ft) wide.

Shell's application provides illustrations of the time series and amplitude spectrum for the far-field signature and the computed acoustic emission pattern for the vertical inline and crossline planes for the 3147 in^3 array with guns at a depth of 6 m (20 ft). The signature for this array was first computed using GSAP, WesternGeco's in house signature modeling software.

Subsequent to submitting its application, Shell contracted with JASCO to model sound source characteristics using a different model than the one used in the application. The JASCO parabolic equation model is believed by Shell and NMFS to be superior in these waters because it accounts for bathymetry effects, water properties, and the geoacoustic properties of seabed layers. The JASCO-modeled radii are based on the worst case model predictions. For this model, the proposed 180–dB and 190–dB radii are 1.5 km (0.9 mi) and 0.5 km (0.3 mi), respectively. This model will be used by Shell and NMFS to estimate preliminary sound level isopleths and radii for rms sound level thresholds between 120 and 190 dB at six proposed survey locations for the proposed airgun arrays. In addition, these modeled radii estimates will be multiplied by a safety margin of 1.5 to obtain conservative exclusion radii for marine mammal safety until empirical sound field verification measurements are completed within the first few days of seismic shooting and new safety radii are calculated and used for implementing safety zones.

An explanation for the indicated sound pressure levels (SPLs) is provided later in this document (see Impacts to Marine Mammals).

Characteristics of Airgun Pulses

Discussion of the characteristics of airgun pulses was provided in several previous **Federal Register** documents (see 69 FR 31792 (June 7, 2004) or 69 FR 34996 (June 23, 2004)) and is not repeated here. Additional information can be found in the MMS Final PEA. Reviewers are encouraged to read these earlier documents for additional information.

Site Clearance Surveys

In addition to deep seismic surveys in the Beaufort Sea, Shell also plans to conduct site clearance and shallow hazards surveys of potential exploratory drilling locations within Shell's lease areas as required by MMS regulations. The site clearance surveys are confined to very small specific areas within defined OCS blocks. Shell has contracted for the *M/V Henry Christoffersen* to conduct the site clearance/shallow hazards surveys, and geotechnical borings. This survey will be conducted contemporaneously with the deep seismic survey program in the Beaufort Sea. Very small and limited geophysical survey energy sources will be employed to measure bathymetry, topography, geo-hazards and other seabed characteristics. These include: (1) a dual frequency subbottom profiler (Datasonics CAP6000 Chirp II (2–7kHz or 8–23kHz)); (2) a medium penetration Subbottom profiler (Datasonics SPR–1200 Bubble Pulser (400Hz)); (3) a hi-resolution multi-channel seismic system (240cu in (4X60) gun array (0–150 Hz)); (4) a multi-beam bathymetric sonar (Seabat 8101 (240 kHz)); and (5) a side-scan sonar system (Datasonics SIS–1500 (190kHz - 210 kHz)). The actual locations of site clearance and shallow hazard surveys in the U.S. Beaufort Sea have not been released by Shell for proprietary reasons. That information will be supplied to NMFS and MMS prior to commencement of operations in the Beaufort Sea. The vessels conducting the site clearance and shallow hazard surveys, and geotechnical borings will also operate in accordance with the provisions of a Conflict Avoidance Agreement (CAA), between the seismic industry, the AEWC and the Whaling Captains Associations regarding times and areas in order to avoid any possible conflict with the bowhead subsistence whale hunts by the Kaktovik and Nuiqsut.

Offshore site clearance surveys use various geophysical methods and tools to acquire graphic records of seafloor and sub-seafloor geologic conditions. The data acquired and the type of investigations outlined in this document are performed routinely for most exploratory drilling and production platforms, submarine pipelines, port facilities, and other offshore projects. High-resolution geophysical data such as two- dimensional, high-resolution multi-channel seismic, medium penetration seismic, subbottom profiler, side scan sonar, multibeam bathymetry, magnetometer and possibly piston core soil sampling are typical types of data acquired. These data are interpreted to define geologic and geotechnical conditions at the site and to assess the potential engineering significance of these conditions. The following section provides a brief description of those instruments used for site clearance that may impact marine mammals. Information on the data acquisition methodology planned by Shell can be found in the Shell application.

Geophysical Tools for Site Clearance

High-Resolution seismic profiling

Reflected sound energy, often called acoustic or seismic energy, produces graphic images of seafloor and sub-seafloor features. These systems transmit the acoustic energy from various sources called transducers that are attached to the hull of the vessel or towed astern. Part of this energy is reflected from the seafloor and from geologic strata below the seafloor. This reflected energy is received by the hydrophone or streamer and is recorded to produce seismic records or profiles. Seismic profiles often resemble geologic cross-sections along the course traveled by the survey vessel.

In most Beaufort Sea site surveys, Shell will operate several high-resolution profiling systems simultaneously to obtain detailed records of seafloor and near seafloor conditions. The survey will include data acquisition using a shallow penetration profiler or subbottom profiler (1 - 12.0 kHz, typically 3.5 kHz), medium penetration system or boomer/sparker/airgun (400–800 Hz) and a deep penetrating hi-resolution multi-channel seismic system (20–300 Hz) not to be confused with the deep seismic used for hydrocarbon exploration. These profiling systems complement each other since each system achieves different degrees of resolution and depths of sub-seafloor penetrations.

Side Scan Sonar

Unlike seismic profiling systems, which produce a vertical profile along the vessel's path, side scan sonar systems provide graphic records that show two-dimensional (map) views of seafloor topography and of objects on the seafloor. The sonar images provide a swath display/record covering an area on the seafloor up to several hundred feet on both sides of the survey trackline. The side scan sonar transmits very high-frequency acoustic signals (100 – 410 kHz) and records the reflected energy from the seafloor. Signals reflected from the seafloor are displayed on a continuous record produce by a two-channel recorder. Reflected signals normally appear as dark areas on the record whereas shadows behind objects appear as light or white areas. The intensity and distribution of reflections displayed on the sonar image depend on the composition and surface texture of the reflecting features, on their size, and on their orientation with respect to the transducers in the towfish. Line spacing and display range are designed to ensure 100 percent coverage of the proposed survey area in the prime survey line direction, with additional tie-lines acquired in an orthogonal direction.

Side scan sonar data are useful for mapping areas of boulders, rock outcrops, and other areas of rough seafloor, and for determining the location and trends of seafloor scarps and ice gouges. These data are also used to locate shipwrecks, pipelines, and other objects on the seafloor.

Multi-beam Bathymetry

Multi-beam bathymetric systems are either hull mounted or towed astern of the survey vessel. The system transmits acoustic signals (200–500 kHz) from multiple projectors propagating to either side of the vessel at angles that vary from vertical to near horizontal. The locations of the soundings cover a swath whose width may be equal to many times the waterdepth. By adjusting the spacing of the survey tracklines such that adjacent swaths are overlapping, Shell obtains depth information for 100 percent of the bottom in the survey area. The time it takes to receive the signals as well as signal intensity, position, and other characteristics for echoes received across the swath are used to calculate depth of each individual beam transmitted across the swath.

Acoustic systems similar to the ones proposed for use by Shell have been described in detail by NMFS previously (see 66 FR 40996, August 6, 2001; 70 FR 13466, March 21, 2005). NMFS encourages readers to refer to these documents for additional information on these systems.

Comments and Responses

A notice of receipt of Shell's MMPA application and NMFS' proposal to issue an IHA to Shell was published in the **Federal Register** on May 3, 2006 (71 FR 26055). That notice described, in detail, Shell's proposed activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 30–day public comment period on Shell's application, comments were received from Shell, the Marine Mammal Commission (Commission), the Center for Biological Diversity (CBD) on behalf of several environmental organizations, the Northern Alaska Environmental Center (NAEC), the Alaska Oil and Gas Association (AOGA), the Alaska Eskimo Whaling Commission (AEWC), the North Slope Borough (NSB), Village of Point Hope (NVPH), and the Alaska Nanuuq Commission (Nanuuq Commission). The AOGA submitted a copy of the comments it submitted on the MMS PEA and the CBD attached the comments submitted by the Natural Resources Defense Council on the PEA. With the exception of some comments relevant to this specific action which are addressed here, comments on the Draft PEA have been addressed in Appendix D of the Final PEA and are not repeated. Some comments providing additional information for NMFS' consideration have been incorporated into this document without further reference.

Activity Concerns

Comment 1: Shell notes that it was awarded 84 OCS leases in the Western Beaufort Sea Planning Area by the MMS in 2005 pursuant to the MMS Lease Sale 195 held March 30, 2005. Shell made plans and signed contracts to perform seismic surveys in the Chukchi and Beaufort Seas during the open water season of 2006, beginning in July. The 2006 seismic surveys are critical in assessing hydrocarbon potential and site conditions necessary to conduct drilling operations in subsequent open water seasons. Shell notes that the 2006 seismic operations in the Chukchi Sea will be very surgical in nature, be at least 50 mi (80.5 km) from shore, and cover less than 2 percent of the lease sale area. In the Beaufort Sea, Shell's seismic operations will be limited to the areas near its lease blocks and cover less than 1 percent of the lease sale area. As Shell's IHA application included a much broader area for seismic operations; the take estimates in its application are inflated and should be recalculated.

Response: While NMFS recognizes that Shell will be concentrating seismic activity in relatively small areas, the Level B harassment estimates are calculated as ''exposures'' to sound and, therefore, while the survey may result in fewer marine mammals being exposed, those animals may be exposed more frequently than if the seismic vessel track were linear.

MMPA Concerns

Comment 2: The CBD states that an IHA is only available if the activity has no potential to result in serious injury or mortality to a marine mammal. If injury or mortality to a marine mammal is possible, take can only be authorized pursuant to a Letter of Authorization (LOA) consistent with regulations promulgated pursuant to 16 U.S.C. 1371 (a)(5)(D)(i) and 50 CFR 216.107. Because NMFS has not promulgated regulations related to incidental takes for seismic surveys, and because such surveys carry the real potential of injury or death to marine mammals, neither an IHA nor an LOA can be issued for Shell's proposed activities.

Response: For reasons discussed later in this document, NMFS does not believe that there is any potential for marine mammal mortality to occur incidental to conducting seismic surveys in the Chukchi and Beaufort seas in 2006. IHAs can authorize takings by Level A (injury) and Level B harassment (behavioral harassment). As documented by Richardson [ed] (1998), aerial and vessel monitoring of marine mammals under previous incidental take authorizations did not indicate more than behavioral harassment takings would occur.

Comment 3: The CBD believes that NMFS cannot issue an IHA to Shell because it has not complied with the MMPA's specific geographic region requirement.

Response: NMFS defines ''specified geographical region'' as ''an area within which a specified activity is conducted and which has certain biogeographic characteristics'' (50 CFR 216.103). NMFS believes that Shell's description of the activity and the locations for conducting seismic surveys meet the requirements of the MMPA. Within the Chukchi Sea, Shell intends to conduct seismic activity within the area designated for Lease Sale 97 (shown in Appendix 4 in Shell's IHA application). More specific locations within the Lease Sale area are considered proprietary. In the Beaufort Sea, the areas of seismic operations are shown in Appendix 5 in

Shell's IHA application. Shell has provided a well-defined area within which certain biogeographic characteristics occur.

Comment 4: The CBD states that Shell's application fails to specify the ''dates and duration'' of these activities as required by 50 CFR 216.103(a)(2), or even who will perform them or in what manner. For example, CBD notes the various dates listed by Shell for beginning seismic. The CBD notes that the proposed IHA (notice) states that seismic acquisition is planned to begin on or about July 10, 2006, while a couple of paragraphs later states that ''Phase I will commence sometime after June 15, 2006; elsewhere the proposed IHA (notice) states that seismic operations will not begin until after July 1, 2006. The CBD believes NMFS' ''small numbers'' and ''negligible impacts'' conclusions are highly suspect given NMFS' confusion as to when and where Shell will actually be operating.

Response: The application shows that Shell plans to pick up crew members and refuel near the end of June in Dutch Harbor and sail for the Chukchi Sea upon completion of resupply. Seismic surveys would begin no earlier than July 10, depending upon ice conditions in the Chukchi Sea. To avoid bowhead whales migrating in the spring leads, seismic survey work cannot begin prior to July 1, as explained in the PEA and as stipulated in Shell's permit from MMS. More recently, agreements with Alaskan natives restricted seismic operations prior to July 15, 2006. Sound exposure calculations are based on miles of seismic lines to be run and the average and maximum density of marine mammals expected to be exposed. Minor variations in dates would be due mostly to ice conditions in either the Chukchi or Beaufort Seas would not affect noise exposure estimates. However, to avoid further confusion, NMFS has modified the IHA to indicate that seismic data collection cannot begin prior to July 1, 2006.

Comment 5: The CBD states that Shell's application and NMFS' notice fail to provide information on the ''dates and duration of the activities and provide only boilerplate descriptions of typical activities.

Response: NMFS has determined that the activity descriptions in Shell's application, including the Appendixes, provide information necessary to make its determinations under the MMPA. The duration of the activity is highly dependent upon logistics, weather, mechanical problems, shut-downs and power-downs. However, Shell provided estimates of expected line miles of survey effort they expect to run which is used in part for calculating incidental harassment estimates.

Comment 6: To protect bowhead whales, other marine mammals, and subsistence use of marine mammal resources, the AEWC states that NMFS must ensure that the planned activities, if authorized, conform to the statutory requirements of the MMPA. In that regard, the AEWC states that while not all acoustic takes threaten an impact that is greater than negligible, the MMPA requires that NMFS take special care to protect whales engaged in biologically significant behaviors such as feeding, mating, calving, and tending to young.

Response: NMFS takes into account biological activities in its analyses and in determining appropriate mitigation and monitoring requirements. We recognize there is uncertainty in the distribution and abundance of marine mammal stocks in the Chukchi Sea. As a result, NMFS has required additional monitoring and mitigation measures for this year's survey. NMFS anticipates the industry research program will answer some of the uncertainties involving distribution and abundance of marine mammals in the Chukchi Sea.

Comment 7: The CBD states that because the MMPA explicitly requires that NMFS prescribe the ''means effecting the least practicable impact'' on the affected species, stock or habitat, an IHA [notice] must explain why measures that would reduce the impact on a species were not chosen (i.e., why they were not practicable). Neither the proposed IHA [notice], Shell's application, nor the PEA do this. The AEWC made a similar comment on the context of biologically significant behaviors.

Response: Neither the MMPA nor NMFS regulations implementing the incidental take program require NMFS to itemize and discuss all measures that were determined to be impractical. Such an effort can quickly become a matter of speculation. For example, drones, manned balloons, and satellites are currently considered impractical for technological and safety reasons and usually need not be discussed in issuing IHAs (although drones may become available for non-military activities within a few years). Helicopters and other aircraft may be practical depending upon distance between landing and activity location, weather and safety and are usually discussed if safety zones cannot be visually monitored effectively. Also, active and passive acoustics are often discussed when issuing an IHA if the safety zone cannot be visually monitored effectively. Time and area closures or restrictions are discussed when appropriate. In many cases, monitoring larger zones to reduce the Level B harassment take, is viewed as secondary to effectively monitoring the Level A harassment zone to prevent marine mammal injury. A final mitigation measure mentioned by commenters to the Draft PEA of using vibroseis technology in winter instead of open water seismic is not practical do to human safety concerns and must be limited to extremely shallow water depths.

Comment 8: The CBD notes that while NMFS has not performed an analysis of why additional mitigation measures are not ''practicable,'' the proposed IHA [notice] contains information to conclude that many such measures are in fact practicable. For example, during periods when conflict with subsistence hunting is most likely, Shell proposes additional ''special'' monitoring and mitigation measures from August 15 until the end of the bowhead hunting season. While these measures are designed to avoid impacts to bowheads so as not to affect the subsistence hunt, there is no reason, and certainly no explanation of, why these measures cannot be instituted for the entirety of the seismic survey. The MMPA requires minimizing all impacts on marine mammals, not only avoiding impacts on the subsistence hunt.

Response: The ''special'' monitoring and mitigation measures proposed by Shell during the bowhead subsistence hunt were: (1) An aerial monitoring program during the bowhead subsistence hunt as described elsewhere in this document, and (2) time/area closures to prevent the survey from potentially having an unmitigable adverse impact. Only the latter is considered a measure that could potentially lower the impact on bowhead whales and other marine mammal species in the central Beaufort Sea. Since the CAA had not been developed at the time of Shell's application or NMFS' **Federal Register** notice for Shell, what those mitigation conditions might be would have been speculation. However, in general the imposition of additional time/area closures in the Beaufort Sea (and to some extent in the Chukchi Sea) are impractical for reasons of cost effectiveness and the limited ice-free time in Arctic Ocean waters. Overlooking costs, time/area closures are not practical in the Beaufort Sea if seismic had to occur over multiple years in an effort to obtain seismic data that could have been obtained with possibly a single-year of effort. For that reason, NMFS limits time/area closures as a

mitigation measure in Arctic waters only to protect subsistence hunting or marine mammal life stages that could significantly affect survival and reproduction.

Marine Mammal Impact Concerns

Comment 9: The CBD states that the tables in the proposed IHA notice provide no support for NMFS' conclusion on small numbers. For Shell's proposed seismic surveys in the Chukchi, the number of bowheads likely to be exposed to sounds of 160 dB or greater and therefore harassed'' according to NMFS' operative thresholds, range from 403 to 3226. In absolute terms these numbers cannot be considered small. Even relative to population size, the higher estimate represents a third of the estimated population of bowheads. CBD makes a similar comment regarding beluga whales.

Response: NMFS believes that the small numbers requirement has been satisfied. The species most likely to be harassed during seismic surveys in the Arctic Ocean area is the ringed seal, with a ''best estimate'' of 7,335 animals in the Beaufort Sea and 13,610 animals in the Chukchi Sea being exposed to sound levels of 160 dB or greater, for a total of 20,945 animals. This does not mean that this is the number of ringed seals that will be taken by Level B harassment, it is the best estimate of the number of animals that potentially could have a behavioral modification due to the noise (for example Moulton and Lawson (2002) indicate that most pinnipeds exposed to seismic sounds lower than 170 dB do not visibly react to that sound; pinnipeds are not likely to react to seismic sounds unless they are greater than 170 dB re 1 microPa (rms)). In addition, these estimates are calculated based upon line miles of survey effort, animal density and the calculated zone of influence (ZOI). While this methodology is valid for seismic surveys that transect long distances, for those surveys that ''mow the lawn'' (that is, remain within a relatively small area, transiting back and forth while shooting seismic), the numbers tend to be highly inflated. As a result, NMFS believes that these exposure estimates are conservative and may actually affect much fewer animals.

Although it might be argued that the estimated number of ringed seals behaviorally harassed is not small in absolute numbers, the number of exposures is relatively small, representing less than 10 percent of the regional stock size of that species (249,000) if each ''exposure'' represents an individual ringed seal. In addition, it should be recognized that because Shell will spend most of the time surveying small areas in the Chukchi Sea, fewer ringed seals would likely be harassed but these animals could be affected more often, unless they habituate to the sounds (see ''Ringed, Largha and Bearded Seals later in this document).

For beluga and bowhead whales, the estimated number of sound exposures during Shell's seismic surveys in the Arctic will be 1702 and 3226, respectively. While these exposure numbers represent a sizable portion of their respective population sizes (46 percent of the beluga population (3710) and 31 percent of the bowhead population (10545)), NMFS believes that the estimated number of exposures by bowheads and belugas greatly overestimate actual exposures for the following reasons: (1) The proposed seismic activities would occur in the Chukchi Sea when bowheads are concentrated in the Canadian Beaufort Sea; (2) bowheads and belugas may be absent or widely distributed and likely occur in very low numbers within the seismic activity area in the Chukchi Sea; (3) seismic surveys are not authorized in the Beaufort Sea during the bowhead westward migration; (4) Shell proposes to conduct seismic in the Beaufort Sea after the bowhead whales have migrated out of the Beaufort Sea; and (5) Shell will conduct late-fall seismic surveys in the Chukchi Sea after most bowheads have migrated out of the area, Therefore, NMFS believes that the number of bowhead whales that may be exposed to sounds at or greater than 160 dB re 1 microPa (rms) would be small.

Comment 10: The CBD states that NMFS' failure to address the scientific literature linking seismic surveys with marine mammal stranding events, and the threat of serious injury or mortality renders NMFS' conclusionary determination that serious injury or mortality will not occur from Shell's activities arbitrary and capricious.

Response: First, the evidence linking marine mammal strandings and seismic surveys remains tenuous at best. Two papers, Taylor *et al.* (2004) and Engel *et al.* (2004) reference seismic signals as a possible cause for a marine mammal stranding. Taylor *et al.* (2004) noted two beaked whale stranding incidents related to seismic surveys. The statement in Taylor *et al.* (2004) was that the seismic vessel was firing its airguns at 1300 hrs on September 24, 2004 and that between 1400 and 1600 hrs, local fishermen found live-stranded beaked whales some 22 km (12 nm) from the ship's location. A review of the vessel's trackline indicated that the closest approach of the seismic vessel and the beaked whales stranding location was 18 nm (33 km) at 1430 hrs. At 1300 hrs, the seismic vessel was located 25 nm (46 km) from the stranding location. What is unknown is the location of the beaked whales prior to the stranding in relation to the seismic vessel, but the close timing of events indicates that the distance was not less than 18 nm (33 km). No physical evidence for a link between the seismic survey and the stranding was obtained. In addition, Taylor *et al.* (2004) indicates that the same seismic vessel was operating 500 km (270 nm) from the site of the Galapagos Island stranding in 2000. Whether the 2004 seismic survey caused to beaked whales to strand is a matter of considerable debate (see Cox *et al.*, 2004). NMFS believes that scientifically, these events do not constitute evidence that seismic surveys have an effect similar to that of mid-frequency tactical sonar. However, these incidents do point to the need to look for such effects during future seismic surveys. To date, follow-up observations on several scientific seismic survey cruises have not indicated any beaked whale stranding incidents.

Engel *et al.* (2004), in a paper presented to the International Whaling Commission (IWC) in 2004 (SC/56/E28), mentioned a possible link between oil and gas seismic activities and the stranding of 8 humpback whales (7 off the Bahia or Espirito Santo States and 1 off Rio de Janeiro, Brazil). Concerns about the relationship between this stranding event and seismic activity were raised by the International Association of Geophysical Contractors (IAGC). The IAGC (2004) argues that not enough evidence is presented in Engel *et al.* (2004) to assess whether or not the relatively high proportion of adult strandings in 2002 is anomalous. The IAGC contends that the data do not establish a clear record of what might be a ''natural'' adult stranding rate, nor is any attempt made to characterize other natural factors that may influence strandings. As stated previously, NMFS remains concerned that the Engel *et al.* (2004) article appears to compare stranding rates made by opportunistic sightings in the past with organized aerial surveys beginning in 2001. If so, then the data are suspect.

Second, strandings have not been recorded for those marine mammal species expected to be harassed by seismic in the Arctic Ocean. Beaked whales and humpback whales, the two species linked in the literature with stranding events with a seismic component are not located in the Beaufort and Chukchi seas seismic

areas. Finally, if bowhead and gray whales react to sounds at very low levels by making minor course corrections to avoid seismic noise and mitigation measures require Shell to ramp-up the seismic array to avoid a startle effect, strandings are highly unlikely to occur in the Arctic Ocean. In conclusion, NMFS does not expect any marine mammals will incur serious injury or mortality as a result of Arctic Ocean seismic surveys in 2006.

Comment 11: In submitted comments on the MMS Draft PEA, (and referenced by CBD), the NRDC states that the decibel thresholds selected for pinnipeds and cetaceans are based on old data which has since been ''superseded by science,'' and that pinnipeds should be included with cetaceans in the 180–db Level A harassment threshold.

Response: New acoustic guidelines will be implemented by NMFS upon completion of a planned EIS on this subject. If NMFS were to implement new criteria at this time, it would need to be species-specific and safety zones would fluctuate depending upon the species believed to be affected by the action. Considering that the 180/190 dB safety zones were established based on onset TTS, a non-injurious (Level B harassment) level, the current safety zones of 180 dB rms for cetaceans and 190 dB rms for pinnipeds is conservative and will protect marine mammals from injury (Level A harassment).

Comment 12: In submitted comments on the MMS Draft PEA, (and referenced by CBD), the NRDC states that harassment of marine mammals can occur at levels below the 160 dB threshold for Level B harassment, and that NMFS should reassess its harassment thresholds for acoustic impacts.

Response: The 160–dB rms isopleth is based on work by Malme *et al.* (1984) for migrating gray whales along the California coast. Clark *et al.* (2000) replicating the work by Malme *et al.* (1984) indicated that this response is context dependent, as gray whales did not respond to simulated airgun noise when the acoustic source was removed from the gray whale migratory corridor. This indicates to NMFS that establishing a 160–dB isopleth for estimating a ZOI for low-frequency hearing specialists when exposed to a low frequency source is conservative. For mid- or high-frequency hearing specialists, a 160–dB ZOI for a low-frequency source is likely overly conservative. In this action, empirical research indicates that bowhead whales respond to sounds at levels lower than 160 dB during periods of important biological behavior (migration) but possibly not during other important periods (feeding). As a result, to reduce the uncertainty over whether these same avoidance characteristics will occur in the Chukchi Sea as they appear to have in the Beaufort Sea, MMS and NMFS have established conservative ZOIs where additional mitigation measures could be imposed to further protect these species during critical periods in Arctic waters.

Comment 13: In submitted comments on the MMS Draft PEA, (and referenced by CBD), NRDC states that MMS' calculations of PTS may be based on an improper model (i.e. traditional, linear models underestimate harm) and that MMS should lower its estimate for auditory injury. They cite Kastak *et al.* (2005) for this contention.

Response: Kastak *et al.* (2005) note the non-linear growth of TTS for relatively small magnitude shifts (<6 dB) and the inadequacy of a linear model using only these data in predicting the growth of TTS with exposure level for a wider range of exposures. It is well known that the TTS growth function is sigmoidal and thus it is misleading to describe it solely based on exposures that generate only small-magnitude TTS (where the slope of the growth function is relatively shallow). For a wide range of exposures, however, there is a steeper, linear portion of the sigmoidal function and a fairly consistent relationship between exposure magnitude and growth of TTS. The slope of this relationship is relatively well-known for humans (on the order of 1.6 dB TTS/dB noise (Ward *et al.*, 1958; 1959)). While it is not well-understood for marine mammals (because studies to date have yet to induce sufficiently large TTS values to properly assess it), the slope of this portion of the function predicted by the Kastak *et al.*(2005) data fit with the curvilinear approximation (based on Maslen, 1981), and was found to be comparable. Therefore, estimations of PTS from TTS onset that use a linear growth function with the steepest slope from a curvilinear function are very likely appropriate and in fact a conservative approximation, based on the information available at this time.

Comment 14: In a footnote to the above comment, NRDC notes that NMFS adopted a higher criterion for pinnipeds (190 dB rms) despite the 1997 HESS (High Energy Seismic Survey) Workshop declining to set this higher criterion. The NRDC claims that this is in violation of the Administrative Procedure Act and the Data Quality Act.

Response: The 190 dB threshold for pinnipeds was not based on the HESS Workshop but came out of a follow-up workshop on acoustics in 1998 (Gentry, 1998). Workshop participants included the same scientists as the HESS Workshop.

Comment 15: With regard to bowhead whales, the CBD says NMFS' requires conclusive evidence of harm before it will find more than a negligible impact from Shell's activity. This is not the standard.

Response: NMFS believes that CBD is referring to a sentence which reads: ''Additionally, Shell cites Richardson and Thomson [eds]. (2002) that there is no conclusive evidence that exposure to sounds exceeding 160 db have displaced bowheads from feeding activity.'' This statement was made by Shell, not NMFS. However, empirical information cannot be ignored when making the required determinations under the MMPA.

Comment 16: The Commission continues to question NMFS' definition of temporary threshold shift (TTS) in marine mammal hearing as constituting Level B Harassment. Clearly an animal's survival depends on its ability to detect and protect itself from threats. If because of temporarily compromised hearing it is unable to display a normal behavioral reaction to events in its environment (e.g., to detect predators or respond to warnings of danger from conspecifics, it is at a significantly greater risk of being seriously injured or killed. Therefore, the Commission reiterates its recommendation that NMFS revise its definition of TTS to include the potential for Level A harassment due to secondary effects of temporary hearing loss.

Response: This issue has been addressed several times by NMFS in the past (see 70 FR 48675, August 19, 2005; 66 FR 22450, May 4, 2001). As stated in those documents, NMFS is using the best scientific information available on this subject. The Commission's argument for considering TTS as both Level A harassment and Level B harassment is based on conjecture on what might occur if a marine mammal with compromised hearing was at a disadvantage for survival. As noted previously, it is likely that marine mammals evolved certain behavioral responses to address natural loud noises in the environment (for example, billions of lightning strikes per year on the ocean at about 260 dB peak), by changes in conspecific spatial separation.

Cumulative Effects Concerns

Comment 17: The Commission questions whether there is a sufficient basis for concluding that the cumulative

effects of the proposed activities, coupled with past and prospective activities in the Beaufort and Chukchi seas, will be negligible for bowhead whales and other marine mammal species. The CBD. citing *Anderson* v. *Evans*, 371 F.3d 475 (9th Cir. 2004), believes that individual IHA review and not a cumulative impact review is inappropriate and should address impacts from multi-activities over multi-years, both onshore and offshore Alaska. The CBD also states that NMFS' failure to address global warming as a cumulative effect renders its negligible findings invalid.

Response: Under section 101(a)(5)(D) of the MMPA, NMFS is required to determine whether the taking by the IHA applicant's specified activity will have a negligible impact on the affected marine mammal species or population stocks. Cumulative impact assessments are NMFS' responsibility under NEPA, not the MMPA. In that regard, the MMS' Final PEA addresses cumulative impacts, as did its Draft PEA. The PEA's cumulative activities scenario and cumulative impact analysis focused on oil and gas-related and non-oil and gas-related noise-generating events/activities in both Federal and State of Alaska waters that were likely and foreseeable. Other appropriate factors, such as Arctic warming, military activities and noise contributions from community and commercial activities were also considered. Appendix D of that PEA addresses similar comments on cumulative impacts, including global warming. That information is incorporated in this document by citation. NMFS has adopted the MMS Final PEA and it is part of NMFS' Administrative Record. Finally, the proposition for which CBD cites *Anderson* was in the context of the court's analysis under NEPA, not MMPA section 101(a)(5)(D), which was not at issue in *Anderson*.

Comment 18: The Commission notes that NMFS should consider the cumulative effects of the University of Texas at Austin's (UTA) seismic survey planned for this summer in the northern Chukchi Sea in combination with the three seismic surveys proposed by the oil industry and require similar, comprehensive monitoring and mitigation measures for that program as well.

Response: See previous response on cumulative impacts. The UTA program is a separate action that was under internal NMFS review following the public comment period at the time the Shell IHA decision was issued (see 71 FR 27997, May 15, 2006). Essentially, seismic survey is significantly further north in the Chukchi Sea than are the oil company surveys, is for a shorter period of time during the summer, will have completed its work weeks prior to the bowhead migration and establishes very conservative safety zones to protect marine mammals.

Subsistence Concerns

Comment 19: The Nanuuq Commission requests that someone from MMS or NMFS attend the Ice Seal Committee's July meeting to share information on the proposed seismic surveys and to respond to questions from the Committee. Issues for discussion include mitigation and monitoring for long-term effects on marine mammals and subsistence hunting due to increased vessel traffic in the area.

Response: NMFS understands that the July meeting was cancelled. The next meeting is scheduled for October. NMFS plans to attend this meeting.

Comment 20: The NVPH objects to any oil and gas activities as referenced in Resolution 06–05, based on concerns relating to NEPA, consultation and cooperation with the oil industry, and impacts on marine mammal resources. The CBD notes that the Villages of Kaktovik and Point Hope have passed resolutions opposing the proposed seismic surveys due to impacts on the subsistence hunt of bowheads and other species. In light of the positions of these communities, the CBD does not see how NMFS can lawfully make the findings required under the MMPA for Shell's proposed IHA.

Response: NMFS acknowledges that these villages have passed resolutions objecting to offshore oil development. However, the village whaling captains of these villages (in addition to villages of Nuiqsuk and Wainwright and the AEWC) have signed a Programmatic CAA indicating to NMFS that there will not be an unmitigable adverse impact on subsistence uses of marine mammals. (see Impact on Subsistence).

Comment 21: The AEWC states that under the MMPA, NMFS must impose mitigation measures sufficient to ensure that authorized activities will not have ''an unmitigable adverse impact'' on the availability of marine mammals for taking for subsistence uses. To accomplish this level of protection, NMFS must evaluate the activities within the context of the many other industrial operations expected this year, including (1) seismic operations in the Canadian Beaufort Sea, (2) vessel traffic associated with NPRA, and (3) ongoing operations at Northstar.

Response: While acknowledging increasing industrialization of the Arctic Ocean and resultant impacts on the subsistence lifestyle of its inhabitants, section 101(a)(5)(D)(i) limits the scope of this determination to the specified activity. However, NMFS works cooperatively with the AEWC to ensure that activities that might result in marine mammal harassment and have an impact on their availability for subsistence uses are fully analyzed for their impacts on subsistence and are the subject of a CAA.

Comment 22: The AEWC is also concerned that Chukchi Sea seismic operations to the west of Barrow, combined with Shell's proposed Beaufort Sea operations and other Beaufort Sea industrial operations, including FEX barging and work at Oooguruk could combine to drive the fall migration offshore, out of reach of whalers before the whales reach Barrow.

Response: See previous response. Shell's Chukchi Sea proposed seismic operation locations are at least one hundred miles southwest of Barrow and, therefore, are unlikely to impact the fall Barrow subsistence hunt. Incidentally, FEX signed a CAA with the AEWC to restrict barging operations during the subsistence hunt. Shell and the other seismic companies also signed a CAA that prohibits most seismic operations in the Beaufort Sea during the subsistence hunt and limits activities affecting hunts in the Chukchi Sea.

Comment 23: The AEWC notes that it has attempted through a CAA to craft mitigation measures to protect the fall bowhead whale subsistence hunt. The whaling captains of the Villages of Barrow, Nuiqsut and Kaktovik have established operating limitations applicable to seismic operations during the fall bowhead whale migration and subsistence hunt. The AEWC hopes these operating limitations will be effective despite the extraordinary level of industrial activity planned during the bowhead migration, in Alaskan as well as Canadian Arctic. The AEWC notes that if these mitigation measures are not adequate to protect the subsistence hunt, the AEWC will work with seismic operators and NMFS to address the concerns of the subsistence hunters.

Response: As noted in the AEWC letter, the signed CAA excludes seismic operations in the near-shore polyna (although it will be necessary in future years for CAAs to address the Alaska Current). Also, Shell has agreed not to commence seismic operations in the Chukchi Sea before July 15, to reduce impacts on the beluga hunt. Additional mitigation requirements are addressed later in this document (see Plan of Cooperation).

Monitoring Concerns

Comment 24: The Commission recommends that if NMFS decides to issue the IHA it should require all practical monitoring and mitigation measures to protect bowhead and other marine mammals from behavioral disturbance and to ensure their availability to Alaska Natives for subsistence purposes. To ensure additional protection to bowhead whales, and other marine mammals, and to obtain as much information as possible on the effects of the proposed (seismic) studies on marine mammals, the Commission recommends that NMFS also require: (1) The use of passive acoustic arrays from the seismic and/or support vessels and a passive net array along the Chukchi Sea coast as recommended by participants at NMFS' open water meeting in Anchorage, AK on April 19–20, 2006; and (2) pre- and post-operation aerial surveys to supplement real-time monitoring for the presence of bowhead whales and other marine mammal species within the proposed action areas, out to the 120–dB isopleth. Finally, the Commission notes that it will be important to assess the efficacy of such surveys to determine their value and reliability in monitoring potential effects.

Response: NMFS considered these recommendations and discusses the required monitoring and mitigation programs required under the IHAs in this **Federal Register** notice.

Comment 25: The CBD states that the MMPA authorizes NMFS to issue an incidental take authorization only if it can first find that it has required adequate monitoring of such taking and all methods and means of ensuring the least practicable impact have been adopted. The proposed IHA (notice) largely ignores this statutory requirement.

Response: NMFS believes Shell and the other seismic survey operators in the Chukchi and Beaufort seas will be implementing a comprehensive monitoring and marine mammal research program that is fully capable of providing information on impacts from the seismic surveys and supporting NMFS' determinations that the activity will result in takes of small numbers of marine mammals, have a negligible impact on affected species and stocks and not have an unmitigable impact on the availability of marine mammals for subsisence. Mitigation measures were addressed previously (see previous comments 7 and 8; also see the Mitigation and Monitoring sections later in this document).

Comment 26: The CBD notes that the proposed IHA notice suggests NMFS will require additional measures of Shell so as to be able to comply with NEPA, such as expanded safety zones for bowhead and gray whale, and having those zones monitored effectively in order to remain within the scope of the PEA. While in agreement, CBD notes that such additional measures are also required to comply with the MMPA. As such they should be explicitly spelled out in the proposed IHA (notice) and subject to public comment.

Response: A detailed description of the monitoring program submitted by Shell was provided in Shell's application and cited in the **Federal Register** notice of the proposed IHA. That notice also provided a description of ongoing discussions regarding improvements to Shell's monitoring program including aerial monitoring and using passive acoustics. As a result of a dialogue on monitoring by scientists and stakeholders attending NMFS' public meeting in Anchorage in April, the industry expanded on its monitoring program in order to fulfill its responsibilities under the MMPA. The only addition to the monitoring program that was not offered for public review at the time was a research component designed to provide baseline data on marine mammals for future operations planning. This research program includes: (1) an acoustic program to measure sounds produced by seismic vessels (mentioned in the proposed IHA notice); (2) aerial monitoring and reconnaissance of marine mammals available for subsistence harvest along the Chukchi Sea coast; (3) research vessel surveys of the Chukchi Sea, including a towed hypdrophone passive acoustic monitoring (PAM) system to collect data on the distribution and abundance of marine mammals; and (4) deployment of, and later analysis of data from, bottom-founded autonomous acoustic recorder arrays along the coast of the Chukchi Sea to record ambient sound levels, vocalizations of marine mammals, and received levels of seismic operations should they be detectable. As a result of the workshop discussions a draft monitoring program was provided to workshop participants around April 26, 2006 and a revised plan distributed in mid-May. Scientists from NMFS and the NSB are continuing discussions to ensure that the research effort obtains the best scientific information possible.

The proposed joint-industry research plan (which is a separate plan from the individual applicant monitoring plans) was not available prior to publication of the proposed IHA **Federal Register** notice on May 3, 2006 (71 FR 26055) and could not be detailed without significantly delaying the public comment period on Shell's application. It should be noted that this research monitoring program follows the guidance of the Commission's recommended approach for monitoring seismic activities in the Arctic (Hofman and Swartz, 1991), that additional research might be warranted when impacts to marine mammals would not be detectable as a result of vessel observation programs.

Comment 27: The AEWC notes the MMPA requires that authorizations for incidental take in Arctic waters include: ''requirements for the monitoring and reporting of such taking by harassment, including the requirements for independent peer review of proposed monitoring plans. '' The MMPA and NMFS' regulations are clear that any monitoring plan accompanying an IHA for activities in Arctic waters and potentially affecting subsistence uses of marine resources shall be subject to independent peer review. The agency has no discretion in this regard. Since Shell has not prepared a legally adequate monitoring plan, independent peer review of such a plan has not been possible. Given the strict requirements governing timing of agency and public review of an IHA application, such independent peer review will not occur as part of this process.≥

Response: Shell submitted its monitoring plans for the Beaufort and Chukchi seas as part of its application. NMFS noted the availability of the application and monitoring plans on May 3, 2006 (71 FR 26055). Shell also made its application available to the AEWC and the NSB and its Department of Wildlife at the time of its application to NMFS and held meetings on its activity with affected communities beginning in the spring, 2006. Shell's Beaufort and Chukchi Sea monitoring plans were the subject of discussion at the NMFS' peer-review workshop in April, 2006. This workshop is the means used by NMFS to meet the requirement for peer-review. As a result of discussions at the April, 2006 workshop, Shell and others proposed conducting additional monitoring and research. That proposal was completed on April 26, 2006, and reviewed by NSB and NMFS scientists. Comments were submitted by the NSB Department of Wildlife Management on May 18, 2006. A revised research plan was released on June 9, 2006 and is currently being reviewed by scientists.

Mitigation Concerns

Comment 28: The CBD recommends NMFS deny an IHA to Shell unless and until NMFS can ensure that mitigation measures are in place to truly avoid adverse impacts to all species and their habitats.

Response: NMFS is required to prescribe means of effecting the least practicable (adverse) impact (i.e., mitigation), not to ensure that no adverse impacts occur. NMFS believes that the mitigation measures required under Shell's IHA will reduce levels to the lowest level practicable. Inherent in implementing these mitigation measures is some level of uncertainty on the distribution and abundance of cetaceans in the Chukchi Sea and on whether the acoustic impacts observed in the Beaufort Sea also occur in the Chukchi Sea.

Comment 29: The CBD believes that the proposed IHA [notice] contains information to conclude that many such measures are in fact practicable. For example, during periods when conflict with subsistence hunting is most likely, Shell proposes additional monitoring and mitigation measures: ''From August 15 until the end of the bowhead hunting season (or until the end of the seismic operations in the Beaufort Sea) special monitoring and mitigation/monitoring measures will be adopted (i.e. aerial surveys).'' While these measures are designed to avoid impacts to bowheads so as not to affect the subsistence hunt, there is no reason, and certainly no explanation of, why these measures cannot be instituted for the entirety of the seismic surveys.

Response: As noted elsewhere in this document, Shell has agreed to area closures in the Beaufort Sea to ensure that there is not an unmitigable adverse impact on the subsistence use of bowheads by its seismic operation in the Beaufort Sea. This mitigation measure was proposed by the AEWC and the whaling captains associations after Shell submitted its application. As a result, neither Shell nor NMFS could address this measure at the time of the proposed IHA notice. While area closures are a valuable mitigation tool for protecting sensitive life stages for marine mammals and possibly for reducing impacts at less sensitive times, the application of temporal and spatial measures need to be balanced with the need to accomplish the activity. In the Beaufort Sea, the short season available for seismic surveys precludes extension of this measure for reasons other than subsistence.

The second measure proposed by Shell in its application is an aerial monitoring program of the Beaufort Sea during the fall bowhead migration. This activity, which is not a mitigation measure (except to the extent detailed later in this document) was fully described in Shell's application. However, it is not a mitigation measure but a measure to obtain information on the fall migration of bowhead whales. Based upon discussions with scientists, modifications to that aerial monitoring program and the addition of aerial and vessel monitoring to the Chukchi Sea have been made to Shell's program.

Comment 30: With regard to nighttime and poor visibility conditions, the CBD notes that Shell proposes essentially no limitations in operations, even though they acknowledge that the likelihood of observers seeing marine mammals in such conditions is low. Only when the senior observer determines that ''densities of endangered cetaceans'' are high enough ''to warrant concern'' that an ''endangered cetacean'' will enter the safety zone would Shell have to stop surveying or move to another part of the survey area. The CBD also states that there is no rationale under the MMPA to limit this provision to ''endangered cetaceans'' (i.e., bowheads) since minimizing impacts to all marine mammals is required. CBD claims the obvious solution, not analyzed by Shell or NMFS is to simply prohibit seismic surveying when conditions prevent observers from detecting all marine mammals in the safety zone.

Response: NMFS agrees that mitigation is not restricted to bowhead whales, but should apply to all marine mammals. However, a shutdown of all seismic activity whenever the shutdown zone cannot be visually seen is simply not practical. It is NMFS opinion that once a safety zone is determined visually to be free of marine mammals, seismic should continue into periods of poor visibility. It should be understood that the safety zone not stationary but is moving along with the ship at whatever speed the ship is progressing. For example, if the ship is making 5 knots, the safety zone will be 5 nm (9.3 km) upstream in an hour). With a 180–dB exclusion zone of 1.5 km (08 nm), marine mammals potentially affected by seismic noise would have ample time to move away from the source, as evidenced by bowhead, beluga and gray whale avoidance behavior. A review of previous monitoring programs indicates these species will not be within a distance to incur Level A harassment. For pinnipeds, NMFS believes that because they are not likely to even react to seismic sounds unless the received levels are >170 dB re 1 microPa (rms), hearing impairment is also unlikely at an SPL as low as 190 dB. Therefore, it is unlikely that marine mammals will be harmed as a result of continuing seismic into periods of poor visibility in Arctic waters. As a result, NMFS has determined that it is only if daytime activities have a large abundance of marine mammals and/or a significant number of shutdowns, should nighttime seismic be prohibited.

Also as a general rule, termination of seismic during nighttime and poor visibility is simply not practicable due to cost considerations and ship time schedules. The cost to operate a large industrial seismic survey with support vessels is approximately $300,000 per day (Kent Satterlee, pers. comn). If the vessels were prohibited from operating during nighttime, each trip could require several additional Arctic survey operations to complete, depending on average daylight at the time of work. In the Chukchi and Beaufort seas, fog is common even though there is 24 hours of daylight per day until late August, but by late September there is less than 12 hours of daylight and by late October there would be only 3–4 hours of daylight, seriously limiting operations later in the year if a daylight and clear weather requirement were imposed.

ESA Concerns

Comment 31: The CBD states that NMFS may authorize incidental take of bowhead whales under the ESA pursuant to section 7(b)(4), but only where such take occurs while ''carrying out an otherwise lawful activity.'' To be ''lawful,'' such activities must ''meet all State and Federal legal requirements except the prohibition against taking in section 9 of the [ESA].'' As discussed, Shell's proposed activities violate the MMPA and NEPA and therefore are not ''otherwise lawful.'' Any take authorization for the bowhead whale would therefore violate the ESA as well as other statutes.

Response: As noted in this document, NMFS has made the necessary determinations under the MMPA and NEPA regarding the incidental harassment of marine mammals by Shell while it is conducting activities permitted legally under MMS' jurisdiction.

NEPA Concerns

Comment 32: The CBD notes that they submitted comments on the MMS PEA along with comments on Shell's IHA application. Subsequent to CBD's May 10, 2006 letter on the PEA, they believe additional information has come to light that requires the preparation of an EIS in accordance with 40 CFR

1508.27(b)(4). The CBD notes that the Native Village of Kaktovik passed a resolution opposing Shell's seismic survey plans and the Native Village of Point Hope also officially expressed its opposition to this summer's various seismic surveys. The CBD believes that NMFS cannot rationally adopt the PEA and make a Finding of No Significant Impact (FONSI) on this action. Instead, it must prepare a full EIS analyzing the effects of Shell's proposed activities in the context of cumulative effects of all other natural and anthropogenic impacts on marine mammals, habitats and communities of the Chukchi and Beaufort seas.

Response: While the Villages of Point Hope and Kaktovik expressed opposition to Shell's activities in the Chukchi and Beaufort seas this year (as coastal native Alaskan communities have done for many years), the Whaling Captains' Associations of Point Hope, Kaktovik, Nuiqsut, and Wainwright signed a CAA with Shell, ConocoPhillips and GXTechnology. This CAA indicates to NMFS that seismic exploration activities by these companies will not have an unmitigable adverse impact on the availability of marine mammals for subsistence uses, including bowheads and belugas. This, along with the required mitigation and monitoring measures, informed NMFS' FONSI.

Description of Habitat and Marine Mammals Affected by the Activity

A detailed description of the Beaufort and Chukchi sea ecosystems and their associated marine mammals can be found in several documents (Corps of Engineers, 1999; NMFS, 1999; Minerals Management Service (MMS), 2006, 1996 and 1992) and does not need to be repeated here.

Marine Mammals

The Beaufort/Chukchi Seas support a diverse assemblage of marine mammals, including bowhead whales (*Balaena mysticetus*), gray whales (*Eschrichtius robustus*), beluga whales (*Delphinapterus leucas*), killer whales (*Orcinus orca*), harbor porpoise (*Phocoena phocoena*), ringed seals (*Phoca hispida*), spotted seals (*Phoca largha*), bearded seals (*Erignathus barbatus*), walrus (*Odobenus rosmarus*) and polar bears (*Ursus maritimus*). These latter two species are under the jurisdiction of the U.S. Fish and Wildlife Service (USFWS) and are not discussed further in this document. Descriptions of the biology and distribution of the marine mammal species under NMFS' jurisdiction can be found in Shell's application and MMS' Final PEA. Information on these species can be found also in the NMFS Stock Assessment Reports. The Alaska Stock Assessment Report is available at: *http://www.nmfs.noaa.gov/pr/sars/region.htm* Please refer to those documents for information on these species.

Potential Effects of Seismic Surveys on Marine Mammals

Disturbance by seismic noise is the principal means of taking by this activity. Support vessels and aircraft may provide a potential secondary source of noise. The physical presence of vessels and aircraft could also lead to non-acoustic effects on marine mammals involving visual or other cues.

As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.*, 1995):

(1) The noise may be too weak to be heard at the location of the animal (*i.e.*, lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

Effects of Seismic Surveys on Marine Mammals

Shell (2005) states that the only anticipated impacts to marine mammals associated with noise propagation from vessel movement, seismic airgun operations, and seabed profiling and coring work (in the Beaufort Sea) would be the temporary and short term displacement of whales and seals from within ensonified zones produced by such noise sources. In the case of bowhead whales, that displacement might well take the form of a deflection of the swim paths of migrating bowheads away from (seaward of) received noise levels greater than 160 db (Richardson *et al.*, 1999). The cited and other studies conducted to test the hypothesis of the deflection response of bowheads have determined that bowheads return to the swim paths they were following at relatively short distances after their exposure to the received sounds. NMFS believes that there is no evidence that bowheads so exposed to low sound pressure levels have incurred injury to their auditory mechanisms. Additionally, Shell cites Richardson and Thomson [eds]. (2002) for the proposition that there is no conclusive evidence that exposure to sounds exceeding 160 dB have displaced bowheads from feeding activity.

Results from the 1996–1998 BP and Western Geophysical seismic monitoring programs in the Beaufort Sea indicate that most fall migrating bowheads deflected seaward to avoid an area within about 20 km (12.4 mi) of an active nearshore seismic operation, with the exception of a few closer sightings when there was an island or very shallow water between the seismic operations and the whales (Miller *et al.*, 1998, 1999). The available data do not provide an unequivocal estimate of the distance (and received sound levels) at

which approaching bowheads begin to deflect, but this may be on the order of 35 km (21.7 mi). It is also uncertain how far beyond (west of) the seismic operation the seaward deflection persists (Miller *et al.*, 1999). In one study, although very few bowheads approached within 20 km (12.4 mi) of the operating seismic vessel, the number of bowheads sighted within that area returned to normal within 12–24 hours after the airgun operations ended (Miller *et al.*, 1999).

Although NMFS believes that some limited masking of low-frequency sounds (*e.g.*, whale calls) is a possibility during seismic surveys, the intermittent nature of seismic source pulses (1 second in duration every 16 to 24 seconds (*i.e.*, less than 7 percent duty cycle)) will limit the extent of masking. Bowhead whales are known to continue calling in the presence of seismic survey sounds, and their calls can be heard between seismic pulses (Greene *et al.*, 1999, Richardson *et al.*, 1986). Masking effects are expected to be absent in the case of belugas, given that sounds important to them are predominantly at much higher frequencies than are airgun sounds (Western Geophysical, 2000).

Hearing damage is not expected to occur during the Shell seismic survey project. It is not positively known whether the hearing systems of marine mammals very close to an airgun would be at risk of temporary or permanent hearing impairment, but TTS is a theoretical possibility for animals within a few hundred meters of the source (Richardson *et al.*, 1995). However, planned monitoring and mitigation measures (described later in this document) are designed to avoid sudden onsets of seismic pulses at full power, to detect marine mammals occurring near the array, and to avoid exposing them to sound pulses that have any possibility of causing hearing impairment.

When the received levels of noise exceed some threshold, cetaceans will show behavioral disturbance reactions. The levels, frequencies, and types of noise that will elicit a response vary between and within species, individuals, locations, and seasons. Behavioral changes may be subtle alterations in surface, respiration, and dive cycles. More conspicuous responses include changes in activity or aerial displays, movement away from the sound source, or complete avoidance of the area. The reaction threshold and degree of response also are related to the activity of the animal at the time of the disturbance. Whales engaged in active behaviors, such as feeding, socializing, or mating, are less likely than resting animals to show overt behavioral reactions, unless the disturbance is directly threatening.

A description of potential impulsive noise impacts to bowhead whales, gray whales, beluga whales and ringed, largha and bearded seals were provided in the May 3, 2006 **Federal Register** notice (71 FR 26055) and is not repeated here. Additional information can be found in NMFS notice of receipt of an application from GX Technologies (71 FR 32045, June 2, 2006).

Numbers of Marine Mammals Expected to Be Exposed to Seismic Noise

The methodology used by Shell to estimate incidental take by Level B harassment is presented in the application. Subsequent to submission of that application, Shell provided more conservative estimates of potential marine mammal exposures by using the JASCO model. Therefore, Tables 1 and 2 provide exposure calculations for both sets of calculations. NMFS has used the more conservative estimates of noise exposure to determine impacts to marine mammals.

TABLE 1. BEAUFORT SEA REVISED ESTIMATES

	Average Density	Maximum Density	Original Estimate Average Density	Original Estimate Maximum Density	Revised Estimate Average Density	Revised Estimates Maximum Density
Cetaceans						
bowhead whales	0.0064	0.0256	46	185	395	1579
gray whale	0.0045	0.0179	33	129	278	1104
beluga	0.0034	0.0135	25	98	210	833
Pinnipeds						
ringed seal	0.251	0.444	1185	2097	7335	12976
spotted seal	0.0001	0.0005	0	2	3	15
bearded seal	0.0128	0.0226	60	107	374	660

TABLE 2. CHUKCHI SEA REVISED ESTIMATES

	Average Density	Maximum Density	Original Estimate Average Density	Original Estimate Maximum Density	Revised Estimate Average Density	Revised Estimates Maximum Density	Revised Estimates Scenario 2 Average	Revised Estimates Chukchi Scenario 2 Maximum
Cetaceans								
bowhead whales	0.0064	0.0256	46	185	403	1613	806	3226
gray whale	0.0045	0.0179	33	129	284	1128	568	2256
beluga	0.0034	0.0135	25	98	214	851	428	1702
killer whale	0	0	0	5	10	10	20	20
harbor porpoise	0	0.0002	0	5	10	13	26	26
Pinnipeds								
ringed seal	0.251	0.444	1185	2097	6805	12038	13610	24076
spotted seal	0.0001	0.0005	0	2	3	14	6	28
bearded seal	0.0128	0.0226	60	107	347	613	694	1226

The density estimates for the species covered under this IHA are based on the estimates developed by LGL (2005). The LGL density estimates are based on the original data from Moore et al. (2000) on summering bowhead, gray, and beluga whales in the Beaufort and Chukchi Seas, and relevant studies on ringed seal estimates, including Stirling et al. (1982) and Kingsley (1986).

In its application, Shell provides estimates of the number of potential exposures to sound levels greater than 160 dB re 1 microPa (rms) and greater than 170 dB. Shell states that while the 160–dB criterion is applied for estimating Level B harassment of all species of cetaceans and pinnipeds, Shell believes that a 170–dB criterion should be considered appropriate for estimating Level B harassment of delphinid cetaceans and pinnipeds, which tend to be less responsive, whereas the 160–dB criterion is considered appropriate for other cetaceans (LGL, 2005). However, NMFS has noted in the past that there is no empirical evidence to indicate that some delphinid species do not respond at the lower level (i.e., 160 dB). As a result, NMFS is using the 160–dB isopleth to estimate the numbers of marine mammals that may be taken by Level B harassment.

The estimates in Tables 1 and 2 are based on marine mammal exposures to 160 dB (and greater) from either approximately 5,556 km (3452 mi) of seismic surveys in three distinct areas of the eastern- and mid-Beaufort Sea and a similar level of effort in the Chukchi Sea or approximately 11,112 km (6905 mi) only in the Chukchi Sea if seismic work in the Beaufort Sea is not undertaken. These latter calculations are provided in the last column of Table 2.

There will be no site clearance work performed for the seismic activities in the Chukchi Sea, therefore, potential taking estimates only include noise disturbance from the use of airguns. It is assumed that, during simultaneous operations of those additional sound sources and the airgun(s), any marine mammals close enough to be affected by the sonars or pinger would already be affected by the airgun(s).

Exposure Calculations for Cetaceans and Pinnipeds

The number of exposures of a particular species to sound pressure levels between 160 dB and 180 dB re 1 microPa (rms) was calculated by multiplying: (1) the expected species density (i.e., average and maximum), as shown in Tables 1 and 2; (2) the anticipated total line-kilometers of operations with the three 1,049–in3 subarrays (*i.e.*, 5556 km (3452 mi)); and (3) the cross-track distances within which received sound levels are predicted to be between 160 and 180 dB (Figure 6–1 and Table 6–3 in the Shell application).

Chukchi Sea

Shell estimates that the average and maximum numbers of bowhead whales that may be exposed to noise levels of 160 dB or greater are 798 and 3192 (based on seismic work in both the Chukchi and Beaufort seas), respectively. However, according to Shell, the proposed seismic activities would occur when bowheads are widely distributed and would be expected to occur in very low numbers within the seismic activity area. Therefore, based on the 160–dB threshold criterion, the number of bowhead whales that may be exposed to sounds at or greater than 160 dB re 1 microPa (rms) would be even smaller, and represents a small percent of the estimated population within the Beaufort and Chukchi Seas. The average and maximum estimates of the number of exposures at or greater than 160 dB are 284 and 1128 for gray whales, 214 and 851 for beluga whales, 10 and 10 for killer whales, and 10 and 13 for harbor porpoises.

While no reliable abundance numbers currently exist for ringed, spotted, and bearded seals for the Chukchi Sea, the potential number of exposures would be a very small fraction of abundance estimates as shown in Table 2.

Beaufort Sea

As indicated in Table 1 in this document, the estimated average and maximum numbers for bowhead whales at exposures 160 dB or greater are 395 and 1579, respectively. Again, as stated earlier, proposed activities would occur mainly when bowheads are not present in the area or are in very low numbers. Gray and beluga whales also have the potential for exposure, particularly near seismic survey area 3. The average and maximum estimates of the number of exposures for gray whales are 278 and 1104, and 210 and 833 for beluga whales, respectively.

Ringed seals would be the most prevalent marine mammal species encountered at each of the three proposed seismic acquisition areas, and would account for most of the marine mammals that might be exposed to seismic sounds equal to or greater than 160 dB. Potential exposure estimates for pinnipeds in the Beaufort Sea are shown in Table 1. However, Moulton and Lawson (2002) indicated that most pinnipeds exposed to seismic sounds lower than 170 dB do not visibly react. As a result, NMFS believes that these exposure estimates are very conservative. Spotted and bearded seals may be encountered in much smaller numbers than ringed seals, but also have the potential for some minor exposure.

Finally, if Shell does not conduct seismic survey work in the Beaufort Sea in 2006, and implements scenario 2 as mentioned previously, Shell estimates that additional sound exposures would occur in the Chukchi Sea. These estimates are provided in the last column of Table 2.

Potential Impact on Habitat

It is unlikely that the proposed seismic activities will result in any permanent impact on habitats used by marine mammals, or to their prey sources. Seismic activities will occur during the time of year when bowhead whales are widely distributed and would be expected to occur in very low numbers within the seismic activity area (during July and again from mid-October through November). The northeastern-most of the recurring feeding areas is in the northeastern Chukchi Sea southwest of Barrow. Any effects would be temporary and of short duration at any one place.

A broad discussion on the various types of potential effects of exposure to seismic on fish and invertebrates can be found in LGL (2005; University of Alaska-Fairbanks Seismic Survey across Arctic Ocean at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#iha*), and includes a summary of direct mortality (pathological/ physiological) and indirect (behavioral) effects.

Mortality to fish, fish eggs and larvae from seismic energy sources would be expected within a few meters (0.5 to 3 m (1.6 to 9.8 ft)) from the seismic source. Direct mortality within 48 hours has been observed in cod and plaice that were subjected to seismic pulses two meters from the source (Matishov, 1992), however other studies did not report any fish kills from seismic source exposure (La Bella *et al.*, 1996; IMG, 2002; Hassel *et al.*, 2003). To date, fish mortalities associated with normal seismic operations are thought to be slight. Saetre and Ona (1996) modeled a worst-case mathematical approach on the effects of seismic energy on fish eggs and larvae, and concluded that mortality rates caused by exposure to seismic are so low compared to natural mortality that issues relating to stock recruitment should be regarded as insignificant.

Limited studies on physiological effects on marine fish and invertebrates to acoustic stress have been conducted.

No significant increases in physiological stress from seismic energy were detected for various fish, squid, and cuttlefish (McCauley *et al.*, 2000) or in male snow crabs (Christian *et al.*, 2003). Behavioral changes in fish associated with seismic exposures are expected to be minor at best. Because only a small portion of the available foraging habitat would be subjected to seismic pulses at a given time, fish would be expected to return to the area of disturbance anywhere from 15–30 minutes later (McCauley *et al.*, 2000) to several days (Engas *et al.*, 1996).

Available data indicate that mortality and behavioral changes do occur within very close range to the seismic source, however, the proposed seismic acquisition activities in the Chukchi and Beaufort seas are predicted by Shell to have a negligible effect to the prey resource of the various life stages of fish and invertebrates available to marine mammals occurring during the project's duration.

The total footprint of the proposed seismic survey area covers approximately 378,000 acres in the Chukchi Sea and 717,000 acres in the Beaufort Sea. The effects of the planned seismic activity at each of the seismic locations on marine mammal habitats and food resources are expected to be negligible, as described. It is estimated that only a small portion of the animals utilizing the areas of the proposed activities would be temporarily displaced.

In addition, feeding does not appear to be an important activity by bowheads migrating through the Chukchi Sea or the eastern and central part of the Alaskan Beaufort Sea in most years (Shell, 2005). Sightings of bowhead whales occur in the summer near Barrow (Moore and DeMaster, 2000) and there are suggestions that certain areas near Barrow are important feeding grounds. In addition, a few bowheads can be found in the Chukchi and Bering Seas during the summer and Rugh *et al.* (2003) suggest that this may be an expansion of the western Arctic stock, although more research is needed. In the absence of important feeding areas, the potential diversion of a small number of bowheads away from seismic activities is not expected to have any significant or long-term consequences for individual bowheads or their population. As a result, NMFS believes Shell's seismic activities will not have any habitat-related effects that would produce long-term effects to marine mammals or their habitat due to the limited extent of the acquisition areas and timing of the activities.

Effects of Seismic Noise and Other Activities on the Availability of Marine Mammals for Subsistence Uses

The disturbance and potential displacement of marine mammals by sounds from seismic activities are the principal concerns related to subsistence use of the area. The harvest of marine mammals (mainly bowhead whales, but also ringed and bearded seals) is central to the culture and subsistence economies of the coastal North Slope and Western Alaskan communities. In particular, if migrating bowhead whales are displaced farther offshore by elevated noise levels, the harvest of these whales could be more difficult and dangerous for hunters. The harvest could also be affected if bowheads become more skittish when exposed to seismic noise. Hunters related how whales also appear ''angry'' due to seismic noise, making whaling more dangerous.

In the Chukchi Sea, Shell seismic work should not have unmitigable adverse impacts on the availability of the whale species for subsistence uses. The whale species normally taken by Inupiat hunters are the bowhead and belugas. Shell's Chukchi seismic operations will not begin until after July 15, 2006 by which time the majority of bowheads will have migrated to their summer feeding areas in Canada. Even if any bowheads remain in the northeastern Chukchi Sea after July 15, they are not normally hunted after this date until the return migration occurs around late September when a fall hunt by Barrow whalers takes place. In the past few years, a small number of bowheads have also been taken by coastal villages along the Chukchi coast. Seismic operations for phase two of the Chukchi program will be timed and located so as to avoid any possible conflict with the Barrow fall whaling, and specific provisions governing the timing and location have been incorporated into the CAA established between Shell and WesternGeco, the AEWC, and the Barrow Whaling Captains Association.

Beluga whales may also be taken sporadically for subsistence needs by coastal villages, but traditionally are taken in small numbers very near the coast. Because the seismic surveys will be conducted at least 12 miles (25 km) offshore, impacts to subsistence uses of bowheads are not anticipated. However, Shell will establish ''communication stations'' in the villages to monitoring impacts. Gray whales, which will be abundant in the northern Chukchi Sea from spring through autumn, are not taken by subsistence hunters.

The various pinniped species, including walrus, are all taken by subsistence hunters of the Chukchi villages (Barrow, Wainwright, Pt Lay, Pt Hope). The planned seismic operations will not adversely affect the usual open-water locations of these species and no haul-out areas will be encountered (with the possible exception of the polar ice front used by walrus, which is under the jurisdiction of the USFWS). However, most seismic operations will take place sufficiently distant from nearshore traditional beluga, seal, and walrus hunting areas such that no unmitigable adverse impacts are anticipated.

In the Beaufort Sea, there could be an adverse impact on the Inupiat bowhead subsistence hunt if the whales were deflected seaward (further from shore) in traditional hunting areas. The impact would be that whaling crews would necessarily be forced to travel greater distances to intercept westward migrating whales thereby creating a safety hazard for whaling crews and/or limiting chances of successfully striking and landing bowheads. This potential impact will be mitigated by application of the procedures established in the CAA between the seismic operators and the AEWC and the whaling captains' associations of Kaktovik, Nuiqsut and Barrow. The times and locations of seismic and other noise producing sources will be curtailed during times of active scouting and whaling within the traditional subsistence hunting areas of the three potentially affected communities. (Shell, 2005).

Monitoring

As part of its application, Shell provided a monitoring plan for assessing impacts to marine mammals from seismic surveys in the Beaufort and Chukchi seas. During NMFS' Arctic Open Water Meeting in Anchorage on April 19–24, 2006, scientists and stakeholders indicated to Shell, ConocoPhillips and GXTechnology (the 3 companies planning to conduct seismic in the Arctic Ocean) that additional research monitoring would be necessary in order to obtain information on marine mammals in the Chukchi Sea and potential impacts of industrial noise on marine mammals and subsistence uses of marine mammals. For this year, in order to reduce uncertainty of impacts on low-frequency hearing sensitive marine mammals (bowhead and gray whales) during periods of significant behavioral activities (migration and feeding), and on subsistence activities, additional mitigation and monitoring measures are warranted. As a result, Shell will conduct the following monitoring:

Vessel-based Visual Monitoring

Seismic Source Vessel Monitoring

Shell will have at least four observers (three trained biologists and one Inupiat observer/communicator) based aboard the seismic vessel. Marine mammal observers (MMOs) will search for and observe marine mammals whenever seismic operations are in progress and for at least 30 minutes before the planned start of seismic transmissions or whenever the seismic array's operations have been suspended for more than 10 minutes. These observers will scan the area immediately around the vessels with reticle binoculars during the daytime. Laser rangefinding equipment will be available to assist with distance estimation. After mid-August, when the duration of darkness increases, image intensifiers will be used by observers and additional light sources may be used to illuminate the safety zone.

The use of four observers allows two observers to be on duty simultaneously for up to 50 percent of the active airgun hours. The use of two observers increases the probability of detecting marine mammals, and two observers will be on duty whenever the seismic array is ramped up. Individual watches will be limited to no more than 4 consecutive hours to avoid observer fatigue (and no more than 12 hours on watch per 24 hour day). When mammals are detected within or about to enter the safety zone designated to prevent injury to the animals (see Mitigation), the geophysical crew leader will be notified so that shutdown procedures can be implemented immediately. Information on training, duties etc can be found in LGL (2006) which is available on the NMFS Web site (see **ADDRESSES**).

Chase Boat Monitoring

In addition to MMOs onboard the seismic vessels, Shell will also have at least two MMOs aboard a ''chase boat'' or ''guard boat.'' During seismic operations, a chase boat remains very near to the stern of the source vessel anytime a member of the source vessel crew is on the back deck deploying or retrieving equipment related to the seismic array. Once the seismic array is deployed the chase boat then serves to keep other vessels away from the seismic vessel and its array (including the hydrophone streamer) during production of seismic data and provide additional emergency response capabilities. Whenever source vessel members are not working on the back deck and radar indicates no vessels approaching the source vessel, the chase boat will conduct observations of the area delineated by the 160–dB isopleth to look for bowhead and gray whale aggregations (see Mitigation). During all active seismic survey activity, the chase boat will conduct marine mammal surveys no less than every 48 hours or 3 times per 7 days, of the 160–dB area to be seismically surveyed over the next 24 hours. MMOs will search for aggregations of bowhead and gray whale feeding. The MMOs on the chase boat will be responsible for immediately contacting the seismic survey ship if marine mammals are sited within the 180/190–dB safety zone or aggregations of 12 or more non-migratory bowhead whales or gray whales are sited within the surveyed 160–dB zone. The MMOs aboard the chase boat will also provide additional observations on the water to document any marine mammals in the vicinity of seismic operations. To maximize the amount of time during the day that an observer is on duty, the two observers aboard the chase boat will rarely work at the same time. As on the source vessel, shifts will be limited to 4 hours in length and 12 hours total in a 24–hour period.

Aerial Monitoring Surveys

Beaufort Sea

Aerial Surveys: Shell will conduct aerial surveys of the Beaufort Sea regional distribution and abundance of marine mammals with special attention to bowhead whales prior to the initiation of the seismic survey starts and periodically during and after the survey. The objectives of the Beaufort Sea aerial surveys are the following:

(1) document the occurrence, distribution, and movements of bowhead, as well as beluga and gray, whales in and near the area where they might be affected by the seismic pulses. These observations will be used to estimate the level of harassment takes and to assess the possibility that seismic operations affect the accessibility of bowhead whales for subsistence hunting. Pinnipeds will be recorded when seen, although survey altitude will be too high for systematic surveys of seals;

(2) document the numbers of whales, at least theoretically, exposed to noise from seismic survey and their responses to the surveys (if detectable); and

(3) Provide real-time or near real-time information that can be used (if appropriate) to alter the survey's starting point and survey line sequence based on the actual distribution of whales in the area immediately prior to and during surveys (see below),.

Aerial surveys will be conducted only when they can be carried out in a safe manner and during periods of good visibility where there is sufficient probability of detecting bowhead whales and other marine mammals. Generally, the flight plan and coverage of the aerial survey will be conducted following established standards and methodologies, as described above, with particular reference to MMS' Bowhead Whale Aerial Survey Program (BWASP) procedures. Specific details of the flight pattern and coverage will be fully developed in an aerial flight operations plan but will be subject to operation changes as needed to provide effective coverage during field operations. Aerial surveys conducted during the bowhead whaling season will be coordinated with whaling efforts, such that airplanes operating in close proximity to whalers can take action (e.g. flying at higher altitudes, to reduce the potential to impact the hunt).

Shell will conduct Beaufort Sea aerial surveys twice a week from August 25 through September 15, 2006 and daily (when weather permits) from September 16th on. Aerial surveys in the Beaufort Sea will continue for three days after the cessation of seismic operations in the Beaufort Sea. Aerial surveys will be conducted by teams of up to four observers (a pilot, two dedicated observers, and an observer/data recorder) in a twin-engine airplane (not a helicopter). Observations are made at an altitude of 900 to 1,500 ft (274 to 457 m)and a ground speed of 120 knots (120 nm/hr; 138 statute mi (mi)/hr; 222 km/hr). Similar to previous Beaufort Sea aerial surveys, the survey plane will traverse a survey grid (approved in advance by marine mammal scientists at NMFS' National Marine Mammal Laboratory (NMML) in coordination with other marine mammal scientists), centered on the seismic operations, which extends 50 to 75 km (31 to 46.6 mi) both east and west of the seismic operations and to 75 km (46.6 mi) offshore. Shell recommends that periodic flights range further to the east may be utilized prior to the onset of migration to provide an early warning of the approach of migrating bowhead whales. After September 1st , the daily flights will also monitor the area within the 120–dB isopleth (to the extent practicable) to locate migrating bowhead whale cow/calf pairs in compliance with mitigation requirements described later in this document.

If seismic work in the Beaufort Sea is suspended by Shell during the bowhead subsistence hunting season, but resumes later in the autumn, aerial surveys, including monitoring the 120–dB zone, will commence (or resume) when the seismic work resumes.

In addition to Shell's Beaufort Sea aerial monitoring program, MMS expects to conduct its broad-scale BWASP aerial survey work from approximately August 31st until the end of the bowhead migration in October. NMFS believes that this combined aerial survey data will provide good information to estimate the number of bowheads taken by Level B harassment.

Chukchi Sea

As described previously in this document, NMFS has determined that in order to avoid potentially significant impact (for purposes of NEPA), Shell must conduct aerial monitoring in the Chukchi Sea either after September 25th, once the research vessel monitoring program has detected 4 cow/calf pairs during a vessel transit (see Research Monitoring) or once bowhead whale hunters have determined that the ''pulse'' of cow/calf pairs are passing Barrow AK, whichever is sooner. Once initiated, aerial monitoring will take place daily (weather permitting), whenever Shell's seismic vessel is conducting seismic surveys and is operating within an area of the Chukchi Sea that can be covered safely and practically. The primary objectives of the offshore aerial surveys will be to (1) document the occurrence, distribution, and movements of bowhead and gray whales, and other marine mammals in and near the area where they might be affected by the seismic sounds and (2) detect bowhead whale cow/calf pairs in or near the area ensonified to a 120–dB SPL near the seismic survey vessel (as detailed later in this document (see Mitigation)).

If an aerial monitoring program cannot be implemented due to human safety concerns, a dedicated vessel may be used for surveys of the 120–dB zone. If vessel surveys are used, a dedicated passive acoustic monitoring program, capable of locating the position of the vocalization, must be employed and monitored at all times that seismic is operating on the vessel. If the passive acoustic system detects one or more bowhead vocalizations within the 120–dB zone, Shell must immediately shut-down the seismic airgun array and/or other acoustic sources; and not proceed with ramping up the seismic airgun array until the passive acoustic monitoring program confirms that bowhead whales are not within the eastern portion of the 120–dB zone ahead of the ship's trackline over the next 24 hours.

Research Monitoring

Research

Shell, ConocoPhillips, and GXTechnology have developed, and will implement, a joint-research component to their individual marine mammal monitoring programs that will further improve the understanding of impacts of seismic exploration on marine mammals, particularly bowhead whales. A preliminary description of this research was outlined in NMFS' proposed notice (71 FR 26055, May 3, 2006). Following NMFS' open water meeting in Anchorage, AK on April 19–24, 2006, a more detailed research plan was developed for the seismic industry. The latest version of this report is available for downloading (see **ADDRESSES**). A description of this Monitoring Plan was provided in an earlier **Federal Register** notice 71 FR 43112, July 31, 2006) and is not repeated here.

Mitigation Measures

Shell will implement five main mitigation measures: (1) The timing and locations for active seismic acquisition work will be scheduled to curtail operations when whaling captains inform the operator that they are scouting or hunting within traditional hunting areas; (2) the configuration of airguns in a manner that directs energy primarily down to the seabed thus decreasing the range of horizontal spreading of seismic noise; (3) a seismic energy source that is as small as possible; (4) the use of ramp-up (soft start) as a method for initiating seismic operations to alert any marine mammals either within or approaching an operating airgun array so that they may swim away from the source; and (5) the curtailment (shut-down/power-down) of active seismic work when the MMOs visually sight (from shipboard or aerially) the presence of marine mammals within identified ensonified (safety) zones. Details of the required mitigation measures follow:

Seasonal/Area Restrictions: Shell will take all practicable measures to complete seismic operations as early as possible and to vacate areas within close proximity of subsistence bowhead hunting areas during periods of hunting activity. During periods of hunting activity, seismic operations will be moved to areas remote from hunting operations or will cease for a period. From August 25 until the end of the bowhead hunting season (or until the end of seismic operations in the Beaufort Sea), seasonal area closures will be implemented as follows: (1) No geophysical activity from (1) the Canadian border to the Canning River from August 25th to September 20th, (2) the Canning River to Point Storkersen from August 25th to September 25th and (3) Pitt Point on the east side of Smith Bay to a location about half way between Barrow and Peard Bay from September 10th to October 25th. Shell will make all reasonable efforts to avoid disruption of the hunt or deflection of migrating bowheads in hunting areas.

Airgun Arrays: For the seismic survey, Shell will:

(a) Configure the airgun array to maximize the proportion of the energy that is directed downward and to minimize horizontal sound propagation. In particular, closely spaced airguns whose overall radiation pattern is nearly omni-directional will be avoided. The size of the airgun arrays, as measured by the source level, will not be any larger than required to meet the technical objectives for the seismic survey.

(b) Utilize pre-initiation modeling, based upon anticipated sound propagation characteristics of the array, to establish anticipated impact zones of 180 dB and 190 dB.

(c) Conduct an independent field sound propagation assessments at the initiation of the field season and adjust the 180–dB and 190–dB zones accordingly, after consultation with NMFS.

Ramp-up (soft-start): For the 2006 seismic survey, Shell will implement the following ramp-up (soft start) procedures:

(a) The seismic operator will ramp-up airguns slowly over a period of 20 minutes each time shooting begins or whenever the shut-down period has been greater than 10 minutes. Soft starts will follow every interruption of the airgun array firing that is greater than 10 minutes, most importantly if the survey is discontinued until marine mammals leave the safety zone. The seismic operator and MMOs will maintain records of the times when ramp-ups start, and when the airgun array reaches full power.

(b) During periods of turn around and transit between seismic transects, one airgun will remain operational. Through use of this approach, seismic operations can resume upon entry to a new transect without full ramp up. While it is routine to ramp up from a single gun firing to full array operation, operation of a single gun allows starting during poor visibility and ramp up without a period of static visual observation.

(c) If shut down occurs, ramp-up will begin only following a minimum of a 30–min period of observation of the prescribed safety zone to assure that no marine mammals are present. However,

if the MMOs are on-duty prior to the shut-down, and continue their observations during the shut-down, then an additional 30–min period of observation prior to ramp-up is not necessary. Ramp-up procedures will be followed until full operating intensity is achieved.

Safety Zones: For the proposed seismic survey, Shell will implement the following measures:

(a) Initial safety zones will be established prior to the survey based on available data and modeling concerning sound output. The sound levels are based on frequencies between 10 Hz and 120 Hz, the typical peak spectrum of sound emitted for seismic surveys.

(b) The safety distances will be verified (and if necessary adjusted) during the first week of the seismic survey, based on direct measurements via calibrated hydrophones of the received levels of underwater sound versus distance and direction from the airgun array. The acoustic data will be analyzed as quickly as reasonably practicable in the field and used to adjust safety distance. The same acoustic data will be useful in interpreting observations of marine mammals during analysis of sighting data after the programs completion (see below).

Biological Observers: For the 2006 Arctic Ocean seismic survey, Shell will implement the following measures:

(a) Trained MMOs on the seismic ship will be on watch for marine mammals during all daylight hours when seismic operations are in progress, as described under Monitoring.

(b) The purpose of the observers on the seismic vessel will primarily be to document the occurrence and responses of marine mammals visible from the vessel, and to initiate airgun shutdown requirements whenever a marine mammal is observed within the safety zone. Furthermore, the observers will confirm the absence of marine mammals in the safety zones prior to ramp-up.

(c) When a marine mammal is sighted within, or approaching, the 180/190–dB safety zones around the airgun array by the seismic vessel MMOs or the chase boat MMOs, the MMO will notify the seismic vessel contractor who will shut down the airguns. After completion of the survey, a technical report and a scientific research paper will be prepared to summarize the observations, results, and conclusions of the marine mammal monitoring program.

Operations at Night and in Poor Visibility: For the 2006 Arctic Ocean seismic programs in the Beaufort and Chukchi seas, Shell will implement the following measures:

(a) When operating under conditions of reduced visibility attributable to darkness or to adverse weather conditions, infra-red or night-vision binoculars will be available for use. It is recognized, however, that their effectiveness for this application is very limited even in clear night time conditions.

(b) Seismic activities will not be initiated during darkness or during conditions when visibility is reduced to less than the radius of the safety zone. If a single small airgun remains firing during a shut-down, the rest of the array can be ramped up during darkness or in periods of low visibility. Seismic operations may continue under conditions of darkness or reduced visibility unless, in the judgment of the senior MMO, densities of marine mammals in the general area are high enough to warrant concern that there is a high concern that one or more marine mammals is likely to enter the safety zone undetected. In that case, observers will advise the ship's captain or his designee to halt airgun operations or to move to a part of the survey area where visibility is adequate or where the likelihood of encountering marine mammals is low based on aerial and vessel based surveys that would be part of the real-time monitoring program.

Mitigation for Subsistence Needs

To issue an IHA in Arctic waters, NMFS must determine that an activity will not have an unmitigable adverse impact on the availability of marine mammals for taking for subsistence uses. While this includes both cetaceans and pinnipeds, the primary impact by seismic activities on subsistence hunting is expected to be impacts from noise on bowhead whales during their westward fall feeding and migration period in the Beaufort Sea. NMFS has defined unmitigable adverse impact in 50 CFR 216.103 as an impact resulting from the specified activity:

(1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) causing the marine mammals to abandon or avoid hunting areas; (ii) directly displacing subsistence users; or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Regulations at 50 CFR 216.104(a)(12) require IHA applicants for activities that take place in Arctic waters to provide a plan of cooperation (POC) or information that identifies what measures have been taken and/or will be taken to minimize any adverse effects on the availability of marine mammals for subsistence uses. Shell's POC notes that negotiations were initiated beginning in summer of 2005 with the AEWC to create a CAA between Shell and WesternGeco for 2006, and the subsistence hunting communities of Barrow, Nuiqsut, and Kaktovik. The CAA covers both the Beaufort Sea seismic program (including deep seismic, site clearance, shallow hazard surveys and a geotechnical seabed coring program) and the Chukchi Sea deep seismic survey. Meetings between Shell and the AEWC began in October 2005 with representatives of the North Slope Borough also present in Fairbanks during the annual meeting of the Alaska Federation of Natives. Additional meetings were held this past spring.

Given the number of activities planned for 2006, the AEWC elected to prepare a Programmatic CAA, setting forth mitigation measures that will apply to all seismic activities. Shell and other companies signed the CAA in July 2006. The CAA excludes conduct of seismic operations in the Chukchi Sea near-shore polyna, imposes time/area closures in the Beaufort Sea, prevents seismic operations in the Chukchi Sea before July 15 (to reduce impacts on the beluga hunt), requires sound signature tests of all geophysical equipment and vessels before initiating operations in the Beaufort and Chukchi seas; makes source verification test results available to the AEWC and others, requires preparation and implementation of a noise impact monitoring plan to collect data designed to determine the effects of its operations on fall migrating bowhead whales and other affected marine mammals; requires bowhead whale collision avoidance measures when within 1 mi (1.6 km) of a bowhead whale,; and requires a cumulative effects analysis of the multiple sound sources and their possible relationship to any observed changes in marine mammal behavior. The monitoring plan was subject to stake-holder review at the 2006 Open Water Meeting in Anchorage as discussed previously.

The CAA incorporates all appropriate measures and procedures regarding the timing and areas of Shell's planned activities (*i.e.*, times and places where seismic operations will be curtailed or moved in order to avoid potential conflicts with active subsistence whaling and sealing); communications system between operator's vessels and whaling and hunting crews (i.e., the communications center will be located in Deadhorse with links to Kaktovik, Nuiqsut, Cross Island, and Barrow); provision for marine mammal observers/Inupiat communicators aboard all project vessels; conflict

resolution procedures; and provisions for rendering emergency assistance to subsistence hunting crews.

In addition, all geophysical activity in the Beaufort Sea will be restricted until the appropriate village has ended its bowhead whale subsistence hunt or exhausted its quota, whichever comes first, as follows. For Kaktovik, there will not be any geophysical activity from the Canadian border to the Canning River from August 25th to September 20th. For Nuiqsut, there will not be any geophysical activity from the Canning River to Point Storkersen from August 25th to September 25th . For Barrow, there will not be any geophysical activity from Pitt Point in Smith Bay to a location about half way between Barrow and Peard Bay from September 10th to October 25th.

In the Chukchi Sea, once fall bowhead whaling starts, seismic operators (and others) will take all reasonable steps to avoid adverse effects on the bowhead whale subsistence hunt and on the behavior of migrating bowhead whales. If alerted to an adverse effect, the operators will promptly reduce the level and volume of geophysical operations and if such adverse effects continue, operators should promptly move operations to an area where seismic operations are feasible and consistent with the CAA. If adverse effects continue and negotiations are unsuccessful, the seismic operations are to cease in the area of the reported adverse effect until the affected village has completed its bowhead whale hunting for 2006.

If requested, post-season meetings will also be held to assess the effectiveness of the 2006 CAA, to address how well conflicts (if any) were resolved; and to receive recommendations on any changes (if any) might be needed in the implementation of future CAAs. The Programmatic CAA for the Beaufort and Chukchi Seas was signed by Shell on May 12, 2006. A signed CAA provides NMFS with information to make a determination that the activity will not have an unmitigable adverse impact on the subsistence use of marine mammals.

Additional Mitigation and Monitoring Measures

As part of NMFS' week-long open-water meeting in Anchorage, on April 19–20, 2006, participants had a discussion on appropriate mitigation and monitoring measures for Arctic Ocean seismic activities in 2006. In addition to the standard mitigation and monitoring measures, additional measures, such as expanded monitoring-safety zones for bowhead and gray whales, and having those zones monitored effectively, have been implemented in order for NMFS to make its FONSI under NEPA. The additional mitigation measures are specific for this project. They do not establish NMFS policy applicable to other projects or other locations under NMFS' jurisdiction, as each application for an IHA is context dependent, that is, judged independently as to which measures are practicable and necessary to reduce impacts to the lowest level and to ensure that takings do not have an unmitigable adverse impact on subsistence uses. These measures have been developed based upon available data specific to the project areas. NMFS and MMS intend to collect additional information from all sources, including industry, non-governmental organizations, Alaska Natives and other federal and state agencies regarding measures necessary for effectively monitoring marine mammal populations, assessing impacts from seismic on marine mammals, and determining practicable measures for mitigating those impacts. MMS and NMFS anticipate that mitigation measures applicable to future seismic and other activities may change and evolve based on newly-acquired data.

Reporting

Shell will submit a report to NMFS approximately 90 days after completion of the 2006 survey season. The 90–day report will: (1) present the results of the 2006 shipboard marine mammal monitoring; (2) estimate exposure of marine mammals to industry sounds; (3) provide data on marine mammal sightings (e.g., species, numbers, locations, age/size/gender, environmental correlates); (4) analyze the effects of seismic operations (e.g., on sighting rates, sighting distances, behaviors, movement patterns); (5) provide summaries of power downs, shut downs, and ramp up delays; (6) provide an analysis of factors influencing detectability of marine mammals; and (7) provide summaries on communications with hunters and potential effects on subsistence activities.

Following the 2006 open water season, a single comprehensive report describing the acoustic, vessel-based, and aerial monitoring programs for all industrial seismic programs will be prepared. This comprehensive report will describe the methods, results, conclusions and limitations of each of the individual data sets in detail. The report will also integrate (to the extent possible) the studies into a broad based assessment of industry activities and their impacts on marine mammals in the Chukchi Sea during 2006. The report will help to establish long term data sets that can assist with the evaluation of changes in the Chukchi Sea ecosystem. The report will also incorporate studies being conducted in the Beaufort Sea and will attempt to provide a regional synthesis of available data on industry activity in offshore areas of northern Alaska that may influence marine mammal density, distribution and behavior.

This comprehensive report will consider data from many different sources including two relatively different types of aerial surveys; several types of acoustic systems for data collection, and vessel based observations. Collection of comparable data across the wide array of programs will help with the synthesis of information. However, interpretation of broad patterns in data from a single year is inherently limited. Many of the 2006 data will be used to assess the efficacy of the various data collection methods and to help establish protocols that will provide a basis for integration of the data sets over a period of years. Because of the complexity of this comprehensive report, NMFS is requiring that it be submitted in draft to NMFS by April 1, 2007 in order for consideration, review and comment at the 2007 open water meeting.

Endangered Species Act (ESA)

NMFS has issued a biological opinion regarding the effects of this action on ESA-listed species and critical habitat under the jurisdiction of NMFS. That biological opinion concluded that this action is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. A copy of the Biological Opinion is available upon request (see **ADDRESSES**).

NEPA

The MMS prepared a Draft PEA for the 2006 Arctic Outer Continental Shelf (OCS) Seismic Surveys. NMFS was a cooperating agency in the preparation of the MMS Draft and Final PEAs. NMFS noted that the MMS had prepared a PEA for the 2006 Arctic seismic surveys and made this Draft PEA available upon request (71 FR 26055, May 3, 2006). In accordance with NOAA Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20, 1999), NMFS has determined that the MMS Final PEA contains an in-depth and detailed description of the seismic survey activities, reasonable alternatives to the proposed action, the

affected environment, mitigation and monitoring measures identified to reduce impacts on the human environment to non-significant levels, and the potential effects of the action on the human environment. In view of the information presented in this document and the analysis contained in the supporting PEA, NMFS has determined therefore that issuance by NMFS of an IHA to Shell and other companies for conducting seismic surveys this year in the Arctic Ocean will not significantly impact the quality of the human environment as described above and in the supporting Final PEA.

This determination is predicated on full implementation of standard mitigation measures for preventing injury or mortality to marine mammals, in addition to the area and project specific mitigation measures described in this **Federal Register** notice. By incorporating the appropriate mitigation measures into NMFS' IHA conditions for this year's seismic survey operations, NMFS has determined that there will be no significant impact on the quality of the human environment. Accordingly, NMFS hereby adopts MMS' Final PEA and has determined that the preparation of an Environmental Impact Statement for this action is not necessary. A copy of the MMS Final PEA for this activity is available upon request and is available online (see **ADDRESSES**).
Conclusions

Summary

Based on the information provided in Shell's application and the MMS PEA, NMFS has determined that the impact of Shell conducting seismic surveys in the northern Chukchi Sea and eastern and central Beaufort Sea in 2006 will have a negligible impact on affected species or stocks of marine mammals and will not have an unmitigable adverse impact on their availability for taking for subsistence uses, provided the mitigation measures required under the authorization and CAA are implemented.

Potential Impacts on Marine Mammals

NMFS has determined that the impact of conducting relatively short-term seismic surveys in the U.S. Chukchi and Beaufort seas may result, at worst, in a temporary modification in behavior by certain species of marine mammals. While behavioral and avoidance reactions may be made by these species in response to the resultant noise, this behavioral change is expected to have a negligible impact on the affected species and stocks of marine mammals.

While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals in the area of seismic operations (as shown in Table 4–1 in the applications), which will vary annually due to variable ice conditions and other factors, the number of potential harassment takings is estimated to be small (see Tables 1 and 2 in this document).

In addition, no take by death or serious injury is anticipated, and the potential for temporary or permanent hearing impairment will be avoided through the incorporation of the mitigation measures contained in Shell's IHA. This determination by NMFS is supported by: the information in this **Federal Register** notice, including: (1) the likelihood that, given sufficient notice through slow ship speed and ramp-up of the seismic array, marine mammals are expected to move away from a noise source that is annoying prior to its becoming potentially injurious; (2) the fact that injurious levels would be very close to the vessel; and (3) the likelihood that marine mammal detection ability by trained observers is close to 100 percent during daytime and remains high at night close to the seismic vessel. Finally, no known rookeries, mating grounds, areas of concentrated feeding, or other areas of special significance for marine mammals are known to occur within or near the planned areas of operations during the season of operations.

Potential Impacts on Subsistence Uses of Marine Mammals

NMFS has determined that the proposed seismic activity by Shell in the northern Chukchi Sea and central and eastern Beaufort Sea in 2006, in combination with other seismic and oil and gas programs in these areas, will not have an unmitigable adverse impact on the subsistence uses of bowhead whales and other marine mammals. This determination is supported by the information in this **Federal Register** notice, including: (1) Seismic activities in the Chukchi Sea will not begin until after July 10 by which time the spring bowhead hunt is expected to have ended; (2) that the fall bowhead whale hunt in the Beaufort Sea will be governed by a CAA between Shell and the AEWC and village whaling captains; (3) the CAA conditions will significantly reduce impacts on subsistence hunters; (4) while it is possible that accessibility to belugas during the spring subsistence beluga hunt could be impaired by the survey, it is unlikely because very little of the proposed survey is within 25 km (15.5 mi) of the Chukchi coast, meaning the vessel will usually be well offshore and away from areas where seismic surveys would influence beluga hunting by communities; and (5) because seals (ringed, spotted, bearded) are hunted in nearshore waters and the seismic survey will remain offshore of the coastal and nearshore areas of these seals where natives would harvest these seals, it should not conflict with harvest activities.

Authorization

As a result of these determinations, NMFS has issued an IHA to Shell to take small numbers of marine mammals, by harassment, incidental to conducting a seismic survey in the northern Chukchi Sea and central and eastern Beaufort Sea in 2006, provided the mitigation, monitoring, and reporting requirements described in this document are undertaken.

Dated: August 18, 2006.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 06–7121 Filed 8–23–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 081806B]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Committee in September, 2006 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Wednesday, September 13, 2006, at 9 a.m.

ADDRESSES: This meeting will be held at the Holiday Inn, 700 Myles Standish Boulevard, Taunton, MA 02780: telephone: (508) 823–0430; fax: (508) 880–6480.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Committee will further develop alternatives for consideration in the Draft Supplemental Environmental Impact Statement (DSEIS) for Amendment 11. These final recommendations will be forwarded to the full Council for approval at the September 2006 Council Meeting. The Committee will also have a presentation on the updated exploitable estimate for the Elephant Trunk Area. No action is necessary by the Committee or Council - this is an informative report from the Scallop Plan Development Team. The Committee may consider other topics at their discretion.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 18, 2006.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E6–13988 Filed 8–23–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 081706F]

New England Fishery Management Council; Public Meetings

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

ACTION: Notice; public meetings.

SUMMARY: The New England Fishery Management Council's (NEFMC) Herring Oversight and Advisory Panel along with the Atlantic States Marine Fisheries Commission (ASMFC) Section and Advisory Panel will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meetings will be held in September 2006. For specific dates and times, see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The meetings will be held at the Sheraton Ferncroft, 50 Ferncroft Road, Danvers, MA; telephone: (978) 777–2500.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

Monday, September 11, 2006 - Joint NEFMC and ASMFC Advisory Panel Meeting, at 10 a.m.

1. Review alternatives under consideration for 2007–09 herring fishery specifications and additional background information/analysis.

2. Discuss 2007–09 specifications and develop joint advisory panel recommendations regarding: allowable biological catch (ABC), domestic annual harvesting (DAH), domestic annual processing (DAP), joint venture processing (JVP), total allowable level of foreign fishing (TALFF), border transfer (BT), U.S. at-sea processing (USAP), optimum yield (OY) and area-specific total allowable catches area-specific (TACs), Research Set-Asides (RSAs)and set-asides for fixed gear fisheries.

3. Discuss ASMFC-only issues for 2007–09 Fishery Specifications and develop Advisory Panel recommendations.

Tuesday, September 12, 2006 - Joint NEFMC Herring Oversight Committee and ASMFC Section Meeting, at 9 a.m.

1. Review alternatives under consideration for 2007–09 fishery specifications and additional background information/analysis.

2. Receive report from Joint Herring Advisory Panel meeting and summary of panel's recommendations.

3. Discuss Amendment 1 submission status and related issues.

4. Discuss 2007–09 specifications and develop Herring Committee and Section recommendations regarding: ABC, DAH, DAP, JVP, TALFF, BT, USAP, OY, TACs, RSA and set-asides for fixed gear fisheries.

5. ASMFC Section: Discuss ASMFC-only issues for 2007–09 Fishery Specifications and develop recommendations.

Although non-emergency issues not contained in the agenda may come before these groups for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the NEFMC's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**), at least 5 working days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 18, 2006.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E6–13989 Filed 8–23–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 081706D]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Habitat/MPA/Ecosystem Committee Meeting in September, 2006 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting will be held on Thursday, September 7, 2006, at 9 a.m.

ADDRESSES: The meeting will be held at the Hampton Inn, One Hampton Way,

Fairhaven, MA 02719: telephone: (508) 990–8500; fax: (508) 990–0183.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Committee will review and recommend for Council consideration essential fish habitat (EFH) designation alternatives for inclusion in Phase 1 of the EFH Omnibus Amendment 2 for Atlantic salmon and Deep-sea red crab. The committee will also review and recommend for Council consideration a range of habitat areas of particular concern (HAPC) alternatives for inclusion in Phase 1 of the EFH Omnibus Amendment 2. In addition, the committee will review and recommend for Council consideration a prey species identification section for inclusion in Phase 1 of the EFH Omnibus Amendment 2 for all Council-managed species. The Committee will also review a non-fishing impacts section for inclusion in Phase 1 of the EFH Omnibus Amendment 2 as well as discuss and consider topics covered at the August 15, 2006 Habitat Advisory Panel meeting. Other topics may be covered at the committee's discretion.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 18, 2006.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E6–13991 Filed 8–23–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 081706C]

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public committee meeting.

SUMMARY: The North Pacific Fishery Management Council's (Council) Crab Plan Team will meet in Anchorage, AK.

DATES: The meeting will be held on September 13, 14 and 15, 2006. See **SUPPLEMENTARY INFORMATION** for specific times.

ADDRESSES: The meeting will be held at the Captain Cook Hotel, Quadrant Room, 4th and K Street, Anchorage, AK.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Diana Stram, North Pacific Fishery Management Council; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The meeting will be held on Wednesday, September 13, from 9 a.m. to 5 p.m., Thursday, September 14, from 9 a.m. to 5 p.m., and Friday, September 15, from 9 a.m. to 2 p.m.

The agenda includes the following: Review crab overfishing definitions; review NMFS and Alaska Department of Fish & Game (ADF&G) surveys; review model and assessment results from Bristol Bay Red King Crab and Bering Sea Snow Crab; review and compile the Stock Assessment Fishery Evaluation Report; make recommendations on crab bycatch and Essential Fish Habitat considerations; discuss issues and timing for May 2007 meetings; other business.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen, (907) 271–2809, at least 5 working days prior to the meeting date.

Dated: August 18, 2006.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E6–13990 Filed 8–23–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 081706E]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meetings.

SUMMARY: The Pacific Fishery Management Council's (Council) Salmon Advisory Subpanel (SAS) will hold a work session by telephone conference, which is open to the public, to develop recommendations for the September Council meeting.

DATES: The telephone conference will be held Thursday, September 7, from 1 p.m. to 4 p.m.

ADDRESSES: A listening station will be available at the Pacific Fishery Management Council, Small Conference Room, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384; telephone: (503) 820–2280.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck Tracy, Salmon Management Staff Officer, Pacific Fishery Management Council: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The purpose of the work session is to review information in the Council briefing book related to salmon and Pacific halibut management, and to develop comments and recommendations for consideration at the November Council meeting.

Although non-emergency issues not contained in the meeting agenda may come before the SAS for discussion, those issues may not be the subject of formal SAS action during this meeting.

SAS action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the SAS's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: August 18, 2006.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E6–13992 Filed 8–23–06; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No.: PTO–C–2006–0039]

Request for Comments on USPTO's Draft Strategic Plan for FY 2007–2012

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Request for comments.

SUMMARY: The United States Patent and Trademark Office (USPTO) solicits comments on its draft strategic plan for 2007–2012. The Government Performance and Results Act of 1993 (GPRA) requires Federal agencies to establish a strategic plan covering not less than five years, and to solicit the views and suggestions of those entities potentially affected by or interested in the plan.

The USPTO's current plan, *The 21st Century Strategic Plan* for 2003–2008, may be viewed on the USPTO Web site at *http://www.uspto.gov* as can the agency's draft plan for 2007–2012.

DATES: Written comments must be received by October 6, 2006. A public forum on Strategic Plan 2007–2012 will be held on Tuesday, September 26, 2006, from 9 a.m. until noon. Those wishing to present oral comments at the forum should register no later than September 19, 2006.

ADDRESSES: The September 26, 2006 public forum will be held at USPTO Headquarters, 600 Dulany Street, Madison West, Room 10D31, Alexandria, VA 22313–1450. Those interested in presenting oral comments or written comments on the draft strategic plan should send their request or written comments to the USPTO by any of the following methods: electronically via a special e-mail address: *StrategicPlanning1@uspto.gov;* by fax to 571–273–0127, Attention: USPTO Strategic Plan Coordinator; by hand delivery or courier to the USPTO Strategic Plan Coordinator, 600 Dulany Street, Madison East, Room 7A45, Alexandria, VA 22313–1450; by mail sent to: The USPTO Strategic Plan Coordinator, P.O. Box 1450, Alexandria, VA 22313–1450.

To ensure timely receipt of your comments, we strongly encourage responses via e-mail, fax, or hand/courier delivery.

FOR FURTHER INFORMATION CONTACT: Joan Bolton, United States Patent and Trademark Office, by telephone at 571–272–6290.

SUPPLEMENTARY INFORMATION: GPRA requires Federal agencies to establish a strategic plan covering not less than a five-year period, and to solicit the views and suggestions of those entities potentially affected by or interested in the plan. This notice represents one in a series of consultations seeking input from a variety of sources on the USPTO's draft strategic plan. On March 14, 2006, the USPTO posted a notice on its Web site soliciting public input and establishing an e-mail box (*StrategicPlanning1@uspto.gov*) for the public's use in submitting suggestions, ideas and comments that the agency should consider in developing the new plan. USPTO employees also were given the opportunity to provide input, either via e-mail or anonymously via USPTO's intranet site.

The draft strategic plan for 2007–2012 is available on the USPTO's Web site at *http://www.USPTO.gov.* The draft plan includes the USPTO's mission statement, vision statement and a description of the strategic goals, objectives and significant actions that the USPTO plans to take in order to accomplish its mission and achieve its vision. Full details on how the USPTO plans to implement the strategic plan, including funding and performance metrics, will be included in the USPTO's fiscal year 2008 President's Budget.

The USPTO would like to receive input from a wide range of organizations (both national and international), public bodies, and other stakeholders. We especially encourage the views and suggestions of individuals and entities holding or dealing with intellectual property, and USPTO employees.

The USPTO anticipates publishing the final Strategic Plan for 2007–2012 in early calendar year 2007, and making it available on our Web site at that time.

Dated: August 21, 2006.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E6–14074 Filed 8–23–06; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Intent To Prepare an Environmental Impact Statement for the Transfer of Cannon Air Force Base and Melrose Air Force Range From Air Combat Command to Air Force Special Operations Command

AGENCY: Department of the Air Force, Air Force Special Operations Command, DoD.

ACTION: Notice of intent.

SUMMARY: In accordance with the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321–4347), the Council on Environmental Quality (CEQ) NEPA Regulations (40 Code of Federal Regulations [CFR] parts 1500–1508), and the United States Air Force's (USAF) Environmental Impact Analysis Process (EIAP, 32 CFR part 989), the Air Force is preparing an EIS to consider the proposed action of transferring certain Air Force Special Operations equipment and personnel to Cannon AFB. The Air Force proposes to transfer aircraft and personnel from Hurlburt Field, Florida, or other existing operational locations to Cannon AFB, New Mexico. Potential AFSOC assets to beddown include aircraft, weapons systems, equipment, and personnel. Growth is planned through Fiscal Year 2013 at Cannon AFB, and AFSOC proposes to begin utilizing Melrose Air Force Range (AFR), existing training airspace, and existing Military Training Routes from Cannon AFB. This NOI describes the Air Force's scoping process and identifies the Air Force's point of contact. As part of the proposal, the Air Force will analyze potential environmental impacts associated with the proposed aircraft, equipment, and personnel transfer, beddown, training, and operations.

Background: On June 19, 2006, in accordance with the 2005 Defense Base Closure and Realignment Commission Report, the SECDEF designated the AFSOC's establishment of the 16th Special Operations Wing at Cannon

AFB, beginning October 2007, as the new mission for that base. The EIS will analyze the impacts of that proposed action on the environment. AFSOC is considering what aircraft and other equipment to base at Cannon AFB, how best to utilize existing facilities, and what facilities will need to be modified or built. The proposed action will consider moving approximately 90 aircraft and approximately 3,500 personnel to the base. It is possible that additional facilities may need to be constructed at Melrose AFR. The impacts from the proposed actions will be considered in the EIS. In addition, the EIS will also address alternatives to the proposed action, including a ''no action'' alternative. Because the proposed action is to be taken as the result of the BRAC directive to the SECDEF to designate a new mission for Cannon AFB, the basing/installation alternative will be limited to the confines of Cannon AFB and Melrose AFR; however, the airspace alternatives will include Melrose AFR, surrounding Military Training Routes and Military Operations Areas (MOAs) including the Mt Dora MOA, Pecos MOA Complex and Bronco MOA.

DATES: The Air Force will hold a series of scoping meetings to solicit public input concerning the scope of the proposed action and alternatives, as well as to help identify other concerns and issues to be addressed in the environmental analysis. The scheduled dates, times, locations, and addresses for the scoping meetings are as follows:

1. September 18, 2006—Monday, 6–8 p.m., at Clovis and Portales, NM, Clovis Community College, 417 Schepps Blvd.

2. September 19, 2006—Tuesday, 6–8 p.m., at Clayton, NM, Clayton High School, 323 South Fifth Street.

3. September 20, 2006—Wednesday, 6–8 p.m., at Fort Sumner, NM, Fort Sumner Community House, 137 East Baker Avenue.

No additional meetings are scheduled at this time. In addition to comments received at the scoping meetings, any written comments on the scope of the EIS received at the address below by October 5, 2006, will be considered in the preparation of this EIS.

FOR FURTHER INFORMATION CONTACT: Mr. Carl T. Hoffman, HQ AFSOC/A7CV, 427 Cody Ave., Suite 225, Hurlburt Field, FL 32544–5434, (850) 884–5984.

Bao-Anh Trinh,

DAF, Air Force Federal Register Liaison Officer.

[FR Doc. E6–14031 Filed 8–23–06; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant Partially Exclusive Patent License; Omega Sensors, Inc.

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant to Omega Sensors, Inc., a revocable, non-assignable, partially exclusive license in the United States to practice the Government-owned invention described in U.S. Patent Pending, entitled ''Method of fabricating a dual-suspension system for MEMS-based devices'', Navy Case Number 96659.

DATES: Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than September 8, 2006.

ADDRESSES: Written objections are to be filed with the Office of Research and Technology Applications, Space and Naval Warfare Systems Center, Code 2112, 83570 Silvergate Ave., Room 2306, San Diego, CA 92152–5048.

FOR FURTHER INFORMATION CONTACT: Dr. Stephen H. Lieberman, Office of Research and Technology Applications, Space and Naval Warfare Systems Center, Code 2112, 83570 Silvergate Ave., Room 2306, San Diego, CA 92152–5048, telephone 619–553–2778, or e-mail: *stephen.lieberman@navy.mil*.

(Authority: 35 U.S.C. 207, 37 CFR part 404.)

Dated: August 15, 2006.

M.A. Harvison,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E6–14028 Filed 8–23–06; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant Exclusive Patent License; Tessarae Inc.

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant to Tessarae Inc., a revocable, non-assignable, exclusive license to practice in the field of use defined as design process, systems and applications utilizing high-density resequencing microarrays (greater than 100,000 features per array and less than 500 square micron feature size), and manufacturable under good practice standards in batch quantities greater than 1,000 arrays (such as CustomSeq resequencing microarrays fabricated by Affymetrix, Inc.), for screening, diagnosis where approved by the appropriate local government health authority, and/or surveillance of pathogen induced disease in the U.S. and certain foreign countries, the Government-owned inventions described in Navy Case No. 96,744: COMPUTER-IMPLEMENTED BIOLOGICAL SEQUENCE IDENTIFIER SYSTEM AND METHOD.//Navy Case No. 97,439: BROAD-SPECTRUM PATHOGEN DIAGNOSTIC AND SURVEILLANCE SYSTEM.//Navy Case No. 97,747: AUTOMATED SAMPLE-TO-MICROARRAY SYSTEM.//Navy Case No. 97,748: OPTIMIZED PATHOGEN RESEQUENCING DIAGNOSTIC AND SURVEILLANCE SYSTEM.//Navy Case No. 98,057: RAPID DETECTION FOR OVER 20 RESPIRATORY PATHOGENS SIMULTANEOUSLY IN CLINICAL SAMPLES USING RESEQUENCING ARRAYS AND ANY CONTINUATIONS, DIVISIONALS OR RE-ISSUES THEREOF.

DATES: Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than September 8, 2006.

ADDRESSES: Written objections are to be filed with the Naval Research Laboratory, Code 1004, 4555 Overlook Avenue, SW., Washington, DC 20375–5320.

FOR FURTHER INFORMATION CONTACT: Head, Technology Transfer Office, NRL Code 1004, 4555 Overlook Avenue, SW., Washington, DC 20375–5320, telephone 202–767–7230. Due to U.S. Postal delays, please fax 202–404–7920, e-mail *techtran@utopia.nrl.navy.mil*, or use courier delivery to expedite response.

(Authority: 35 U.S.C. 207, 37 CFR part 404.)

Dated: August 18, 2006.

M.A. Harvison,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E6–14026 Filed 8–23–06; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: Department of Energy.

ACTION: Submission for Office of Management and Budget (OMB) review; comment request.

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to extend for three years the information collection package entitled, ''Chronic Beryllium Disease Prevention Program.'' Comments are invited on: (a) Whether the extended information collections are necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the information collections, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this collection must be received on or before September 25, 2006. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at 202–395–4650.

ADDRESSES: Written comments should be sent to: DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street, NW., Washington, DC 20503.

Comments should also be addressed to: Jeffrey Martus, IM–11/Germantown Building, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585–1290, or by fax at 301–903–9061 or by e-mail at *Jeffrey.martus@hq.doe.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Jeffrey Martus at the address listed above in **ADDRESSES**.

SUPPLEMENTARY INFORMATION: The information collection packages listed in this notice for public comment include the following:

(1) *OMB No.:* 1910–5112.

(2) *Package Title:* Chronic Beryllium Disease Prevention Program.

(3) *Type of Review:* Renewal.

(4) *Purpose:* This information is used by DOE and DOE contractor employers to manage chronic beryllium disease prevention programs, to provide information to employees, and to permit oversight of their programs by DOE management.

(5) *Respondents:* 1,703.

(6) *Estimated Burden Hours:* 32,952.

Statutory Authority: Department of Energy Organization Act, Public Law 95–91.

Jeffrey Martus,

Records Management Division, Office of the Chief Information Officer.

[FR Doc. E6–14046 Filed 8–23–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[Docket No. EA–260–B]

Application To Voluntarily Transfer Export Authority EPCOR Merchant and Capital (U.S.) Inc.

AGENCY: Office Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of Application.

SUMMARY: EPCOR Merchant and Capital (U.S.) Inc. (EMC) has applied to voluntarily transfer to EPCOR Energy Marketing (U.S.) Inc. (EEM) its authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests or requests to intervene must be submitted on or before September 8, 2006.

ADDRESSES: Comments, protests or requests to intervene should be addressed as follows: Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (FAX 202–586–5860).

FOR FURTHER INFORMATION CONTACT: Steven Mintz (Program Office) 202–586–9506 or Michael Skinker (Program Attorney) 202–586–2793.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)).

On April 8, 2002, the Department of Energy (DOE) issued Order No. EA-260 authorizing EMC to transmit electric energy from the United States to Canada as a power marketer using existing international electric transmission facilities. That two-year authorization expired on April 8, 2004. On July 8, 2004, DOE received an application from EMC to renew its authorization to transmit electric energy from the United States to Canada. On October 13, 2004, that renewal was granted in Order No. EA–260–A and will expire on April 9, 2009.

On July 13, 2006, DOE received an application from EMC to voluntarily transfer its export authority to EEM. EEM was formed to assume the duties previously undertaken by EMC, including the exporting of electric energy to Canada. EEM is a Delaware corporation with its principal place of business in Calgary, Alberta, Canada. EEM is an indirect, wholly-owned subsidiary of EPCOR Utilities Inc. of Edmonton, Alberta, Canada. EEM is a power marketer that does not own or control any electric generation or transmission facilities nor does it have a franchised service territory in the United States.

In OE Docket No. EA–260–B, EEM proposes to export electric energy to Canada and to arrange for the delivery of those exports over the international transmission facilities currently owned by Basin Electric Power Cooperative, Bonneville Power Administration, Eastern Maine Electric Cooperative, International Transmission Company, Joint Owners of the Highgate Project, Long Sault, Inc., Maine Electric Power Company, Maine Public Service Company, Minnesota Power, Inc., Minnkota Power Cooperative, New York Power Authority, Niagara Mohawk Power Corporation, Northern States Power, and Vermont Electric Transmission Company and Vermont Electric Transmission Co.

The construction of each of the international transmission facilities to be utilized by EEM, as more fully described in its application, has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

The applicant has requested expedited processing of this application so that it may proceed with the proposed transfer. Accordingly, DOE has shortened the public comment period to 15 days.

Procedural Matters: Any person desiring to become a party to this proceeding or to be heard by filing comments or protests to this application should file a petition to intervene, comment or protest at the address provided above in accordance with 385.211 or 385.214 of the Federal Energy Regulatory Commission's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with the DOE on or before the date listed above.

Comments on the EMC application to voluntarily transfer their export authorization to EEM should be clearly

marked with Docket EA–260–B. Additional copies are to be filed directly with Lee Bui, Transaction Accounting Assistant, EPCOR Energy Marketing (U.S.) Inc., EPCOR Place, 8th Floor, 505 2nd Street, SW., Calgary, Alberta T2P 1N8, Canada *and* Sandra E. Rizzo, Esq. Preston Gates Ellis, & Rouvelas Meeds, LLP, 1735 New York Avenue, NW., Suite 500, Washington, DC 20006.

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969, and a determination is made by the DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above or by e-mailing Odessa Hopkins at *Odessa.hopkins@hq.doe.gov.*

Issued in Washington, DC, on August 17, 2006.

Anthony J. Como,

Director, Permitting and Siting Office of Electricity Delivery and Energy Reliability.

[FR Doc. E6–14044 Filed 8–23–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Notice of Availability; Draft Environmental Impact Statement for the Orlando Gasification Project

AGENCY: Department of Energy.

ACTION: Notice of availability and public hearings.

SUMMARY: The U.S. Department of Energy (DOE) announces the availability of the document, Draft Environmental Impact Statement for the Orlando Gasification Project (DOE/EIS–0383), for public comment. The draft environmental impact statement (EIS) analyzes the potential environmental consequences of providing federal funding for the design, engineering, construction, and operation of facilities at Orlando Utilities Commission's (OUC's) existing Stanton Energy Center near Orlando, Florida. The project has been selected by DOE for further consideration under the Clean Coal Power Initiative (CCPI) to demonstrate advanced power generation systems using Integrated Gasification Combined Cycle (IGCC) technology. DOE has awarded a cooperative agreement to SCS for a project definition phase during which SCS will complete a detailed Project Management Plan, prepare environmental information and permit applications, and perform Front-End Engineering Design activities.

The Department prepared this draft EIS in accordance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality (CEQ) regulations that implement the procedural provisions of NEPA (40 CFR parts 1500–1508), and the DOE procedures implementing NEPA (10 CFR part 1021).

DOE's proposed action (and preferred alternative) is to provide cost-shared funding to design, construct, and operate the Orlando Gasification Project. Although DOE funding would support only the Orlando Gasification Project (*i.e.*, coal gasifier, synthesis gas cleanup systems, and supporting infrastructure), the project would be integrated with a planned, privately funded, combined-cycle unit, which together would constitute the IGCC facilities. The facilities would convert coal into synthesis gas to drive a gas combustion turbine, and hot exhaust gas from the gas turbine would generate steam in a heat recovery steam generator (HRSG) to drive a steam turbine. Combined, the two turbines would generate 285 MW (megawatts) of electricity. The potential environmental impacts of this action are evaluated in this Draft EIS. DOE also analyzed the No-Action Alternative (not funding the demonstration), including a scenario reasonably expected to result as a consequence of the no-action alternative. Without DOE participation, Southern Company and/or OUC could reasonably pursue at least one option. The combined-cycle facilities could be built at the Stanton Energy Center without the gasifier, synthesis gas cleanup systems, and supporting infrastructure.

DATES: DOE invites the public to comment on the Draft EIS during the public comment period, which ends October 10, 2006. DOE will consider all comments postmarked or received during the public comment period in preparing the Final EIS, and will consider late comments to the extent practicable.

DOE will hold a public hearing on September 13, 2006, at Timber Creek High School, 1001 Avalon Park Boulevard, Orlando, Florida, 7 p.m. to 9 p.m. An informational session will be held at the same location from 5 p.m. to 7 p.m., preceding the public hearing on the date noted above.

ADDRESSES: Requests for information about this Draft EIS or to receive a copy of the Draft EIS should be directed to: Richard A. Hargis, Jr., NEPA Document Manager, U.S. Department of Energy, National Energy Technology Laboratory, M/S 922–342C, P.O. Box 10940, Pittsburgh, PA 15236. Additional information about the Draft EIS may also be requested by telephone at: (412) 386–6065, or toll-free at: (888) 322–7436, x6065.

The Draft EIS will be available at *http://www.eh.doe.gov/nepa/.* Copies of the Draft EIS are also available for review at the locations listed in the **SUPPLEMENTARY INFORMATION** section of this Notice. Written comments on the Draft EIS can be mailed to Richard A. Hargis, Jr., NEPA Document Manager, at the address noted above. Written comments may also be submitted by fax to: (412) 386–4775, or submitted electronically to: *hargis@netl.doe.gov.* Oral comments on the Draft EIS will be accepted only during the public hearing scheduled for the date and location provided in the **DATES** section of this Notice. Requests to speak at the public hearing can be made by calling or writing the EIS Document Manager (see **ADDRESSES**). Requests to speak that have not been submitted prior to the hearing will be accepted in the order in which they are received during the hearing. Speakers are encouraged to provide a written version of their oral comments for the record. Each speaker will be allowed five minutes to present comments unless more time is requested and available. Comments will be recorded by a court reporter and will become part of the public hearing record.

FOR FURTHER INFORMATION CONTACT: For further information on the proposed project or the draft environmental impact statement, please contact Mr. Richard A. Hargis, Jr., as directed above. For general information regarding the DOE NEPA process, please contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (EH–42), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, Telephone: (202) 586–4600, or leave a message at: (800) 472–2756.

SUPPLEMENTARY INFORMATION:

Description of Alternatives

DOE analyzed two alternatives in the Draft EIS: The proposed action and the no-action alternative. Under the proposed action, DOE would provide cost-shared funding for construction and operation of gasification facilities at Orlando Utilities Commission's (OUC's) existing Stanton Energy Center near Orlando, Florida. The project has been selected by DOE under the Clean Coal Power Initiative (CCPI) to demonstrate advanced power generation systems

using Integrated Gasification Combined Cycle (IGCC) technology. Although DOE funding would support only the Orlando Gasification Project (*i.e.*, coal gasifier, synthesis gas cleanup systems, and supporting infrastructure), the project would be integrated with a planned, privately funded, combined-cycle unit, which together would constitute the IGCC facilities. The facilities would convert coal into synthesis gas to drive a gas combustion turbine, and hot exhaust gas from the gas turbine would generate steam from water to drive a steam turbine. Combined, the two turbines would generate 285 MW (megawatts) of electricity. The EIS evaluates potential impacts of the proposed facilities on land use, aesthetics, air quality, geology, water resources, floodplains, wetlands, ecological resources, social and economic resources, waste management, human health and safety, and noise.

Construction of the proposed facilities would begin in late 2007 and continue until early 2010. An average of about 350 construction workers would be on the site during construction. Approximately 600 to 700 workers would be required during the peak construction period between fall 2008 and spring 2009. After mechanical checkout of the proposed facilities, demonstration (including data analysis and process evaluation) would be conducted over a 4.5-year period from mid 2010 until late 2014. If the demonstration is successful, commercial operation would follow immediately. The combined workforce (*i.e.*, including the proposed Orlando Gasification Project and the combined-cycle generating unit) would consist of approximately 72 employees added to the existing Stanton Energy Center staff of 204 employees. Of the 72 new employees, 19 workers would provide support only during the startup and demonstration phases of the project, while 53 employees would be needed over the lifetime of the facilities (*i.e.*, during startup, demonstration, and commercial operation), unless the gasifier and related equipment would no longer be required because the demonstration was unsuccessful.

Under this latter scenario, only 21 employees would be needed over the lifetime of the remaining combined-cycle unit using natural gas exclusively. The facilities would be designed for a lifetime of at least 20 years, including the 4.5-year demonstration period. The new coal gasifier would operate entirely on coal, consuming a total of approximately 1,020,000 tons per year to produce synthesis gas. Two to three trains per week would deliver low-sulfur subbituminous coal from the Powder River Basin in Wyoming. The heating value of the coal would average about 8,760 Btu/lb and the sulfur content would average about 0.26%. Most air emissions would result from combustion of synthesis gas in the gas combustion turbine during normal operations. The exhaust gas would be released to the atmosphere via a 205 ft stack.

Sources of air emissions from the proposed facilities would include the HRSG stack, startup stack, multipoint flare, and 6-cell mechanical-draft cooling tower, of which the HRSG stack would generate the most emissions. Except during occasional startups, shutdowns, and upsets, the flare would normally have only minimal emissions associated with eight natural gas-fired pilot lights. Based on 100% load throughout the year (100% capacity factor) using the higher of estimated synthesis gas or natural gas emission rates, annual emissions of criteria pollutants would include 162 tons of SO_2, 1,006 tons of NO_X, 189 tons of particulate matter, 654 tons of carbon monoxide (CO), and 0.03 tons of lead (Pb). Annual NO_X emissions from the Stanton Energy Center overall would not be expected to increase because OUC has agreed, as part of the permitting process, to reduce NO_X emissions from other units at the Stanton Energy Center so that there would be a net decrease in NO_X emissions. Annual emissions of volatile organic compounds (VOCs), a precursor of the criteria pollutant ozone, would be 129 tons.

Under the No Action Alternative, DOE would not provide cost-shared funding to demonstrate the Orlando Gasification Project. Without DOE participation, Southern Company and/or OUC could reasonably pursue at least one option. The combined-cycle facilities could be built at the Stanton Energy Center without the gasifier, synthesis gas cleanup systems, and supporting infrastructure. The combined-cycle facilities would operate using natural gas as fuel without the availability of synthesis gas. During operation of the natural gas-fired unit, emissions of air pollutants (*e.g.*, SO_2 and NO_X) would be less than those predicted for the proposed Orlando Gasification Project. The flare required for the proposed facilities would not be required. This scenario would not provide a low-cost fuel source for the combined-cycle facilities and would not contribute to the goal of the CCPI program, which is to accelerate commercial deployment of advanced coal technologies that provide the United States with clean, reliable, and affordable energy.

Availability of the Draft EIS

Copies of this Draft EIS have been distributed to Members of Congress, Federal, State, and local officials, and agencies, organizations and individuals who may be interested or affected. This Draft EIS will be available on the Internet at: *http://www.eh.doe.gov/nepa/*. Additional copies can also be requested by telephone at: (412) 386–6065, or (888) 322–7436, x6065. Copies of the Draft EIS are also available for public review at the Alafaya Library, 1200 E. Colonial Dr., Orlando, Florida, 32803.

Issued in Washington, DC, on August 18, 2006.

Mark J. Matarrese,

Director, Office of Environment, Security, Safety and Health, Office of Fossil Energy.

[FR Doc. 06–7093 Filed 8–23–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy; Carbon Nanotubes for On-Board Hydrogen Storage Go/No-Go Decision

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy (DOE).

ACTION: Notice of request for technical input to go/no-go decision.

SUMMARY: The Department of Energy (the Department or DOE), Hydrogen, Fuel Cells and Infrastructure Technologies Program, is requesting position papers or other technical documentation regarding carbon nanotubes for on-board hydrogen storage systems by September 15, 2006. This information will be used as part of DOE's go/no-go process in determining the future of applied research and development of carbon nanotubes for on-board hydrogen storage.

DATES: Written position papers or other technical documentation for consideration by the Department regarding this decision are welcome. Documents may be submitted via e-mail or as hard copies but must be received by September 15, 2006.

ADDRESSES: For hard copies, please submit 2 copies of all documents to: U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Mail Station EE–2H, Attn: Dr. Sunita Satyapal, 1000 Independence Avenue, SW., Washington, DC 20585–0121. For e-mail submissions, send documents to

brinda.thomas@ee.doe.gov and *laura.verduzco@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Sunita Satyapal, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Mail Station EE–2H, 1000 Independence Avenue, SW., Washington, DC 20585–0121, Phone: (202) 586–2336, e-mail: *sunita.satyapal@ee.doe.gov.*

SUPPLEMENTARY INFORMATION: The mission of the Department of Energy's Hydrogen, Fuel Cells and Infrastructure Technologies Program is to research, develop and validate fuel cell and hydrogen production, delivery, and storage technologies, such that hydrogen from diverse domestic resources will be used in a clean, safe, reliable and affordable manner in fuel cell vehicles, central station electric power production, distributed thermal electric, and combined heat and power applications. The President's Hydrogen Fuel Initiative, launched in 2003, accelerates research, development and demonstration of hydrogen production, delivery and storage technologies to enable technology readiness. A critical requirement for achieving technology readiness is the development of on-board hydrogen storage systems with enough storage capacity to meet driving range expectations (more than 300 miles in the United States), while meeting a number of requirements such as weight, volume and cost. Detailed technical targets developed by DOE, with input through the FreedomCAR and Fuel Partnership, are available at: *http://www1.eere.energy.gov/hydrogenandfuelcells/mypp/pdfs/storage.pdf.*

The DOE Hydrogen Program initiated research to develop single wall carbon nanotubes as a storage medium for hydrogen in the early 1990s. At that time, the overall Program had limited resources and storage research and development (R&D) was limited to just a few material classes. Initial hydrogen capacity measurements on nanotubes had appeared promising, but some of these results were subsequently found not to be reproducible. Uncertainty in the performance of carbon nanotubes as a storage material grew as other research groups initiated their own efforts on this material and published hydrogen capacity results ranging from 0 to well over 6 wt.%. Importantly, the differences in hydrogen capacity could not be correlated with specific carbon nanotube synthesis methods or with various properties of the carbon nanotube structure. Although the number of publications and the worldwide level of effort on carbon nanotube R&D have continued to grow and important progress has been achieved, uncertainties remain concerning hydrogen storage capacity.

Subsequent to the DOE's no-go decision for on-board fuel processing of gasoline in 2004 (see: *http://www1.eere.energy.gov/hydrogenandfuelcells/pdfs/committee_report.pdf*), the strategy for fueling fuel cell vehicles shifted from an on-board reformer-based fuel system to the development of technologies and infrastructure to produce, store, and distribute hydrogen for on-board storage and use in direct-hydrogen fuel cell vehicles. Development of viable on-board hydrogen storage systems became a critical element within the Program. Consequently, the hydrogen storage Program has greatly expanded and restructured into a ''National Hydrogen Storage Project'' including three Centers of Excellence and independent projects covering a diverse portfolio of hydrogen storage R&D. Each Center of Excellence is focusing on a class of storage materials—metal (reversible) hydrides, chemical hydrides (non-reversible) and carbon (and other hydrogen adsorbent) materials—and each has university, industry and national lab partners pursuing and leveraging their specific expertise in different areas. The Program has also expanded basic science efforts and coordination between DOE's Office of Energy Efficiency and Renewable Energy and Office of Science (see *www.hydrogen.energy.gov*).

Within the current storage sub-Program portfolio, there are a number of promising storage materials being studied which have the potential for hydrogen storage capacities comparable to, or greater than initially envisioned for carbon nanotubes. For example, modeling studies of metal-modified carbon fullerene structures suggest that they hold promise for achieving high hydrogen capacities. Non-carbon structures, such as metal-oxide frameworks, are also being pursued in the Center of Excellence for carbon-based materials. On-board hydrogen storage systems must be developed which are safe, low cost and have high volumetric and gravimetric energy capacities. Periodic assessments and decision points on specific material technologies are included within the hydrogen storage sub-Program to meet the required performance targets within the Program timeframe.

The DOE will make a decision regarding the future of pure carbon nanotubes for on-board hydrogen storage activities within the Hydrogen, Fuel Cells and Infrastructure Technologies Program in October 2006. DOE will review the current state of carbon nanotube activities against technical criteria and base its pure carbon single-wall nanotube go/no-go decision on an analysis of:

(1) The technical progress to date on the demonstrated capacity for hydrogen storage in pure, undoped carbon single-walled nanotubes (SWNTs) and whether SWNTs have met the criterion of 6 weight percent hydrogen storage (on a materials basis) at room temperature, and

(2) Whether a technically viable pathway exists to meet the original criterion of 6 weight percent at room temperature using either pure, undoped SWNTs or a ''hybrid'' approach (*e.g.*, metal doped nanotubes).

DOE will consider whether its 2007 or 2010 system targets can be met using available pure nanotube technology as demonstrated on the laboratory scale. A single system that meets all criteria simultaneously is desired; however, if integration with other technologies is needed to simultaneously meet all targets, the technologies must be compatible.

DOE will also take into consideration input on the following:

(1) Whether hydrogen adsorption in carbon nanotubes at low temperature (77 K) should be considered at this early stage of the DOE R&D Program (although the original criterion of 6 weight percent was at room temperature), and

(2) Whether SWNTs may be used as model materials for fundamental research, theoretical simulation and an improved understanding of nanoscale hydrogen storage mechanisms and the interplay between factors such as charge/discharge efficiency, thermodynamics/kinetics considerations, and volumetric/gravimetric capacities.

Position papers or other technical documents relevant to the go/no-go decision will be accepted by DOE for consideration in this decision. Position papers are limited to 10 pages maximum, and should contain a cover page with a point of contact, company name, address and e-mail address. The cover page will not be counted in the 10 page limitation. Technical documents, such as published journal articles or preprints, are not restricted to the page limit. Position papers and other technical documents will be made available to the public and should not contain any proprietary information.

For more information about the Hydrogen, Fuel Cells and Infrastructure Technologies Program and related on-board hydrogen storage activities visit the Program's Web site at

www.eere.energy.gov/hydrogenandfuelcells.

Issued in Golden, CO on August 10, 2006.

Matthew A. Barron,

Acting Procurement Director, Golden Field Office.

[FR Doc. E6–14047 Filed 8–23–06; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER00–3614–004]

BP Energy Company, BPWest Coast Products LLC; Notice of Filing

August 18, 2006.

On August 10, 2006, BP Energy Company (BP Energy) and BP West Coast Products LLC filed a supplemental informational filing relating to BP Energy's June 17, 2002 triennial market-power update and June 17, 2005 triennial market power update filed by BP Energy on behalf of itself and its affiliates in the above-captioned dockets.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and § 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 31, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–14013 Filed 8–23–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP06–430–000]

Columbia Gas Transmission Corporation; Notice of Application

August 17, 2006.

Take notice that on August 15, 2006, Columbia Gas Transmission Corporation (Columbia), 1700 MacCorkle Avenue, SE., Charleston, West Virginia, filed in Docket No. CP06–430–000 an application pursuant to Section 7 of the Natural Gas Act (NGA), as amended, for authorization to permit Columbia to increase the maximum volume of gas in storage in certain storage fields in Bedford and Washington Counties, Pennsylvania; Kanawha, Randolph, Pocahontas, Putnam, and Preston Counties, West Virginia; and Hocking and Lorain Counties, Ohio, on a temporary basis from August 2006 to April 2007, to a level above the amount currently certificated by the Commission, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, call (202) 502–8659 or TTY, (202) 208–3676.

Any questions regarding this application should be directed to Fredric J. George, Lead Counsel, Columbia Gas Transmission Corporation, P.O. Box 1273, Charleston West Virginia 25325–1273; telephone (304) 357–2359, fax (304) 357–3206.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the

Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments protests and interventions via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

Comment Date: 5 p.m. Eastern Time on August 24, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–14009 Filed 8–23–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–335–001]

Discovery Gas Transmission LLC; Notice of Interest Credit

August 18, 2006.

Take notice that on August 4, 2006, Discovery Gas Transmission LLC (Discovery) submitted to the Commission a supplement to its annual cash-out report for the calendar year ended December 31, 2005 including an interest calculation.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before the date as indicated below. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Protest Date: 5 p.m. Eastern Time on August 25, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–14015 Filed 8–23–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP05–130–000; CP05–132–000; Docket No. CP05–131–000]

Dominion Cove Point LNG, LP; Dominion Transmission, Inc.; Notice of Availability of the Final Conformity Determination for Maryland, Virginia, West Virginia and New York-Cove Point Expansion Project

August 18, 2006.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared a Final General Conformity Determination to assess the potential air quality impacts associated with the construction and operation of a liquefied natural gas (LNG) import terminal and natural gas pipeline facilities proposed by Dominion Cove Point LNG, LP and Dominion Transmission, Incorporated (Dominion), referred to as the Cove Point Expansion Project, in the above-referenced dockets.

This Final General Conformity Determination was prepared to satisfy the requirements of the Clean Air Act.

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Web site (*http://www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6–14019 Filed 8–23–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–484–000]

El Paso Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

August 18, 2006.

Take notice that on August 14, 2006, El Paso Natural Gas Company (El Paso) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1–A, the following tariff sheets to become effective September 14, 2006:

Thirtieth Revised Sheet No. 1.
Tenth Revised Sheet No. 2.
Sixth Revised Sheet No. 2A.

El Paso states that it is also filing two firm transportation service agreements (TSAs) with San Diego Gas & Electric Company and West Texas Gas, Inc.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC

Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6–14016 Filed 8–23–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ES06–59–000]

Evergreen Wind Power, LLC; Notice of Application for Issuance of Securities

August 18, 2006.

Take notice that on August 11, 2006, Evergreen Wind Power, LLC (''Evergreen'') submitted an application pursuant to section 204 of the Federal Power Act requesting that the Commission authorize Evergreen to issue securities and assume liabilities related to the debt financing of the wind energy project that it is currently developing in Mars Hill, Maine. Evergreen requests expedited action on its application to accommodate its debt financing scheduled for September 2006. Evergreen further requests certain exemptions from and waivers of Sections 34.2 and 34.4 of the Commission's regulations.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. eastern time on September 1, 2006.

Magalie R. Salas,

Secretary.

[FR Doc. E6–14014 Filed 8–23–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP06–429–000]

Florida Gas Transmission Company; Notice of Request Under Blanket Authorization

August 17, 2006.

Take notice that on August 8, 2006, Florida Gas Transmission Company (FGT), 5444 Westheimer Road, Houston, Texas 77056, filed in Docket No. CP06–429–000 a request pursuant to Sections 157.205 and 157.208 of the Commission's Regulations under the Natural Gas Act (18 CFR Sections 157.205 and 157.208) for authorization to replace approximately 6.6 miles of existing St Petersburg 12-inch lateral gas transmission lines located in east-central Pinellas County, Florida, under the authorization issued in Docket No. CP82–553–000 pursuant to Section 7 of the Natural Gas Act, all as more fully described in the request.

This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Any questions concerning this request may be directed to Stephen Veatch, Senior Director of Certificates & Tariffs, Florida Gas Transmission Company, 5444 Westheimer Road, Houston, Texas 77056, at (713) 989–2024 or Fax (713) 989–1158 or by e-mail *Stephen.veatch@SUG.com*.

FGT states that there are five (5) sections of the 12-inch St. Petersburg lateral that need to be replaced. In addition to the 12-inch pipeline to be replaced, FGT indicates that it intends to install a 12-inch pig launcher and receiver, and replace block valves BV 24–10 and 24–11. FGT contends that the additional installations would allow for passage of a pipeline integrity tool to be run after the segments are replaced.

FGT asserts that the proposed project is required to upgrade and repair line sections and valves which have been in service for an extended period of time. FGT maintains that the replaced pipe would be filled with grout and abandoned in place. FGT concludes that the total costs for the project is estimated to be $19,987,000.

Any person or the Commission's Staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and, pursuant to Section 157.205 of the Commission's Regulations under the Natural Gas Act (NGA) (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-filing'' link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E6–14010 Filed 8–23–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–490–000]

Northern Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

August 18, 2006.

Take notice that on August 15, 2006, Northern Natural Gas Company (Northern) tendered for filing to become part of its FERC Gas Tariff, Fifth Revised Volume No. 1 the following tariff sheets to be effective November 1, 2006:

Third Revised Sheet No. 263F.
Third Revised Sheet No. 263G.
Tenth Revised Sheet No. 263H.
Ninth Revised Sheet No. 263H.1.

Northern states that Tariff Sheet Nos. 263H and 263H.1 reflect the Sourcers' flow obligations as a result of the Appendix B customers' elections to source or buy out of their flow obligations pursuant to Section 29(C)2 of Northern's tariff.

Northern states that copies of the filing were served upon Northern's customers and interested State Commissions.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6–14011 Filed 8–23–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–486–000]

Transcontinental Gas Pipe Line Corporation; Notice of Refund Report

August 18, 2006.

Take notice that on August 15, 2006, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing a report reflecting the flow through of refunds received from Texas Gas Transmission, LLC (Texas Gas) in Docket No. RP05–317.

Transco states that on August 15, 2006, in accordance with Section 4 of its Rate Schedule FT–NT, flowed through the amount of $169,074.46 refunded by Texas Gas to its FT–NT customer.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6–14017 Filed 8–23–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP06–489–000]

Trunkline Gas Company, LLC; Notice of Proposed Changes in FERC Gas Tariff

August 18, 2006.

Take notice that on August 15, 2006, Trunkline Gas Company, LLC (Trunkline) tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the following tariff sheets, to become effective May 1, 2006:

Fifth Revised Sheet No. 2.
Tenth Revised Sheet No. 10.
Tenth Revised Sheet No. 11.
Tenth Revised Sheet No. 12.
Tenth Revised Sheet No. 13.
Tenth Revised Sheet No. 14.
Tenth Revised Sheet No. 15.
Tenth Revised Sheet No. 16.
Tenth Revised Sheet No. 17.
Third Revised Sheet No. 201.
Second Revised Sheet No. 283.
Second Revised Sheet No. 299.

Trunkline states that the purpose of this filing is to remove the Final Take-or-Pay Fixed Surcharge and Volumetric Surcharge as provided in Section 25 of the General Terms and Conditions of Trunkline's tariff.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 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 notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed in accordance with the provisions of Section 154.210 of the Commission's regulations (18 CFR 154.210). Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6–14018 Filed 8–23–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

August 17, 2006.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG06–71–000.

Applicants: Evergreen Wind Power, LLC.

Description: Evergreen Wind Power LLC's Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 8/11/2006.

Accession Number: 20060815–0029.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER03–719–003; ER03–720–003; ER03–721–003; ER98–830–012.

Applicants: New Athens Generating Company, LLC.

Description: New Athens Generating Co LLC et al submits a Notice of Non-Material Change in Status relating to their upstream indirect ownership.

Filed Date: 8/11/2006.

Accession Number: 20060816–0057.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Docket Numbers: ER05–718–000.

Applicants: California Independent System Operator.

Description: California Independent System Operator Corp. submits its Sixty-Third Report on Market Impacts of Amendment 66, as prepared by the ISO's Department of Market Monitoring.

Filed Date: 8/11/2006.

Accession Number: 20060815–0196.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Docket Numbers: ER05–976–001.

Applicants: FirstEnergy Solutions Corp.

Description: FirstEnergy Solutions Corp. submits a substitute FERC Electric Tariff, First Revised Volume No. 1.

Filed Date: 8/11/2006.

Accession Number: 20060816–0067.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Docket Numbers: ER06–1228–001.

Applicants: Phibro LLC.

Description: Phibro LLC submits its triennial updated market analysis.

Filed Date: 8/11/2006.

Accession Number: 20060815–0030.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Docket Numbers: ER06–1352–000.

Applicants: American Electric Power Services Corp.

Description: Indiana & Michigan Power Co. submits an interconnection and local delivery service agreement with the City of Niles, Michigan.

Filed Date: 8/11/2006.

Accession Number: 20060814–0208.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Docket Numbers: ER06–1354–000.

Applicants: AB Energy, Inc.

Description: AB Energy, Inc. submits its Petition for Acceptance of Initial Tariff, Waivers, and Blanket Authority.

Filed Date: 8/11/2006.

Accession Number: 20060815–0027.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Docket Numbers: ER06–1355–000.

Applicants: Evergreen Wind Power, LLC.

Description: Application of Evergreen Wind Power LLC for order accepting initial tariff, waiving regulations & granting blanket approvals, & request for expedited consideraton & waiver of 60 day prior notice requirement.

Filed Date: 8/11/2006.

Accession Number: 20060815–0026.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Docket Numbers: ER06–1356–000.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator, Inc. submits proposed revisions to Attachment L (Credit Policy) of its Open Access Transmission and Energy Markets Tariff.

Filed Date: 8/11/2006.

Accession Number: 20060815–0025.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Docket Numbers: ER06–1357–000.

Applicants: Big Sandy Peaker Plant, LLC.

Description: Big Sandy Peaker Plant LLC submits its FERC Electric Tariff, Original Volume No 3 pursuant to which Big Sandy will provide Black Start Service to PJM Interconnection LLC.

Filed Date: 8/11/2006.

Accession Number: 20060815–0024.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Docket Numbers: ER06–1358–000.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator, Inc. et al. submits proposed revisions to Attachment N–I of its ISO Open Access Transmission & Energy Markets Tariff, FERC Electric Tariff, Third Revised Volume 1.

Filed Date: 8/11/2006.

Accession Number: 20060816–0056.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Docket Numbers: ER06–1359–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection LLC submits revisions to the chart in Schedule 2 of the PJM Open Access Transmission Tariff to incorporate revised or new revenue requirements of FPL Energy Marcus Hook lP et al.

Filed Date: 8/11/2006.

Accession Number: 20060816–0058.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Docket Numbers: ER06–1360–000.

Applicants: California Independent System Operator.

Description: California Independent System Operator Corp. on behalf of itself and Pacific Gas & Electric et al submits an amendment to the Transmission Control Agreement, Rate Schedule 7 among the ISO and the Participating Transmission Owners.

Filed Date: 8/11/2006.

Accession Number: 20060816–0250.

Comment Date: 5 p.m. Eastern Time on Friday, September 1, 2006.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Magalie R. Salas,

Secretary.

[FR Doc. E6–14008 Filed 8–23–06; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP06–85–000]

CenterPoint Energy Gas Transmission Company; Notice of Availability of the Final Environmental Impact Statement for the Proposed Carthage to Perryville Project

August 18, 2006.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared this Final Environmental Impact Statement (EIS) for the natural gas pipeline facilities proposed by CenterPoint Energy Gas Transmission (CEGT) under the above-referenced docket. CEGT's Carthage to Perryville Project (Project) would be located in various counties and parishes in eastern Texas and northern Louisiana.

The Final EIS was prepared to satisfy the requirements of the National Environmental Policy Act. The FERC staff concludes that the proposed Project, with the appropriate mitigation measures as recommended, would have limited adverse environmental impact.

The U.S. Fish and Wildlife Service (FWS) and the U.S. Army Corps of Engineers (COE) are Federal cooperating agencies for the development of this EIS. A Federal cooperating agency has jurisdiction by law or special expertise with respect to any environmental impact involved with the proposal and is involved in the NEPA analysis.

The general purpose of the proposed Project is to facilitate the transport of up to 1.2 billion cubic feet per day of natural gas received from production areas in eastern Texas, as well as northern Louisiana, to markets in the Midwest and Northeastern regions of the United States that can be accessed through interconnects with existing pipeline infrastructure.

The Final EIS addresses the potential environmental effects of construction and operation of the following facilities:

- About 172.1 miles of 42-inch-diameter natural gas pipeline in Panola County, Texas, and Caddo, DeSoto, Red River, Bienville, Jackson, Ouachita, and Richland Parishes, Louisiana;
- Two new, 20,620 horsepower (hp) gas-turbine-driven compressor stations, the Panola and Vernon Compressor Stations, located in Panola County, Texas, and Jackson Parish, Louisiana, respectively;
- Two meter and regulator stations at receipt points with three intrastate pipelines, including:

—Houston Pipe Line (HPL) Meter/Regulator (M/R) Station in Panola County, Texas;

—Duke Energy Field Services-Enbridge M/R Station in Panola County, Texas;

- Four new meter and regulator stations at interconnects with existing interstate pipelines, including:

—Texas Gas M/R Station in Ouachita Parish, Louisiana;

—ANR M/R Station in Richland Parish, Louisiana;

—Trunkline M/R Station in Richland Parish, Louisiana;

—Columbia Gulf M/R Station in Richland Parish, Louisiana;

- 11 mainline valves; and
- Four pig launcher/receiver facilities associated with the Panola and Vernon Compressor Stations and the HPL and Columbia Gulf M/R Stations.

CEGT proposes to construct its pipeline facilities in two phases. Construction of Phase I would be initiated in October 2006 and completed by February 2007, at which point CEGT would place the proposed Project in-service. Under Phase I, a single, 10,310-hp turbine compressor would be installed at each compressor station. Under Phase II, a second compressor would be installed to bring the total installed compression at each facility to 20,620 hp. CEGT indicates that Phase II facilities would be installed and operational by October 2008.

The Final EIS has been placed in the public files of the FERC and is available for public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street, NE., Room 2A, Washington, DC 20426, (202) 502–8371.

A limited number of copies of the Final EIS are available from the Public Reference Room identified above. In addition, CD copies of the Final EIS have been mailed to affected landowners; various Federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; local libraries and newspapers; intervenors; and other individuals that expressed an interest in the proposed Project. Hard-copies of the Final EIS have also been mailed to those who requested that format during the scoping and comment periods for the proposed Project.

In accordance with the Council on Environmental Quality's (CEQ)

regulations implementing NEPA, no agency decision on a proposed action may be made until 30 days after the U.S. Environmental Protection Agency (EPA) publishes a notice of availability of a Final EIS. However, the CEQ regulations provide an exception to this rule when an agency decision is subject to a formal internal process that allows other agencies or the public to make their views known. In such cases, the agency decision may be made at the same time the notice of the Final EIS is published, allowing both periods to run concurrently. Should the FERC issue CEGT authorizations for the proposed Project, it would be subject to a 30-day rehearing period. Therefore, the Commission could issue its decision concurrently with the EPA's notice of availability.

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC (3372) or on the FERC Internet Web site (*http://www.ferc.gov*). Using the ''eLibrary link,'' select ''General Search'' and enter the project docket number excluding the last three digits (i.e., CP06–85) in the ''Docket Number'' field. Be sure you have selected an appropriate date range. For assistance, please contact *FERC Online Support at FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or TTY (202) 502–8659. The eLibrary link on the FERC Internet Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

In addition, the FERC now offers a free service called eSubscription that allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. To register for this service, go to *http://www.ferc.gov/esubscribenow.htm.*

Magalie R. Salas,

Secretary.

[FR Doc. E6–14012 Filed 8–23–06; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2006–0398; FRL–8086–6]

Release of Draft Brochure on Current Best Practices to Prevent Asbestos Exposure Among Brake and Clutch Repair Workers; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: EPA is announcing the release of a draft brochure entitled, *Current Best Practices for Preventing Asbestos Exposure Among Brake and Clutch Repair Workers*. This brochure, when finalized, is intended to provide information for automotive professionals and home mechanics on preventing exposure to brake and clutch dust that may contain asbestos fibers. The draft brochure summarizes work practices that may be used to avoid asbestos exposure and identifies pertinent Occupational Safety and Health Administration (OSHA) regulatory requirements for professional automotive mechanics, which are found at 29 CFR 1910.1001, specifically paragraph (f)(3) and Appendix F. These same requirements also are contained in EPA's Worker Protection Rule, found at 40 CFR part 763, subpart G, which applies to State and local government employees who perform brake and clutch work in States without OSHA-approved State plans. The draft brochure also provides related information for home mechanics to consider. When finalized, this brochure will update and supercede the existing document entitled, *Guidance for Preventing Asbestos Disease Among Auto Mechanics* (EPA–560–OPTS–86–002), commonly referred to as the ''Gold Book.'' The public is encouraged to provide comments to EPA regarding this draft brochure, which can be found at *http://www.epa.gov/asbestos*.

DATES: Comments must be received on or before October 23, 2006.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2006–0398, by one of the following methods.

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*. Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery*: OPPT Document Control Office (DCO), EPA East, Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2006–0398. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2006–0398. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov*, or in hard copy at the OPPT Docket, EPA Docket Center (EPA/DC), EPA West, Rm. B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone

number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280.

FOR FURTHER INFORMATION CONTACT: *For general information contact*: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

For technical information contact: Tom Simons, National Program Chemicals Division (7404T), Office Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 566–0517; e-mail address: *simons.tom@epa.gov* or Robert Courtnage, National Program Chemicals Division (7404T), Office Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 566–1081; e-mail address: *courtnage.robert@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you conduct automotive repair work. Individuals covered by this action may include those in the professional automotive repair industry, State and local government employees who perform brake and clutch work in States without OSHA-approved State plans, and people performing do-it-yourself automotive repair. In addition, those involved in the manufacture and/or import of automotive brake and clutch products that may contain asbestos, and those involved in regulatory compliance may be affected by the notice.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in 29 CFR 1910.1001, specifically paragraph (f)(3) and Appendix F or 40 CFR part 763, subpart G. If you have any questions regarding the applicability of this action to a particular entity, consult either technical person listed under **FOR FURTHER INFORMATION CONTACT**.

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

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

2. *Tips for preparing your comments.* When submitting comments, remember to:

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

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

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

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

v. If you estimate potential costs or burdens, explain how you arrived at the estimate.

vi. Provide specific examples to illustrate your concerns, and suggested alternatives.

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

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

II. What Action is the Agency Taking?

EPA is announcing the release of a draft brochure entitled, *Current Best Practices for Preventing Asbestos Exposure Among Brake and Clutch Repair Workers*. This brochure, when finalized, will provide information for automotive professionals, including State and local government employees who perform brake and clutch work, and home mechanics on preventing exposure to brake and clutch dust that may contain asbestos fibers. The draft brochure summarizes work practices that may be used to avoid asbestos exposure and identifies pertinent OSHA regulatory requirements for professional automotive mechanics, which are found at 29 CFR 1910.1001, specifically paragraph (f)(3) and Appendix F. EPA's Worker Protection Rule, found at 40 CFR part 763, subpart G, contains identical requirements and applies to State and local government employees who perform brake and clutch work in States without OSHA-approved State plans. The draft brochure also provides related information specifically for the consideration of home mechanics, who are not subject to the OSHA (or EPA) work practice standards. When finalized, this brochure will update and replace the existing document entitled, *Guidance for Preventing Asbestos Disease Among Auto Mechanics* (EPA–560–OPTS–86–002), commonly referred to as the ''Gold Book.'' The public is encouraged to provide comments to EPA regarding this draft brochure, which can be found at *http://www.epa.gov/asbestos*.

Asbestos is the common name given to a number of naturally occurring mineral fibers that have been used in manufactured goods due to their high tensile strength, resistance to heat, and chemical stability. Because of these properties, asbestos fibers have been used in a wide range of manufactured goods, including roofing shingles, ceiling and floor tiles, paper and cement products, textiles, and coatings and friction products such as automobile clutch, brake, and transmission parts. Exposure to asbestos is potentially harmful to human health if microscopic asbestos fibers, released into the air when asbestos is disturbed or in poor condition, are inhaled into the lungs. Asbestos exposure has been associated with a number of serious health problems and diseases, including asbestosis, lung cancer, and mesothelioma.

In 2004, EPA contacted nine auto manufacturers that cumulatively accounted for over 96% of the light vehicles sold in the United States and asked whether they used asbestos brakes in new vehicles or replacement parts sold in the United States. All nine companies responded that they no longer sold asbestos brakes in new vehicles or as replacement parts in the United States. These responses did not address aftermarket brakes (replacement parts not supplied by the vehicle manufacturer). Aftermarket brakes that contain asbestos may, in some cases, still be available for purchase in the United States. Accordingly, while the use of asbestos in automotive brake and clutch products appears to be declining domestically, this remains a source of

potential asbestos exposure. EPA did not seek information on clutches because the Congressional inquiry to which the Agency was responding when seeking this information was limited to brakes. It should be noted that the aftermarket for clutches is significantly smaller than the aftermarket for brakes.

This draft brochure contains current information and, when finalized, will supersede the currently available *Guidance for Preventing Asbestos Disease Among Auto Mechanics* (EPA–560–OPTS–86–002). The purpose of the brochure, once finalized, will be to provide the public and workers involved in brake and clutch repair work with a simple, easy-to-understand summary of the OSHA work practice standards, which are mandatory for certain professional automotive mechanics. Also discussed in this brochure is EPA's Worker Protection Rule, which contains identical requirements, and is mandatory for State and local government employees who perform brake and clutch work in States without OSHA-approved State plans. EPA believes that home mechanics also may benefit from information discussed in the brochure regarding these work practice standards and additional advice on steps they can consider taking to prevent possible asbestos exposure when working with asbestos-containing friction products. Neither the draft nor final brochure is intended to provide comprehensive technical information regarding work practices, or a comprehensive assessment of the possible health effects from exposure to asbestos in brakes and clutches. Additionally, neither the draft nor final brochure is a substitute for any applicable legal requirements, or a regulation. Thus, they do not impose legally binding requirements on any party, including EPA, States, or the regulated community. Interested professional mechanics engaged in commercial brake and clutch repair are encouraged to contact OSHA regarding compliance with the mandatory work practice standards highlighted in this draft brochure (*http://www.osha.gov*). Similarly, interested State and local government employees who perform brake and clutch work in States without OSHA-approved State plans are encouraged to contact EPA regarding compliance with EPA's Worker Protection Rule. Finally, home mechanics may contact EPA with any specific questions not addressed in the brochure by visiting the EPA asbestos website at *http://www.epa.gov/asbestos*.

EPA is seeking public comment on all aspects of the new brochure's design and content. This includes the tone of the brochure and the extent to which the current wording and design tend to support its effectiveness as an educational tool. One issue that EPA has considered is the need to balance technical accuracy with clarity and freedom from overly technical terminology, while still maintaining consistency with the OSHA mandatory work practice standards and the identical requirements contained in EPA's Worker Protection Rule. The extent to which the current draft is clear and understandable is of primary concern to the Agency. In designing the layout of the brochure, EPA has been aware of the need to develop a dynamic and engaging document while ensuring that the brochure can be easily and inexpensively reprinted. This approach has led the Agency to incorporate a layout and illustrations that anchor many of the brochure's key points while providing visual interest. EPA requests comment on whether the draft images may be altered in any way to increase their effectiveness.

EPA welcomes all comments and suggestions for improving the draft brochure and will, where appropriate, incorporate changes to the final brochure. However, EPA does not plan to develop or publish a formal document that summarizes and responds to the comments received. EPA will announce the availability of the final brochure through a future **Federal Register** notice and, once finalized, the brochure will be available on the EPA asbestos website at *http://www.epa.gov/asbestos*.

List of Subjects

Environmental protection, Asbestos, Automotive brake and clutch repair, Health.

Dated: August 17, 2006.

James B. Gulliford,

Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

[FR Doc. E6–14057 Filed 8–23–06; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[Docket ID No: EPA–R08–OW–2006–0627; FRL–8212–9]

Public Water System Supervision Program Revision for the State of Utah

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with the provisions of section 1413 of the Safe Drinking Water Act (SDWA), 42 U.S.C. 300g–2, and 40 CFR 142.13, public notice is hereby given that the State of Utah has revised its Public Water System Supervision (PWSS) Primacy Program by adopting Federal regulations for the Arsenic Rule and Filter Backwash Recycling Rule, which corresponds to 40 CFR Parts 141 and 142. The EPA has completed its review of these revisions in accordance with SDWA, and proposes to approve Utah's primacy revisions for the above stated Rule(s).

Today's approval action does not extend to public water systems in Indian country, as defined in 18 U.S.C. 1151. Please see **SUPPLEMENTARY INFORMATION**, Item B.

DATES: Any member of the public is invited to request a public hearing on this determination by September 25, 2006. Please see Supplementary Information, Item C, for details. Should no timely and appropriate request for a hearing be received, and the Regional Administrator (RA) does not elect to hold a hearing on his own motion, this determination shall become effective September 25, 2006. If a hearing is granted, then this determination shall not become effective until such time following the hearing, as the RA issues an order affirming or rescinding this action.

ADDRESSES: Requests for a public hearing shall be addressed to: Robert E. Roberts, Regional Administrator, c/o Jack Theis (8P–W–DW), U.S. EPA, Region 8, 999 18th Street, Suite 300, Denver, CO 80202–2466.

All documents relating to this determination are available for inspection at the following locations: (1) U.S. EPA, Region 8, Drinking Water Unit, 999 18th Street (4th Floor), Denver, CO 80202–2466, (2) Utah Department of Environment Quality (DEQ), Division of Drinking Water, 1950 West North Temple, Salt Lake City, UT 84114–4830, and/or (3) online at: *http://www.regulations.gov*, with reference to Docket ID No. EPA–R08–OW–2006–0627. However, based on sensitivity, certain materials are available in hardcopy only. The above Web site is an ''anonymous access'' system, which means that should you submit an electronic comment, EPA recommends you provide your identity or contact information in the body of your comment. If you e-mail your comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment(s) that is placed in the public docket and made available on the Internet. If your

comment cannot be read due to technical difficulties and you cannot be contacted for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters or any form of encryption, and be free of any defects or viruses.

FOR FURTHER INFORMATION CONTACT: Jack Theis at 303–312–6347.

SUPPLEMENTARY INFORMATION: EPA approved Utah's application for assuming primary enforcement authority for the PWSS program, pursuant to section 1413 of SDWA, 42 U.S.C. 300g–2, and 40 CFR Part 142. DEQ administers Utah's PWSS program.

A. Why Are Revisions to State Programs Necessary?

States with primary PWSS enforcement authority must comply with the requirements of 40 CFR Part 142 for maintaining primacy. They must adopt regulations that are at least as stringent as the NPDWRs at 40 CFR Parts 141 and 142, as well as adopt all new and revised NPDWRs in order to retain primacy (40 CFR 142.12(a)).

B. How Does Today's Action Affect Indian Country in Utah?

This program revision does not extend to ''Indian country'', as defined in 18 U.S.C. 1151. Indian country includes: (1) Lands within the exterior boundaries of the following Indian Reservations located within or abutting the State of Utah:

a. Goshute Indian Reservation;

b. Navaho Indian Reservation;

c. Northwestern Band of Shoshoni Nation of Utah (Washakie) Indian Reservation;

d. Paiute Indian Tribe of Utah Indian Reservation;

e. Skull Valley Band of Goshute Indians of Utah Indian Reservation;

f. Uintah and Ouray Indian Reservation (see below);

g. Ute Mountain Indian Reservation;

(2) Any land held in trust by the United States for an Indian tribe; and (3) any other areas which are ''Indian country'' within the meaning of 18 U.S.C. 1151.

With respect to the Uintah and Ouray Indian Reservation, Federal courts have determined that certain lands within the exterior boundaries of the Reservation do not constitute Indian country. This State program revision approval will extend to those lands which the courts have determined are not Indian country.

C. Requesting a Hearing

Any request for a public hearing shall include: (1) The name, address, and telephone number of the individual, organization, or other entity requesting a hearing, (2) a brief statement of the requester's interest in the RA's determination and of information that he/she intends to submit at such hearing, and (3) the signature of the requester or responsible official, if made on behalf of an organization or other entity.

Notice of any hearing shall be given not less than fifteen (15) days prior to the time scheduled for the hearing, and will be made by the RA in the **Federal Register** and newspapers of general circulation in the State. A notice will also be sent to both the person(s) requesting the hearing and the State. The hearing notice will include a statement of purpose, information regarding time and location, and the address and telephone number where interested persons may obtain further information. The RA will issue a final determination upon review of the hearing record.

Frivolous or insubstantial requests for a hearing may be denied by the RA. However, if a substantial request is made within thirty (30) days after this notice, a public hearing will be held.

Please bring this notice to the attention of any person(s) known by you to have an interest in this determination.

Dated: August 17, 2006.

Kerrigan G. Clough,

Deputy Regional Administrator, Region 8.

[FR Doc. E6–14051 Filed 8–23–06; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

Sunshine Act; Cancellation of Previously Announced Meetings: Tuesday, August 15, 2006, Meeting Closed to the Public and Thursday, August 17, 2006, Meeting Open to the Public

DATE AND TIME: Tuesday, August 29, 2006 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes.

Advisory Opinion 2006–21: Cantwell 2006 by Matthew S. Butler, Campaign Manager.

Advisory Opinion 2006–26: Texans for Henry Bonilla by counsel, Jan Witold Baran.

Proposed Interim Final Rule Exempting Grassroots Lobbying Communications from the Definition of ''Electioneering Communication.''

Notice of Disposition of Petition for Rulemaking to Except Certain ''Grassroots Lobbying''

Communications from the Definition of ''Electioneering Communication.''

Management and Administrative Matters.

DATE AND TIME: Tuesday, August 29, 2006 at the conclusion of the open meeting and Wednesday, August 30, 2006.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

PERSON TO CONTACT FOR INFORMATION: Mr. Robert Biersack, Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. 06–7162 Filed 8–22–06; 2:33 pm]

BILLING CODE 6715–01–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 September 8, 2006.

A. Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. The Hill Family, consisting of David Hill, Ellsworth, Iowa; Heather

Miller, Urbandale, Iowa; and Heidi Loverude, Urbandale, Iowa, acting as a group in concert, to retain voting shares of Freedom Holdings Company, and thereby indirectly retain voting shares of Freedom Financial Bank, both of West Des Moines, Iowa.

B. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) 411 Locust Street, St. Louis, Missouri 63166-2034:

1. Lori and Craig Glattly, both of Lake Forest, Illinois; to acquire shares of Texico Bancshares Corporation, and thereby indirectly acquire voting shares of Texico State Bank, both of Texico, Illinois

2. Dearmin Investment Holdings Business, L.P., Odon, Indiana; to acquire voting shares of Dearmin Bancorp, Inc., and thereby indirectly acquire voting shares of The First National Bank of Odon, both of Odon, Indiana.

Board of Governors of the Federal Reserve System, August 21, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–14066 Filed 8–23–06; 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 *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 September 18, 2006.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) P.O. Box 55882, Boston, Massachusetts 02106-2204:

1. Hampden Bancorp, Inc., Springfield, Massachusetts; to become a bank holding by acquiring 100 percent of the voting shares of Hampden Bank, Springfield, Massachusetts, upon its reorganization from mutual to stock form.

B. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. Congaree Bancshares, Inc., West Columbia, South Carolina; to become a bank holding company by acquiring 100 percent of the voting shares of Congaree State Bank, West Columbia, South Carolina (in organization).

C. Federal Reserve Bank of Atlanta (Andre Anderson, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. Cornerstone Bancorp, Inc., St. Petersburg, Florida; to become a bank holding company by acquiring 100 percent of the voting shares of Cornerstone Community Bank, Saint Petersburg, Florida.

Board of Governors of the Federal Reserve System, August 21, 2006.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E6–14067 Filed 8–23–06; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Misconduct in Science

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI) and the Assistant Secretary for Health have taken final action in the following case:

Kui Zhu, Ph.D., Cleveland Clinic Research Foundation: Based on accumulated evidence including the Cleveland Clinic Research Foundation (CCF) investigation report (CCF Report) and additional analysis and information obtained by the Office of Research Integrity (ORI) during its oversight review of the CCF Report, the U.S. Public Health Service (PHS) found that Kui Zhu, Ph.D., former postdoctoral fellow, CCF, engaged in misconduct in science by intentionally and knowingly fabricating and falsifying data for figures in two publications and with research funded by National Cancer Institute (NCI), National Institutes of Health (NIH), grants R21 CA84038, R01 CA76204, and T32 CA09056.

ORI has implemented the following administrative actions for a period of three (3) years, beginning June 7, 2006:

(1) Dr. Zhu is debarred from any contracting or subcontracting with any agency of the United States Government and from eligibility or involvement in nonprocurement programs of the United States Government as defined in the debarment regulations at 45 CFR part 76; and

(2) Dr. Zhu is prohibited from serving in any advisory capacity to PHS, including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as a consultant.

FOR FURTHER INFORMATION CONTACT: Director, Division of Investigative Oversight, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8800.

Chris B. Pascal,

Director, Office of Research Integrity.

[FR Doc. E6–14054 Filed 8–23–06; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Center for Environmental Health/Agency for Toxic Substances and Disease Registry; Teleconference

Agency: The Program Peer Review Subcommittee of the Board of Scientific Counselors (BSC), Centers for Disease Control And Prevention (CDC), National Center for Environmental Health/ Agency for Toxic Substances and Disease Registry (NCEH/ATSDR).

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), CDC, NCEH/ATSCR announces the following subcommittee meeting:

Name: Program Peer Review Subcommittee (PPRS).

Time and Date: 10 a.m.–12 p.m. Eastern Daylight Savings Time, September 11, 2006.

Place: The teleconference will originate at NCEH/ATSDR in Atlanta, Georgia. To

participate, dial 877/315–6535 and enter conference code 383520.

Purpose: Under the charge of the BSC, NCEH/ATSDR, the PPRS will provide the BSC, NCEH/ATSDR with advice and recommendations on NCEH/ATSDR program peer review. They will serve the function of organizing, facilitating, and providing a long-term perspective to the conduct of NCEH/ATSDR program peer review.

Matters to be Discussed: A review of the minutes from the previous meeting; a discussion to finalize members of the Peer Review Workgroup for the site specific activities' peer review, external partners and customers, and chairperson(s); a discussion on the revised schedule for program peer reviews; a discussion of Terrorism Preparedness and Emergency Response Peer Review in February 2007.

Agenda items are subject to change as priorities dictate.

Supplementary Information: Public comment period is scheduled for 11:20–11:30 a.m.

For Further Information Contact: Sandra Malcom, Committee Management Specialist, Office of Science, NCEH/ATSDR, M/S E–28, 1600 Clifton Road, NE., Atlanta, Georgia 30333, telephone 404/498–0622.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and NCEH/ATSDR.

Dated: August 18, 2006.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E6–14032 Filed 8–23–06; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 71 FR 44298–44300, dated August 4, 2006) is amended to reflect the transfer of functions and name change to Office of Equal Employment Opportunity, Office of the Director, Centers for Disease Control and Prevention.

Section C–B, Organization and Functions, is hereby amended as follows:

Under item (7) of the functional statement for the *Office of the Chief Operating Officer (CAJ),* delete the following: alternative dispute resolution activities.

Delete in its entirety the title and functional statement for the *Office of Equal Employment Opportunity (CAV),* and insert the following:

Office of Dispute Resolution and Equal Employment Opportunity (CAV). The Office of Dispute Resolution and Equal Employment Opportunity (ODREEO) is located in the Office of the Director, Centers for Disease Control and Prevention (CDC). The Director, ODREEO, serves as the principal advisor to the Director, CDC, on all equal employment opportunity matters. The ODREEO: (1) Develops and recommends for adoption CDC-wide equal employment opportunity policies, goals, and priorities to carry out the directives of the U.S. Office of Personnel Management, U.S. Equal Employment Opportunity Commission, and Department of Health and Human Services (DHHS) equal employment opportunity policies and requirements that are mandated by Title VII, Civil Rights Act of 1964; Age Discrimination in Employment Act (ADEA); Rehabilitation Act of 1973; Civil Service Reform Act; 29 CFR 1614, Federal Sector Equal Employment Opportunity; Executive Order 11478, Equal Employment Opportunity in the Federal Government; (2) provides leadership, direction, and technical guidance to CDC managers and staff for the development of comprehensive programs and plans; (3) coordinates and evaluates agency equal employment opportunity operations and plans, including affirmative action; (4) develops plans, programs, and procedures to assure the prompt receipt, investigation, and resolution of complaints of alleged discrimination by reason of race, sex, age, religion, national origin, handicap, or by reason of reprisal or retaliation; (5) coordinates the development of comprehensive special emphasis programs to assure full recognition of the needs of women, Hispanics, other minorities and the handicapped in hiring and employment; (6) identifies needs for ODREEO functions within CDC and assures the development of a training curriculum for all CDC supervisory personnel; (7) prepares or coordinates the preparation of, reports and analyses designed to reflect the status of employment of women and minorities at CDC and maintains liaison with DHHS and other organizations concerned with equal employment opportunity; (8) ensures effective coordination of ODREEO activities with CDC personnel and training programs, and with CDC national centers manpower planning and support programs in the health professions; (9) develops a system of structured reviews and evaluations of CDC ODREEO activities to assure effective operations and accountability; (10) assists in assuring the adequate allocation of resources for ODREEO including the establishment of guidelines for recruiting, selection, and training of agency personnel; (11) develops and directs research and evaluation studies to focus on, and improve the effectiveness of, ODREEO program activities; (12) provides direction for the agency's alternative dispute resolution activities, and (13) provides direct support for ODREEO program activities in CDC.

Dated: August 14, 2006.

William H. Gimson,

Chief Operating Officer, Centers for Disease Control and Prevention (CDC).

[FR Doc. 06–7117 Filed 8–23–06; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Updated Vaccine Information Statements for Influenza Vaccines; Revised Instructions for Use of Vaccine Information Statements

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: Under the National Childhood Vaccine Injury Act (NCVIA) (42 U.S.C. 300aa–26), the CDC must develop vaccine information materials that all health care providers are required to give to patients/parents prior to administration of specific vaccines. Since January 1, 2006, use of trivalent influenza vaccine information materials has been required. This notice announces availability of updated influenza vaccine information materials for use in the upcoming 2006–07 influenza season.

DATES: Each health care provider who administers any trivalent influenza vaccine to any child or adult in the United States during the 2006–07 influenza season shall provide copies of the relevant influenza vaccine information materials referenced in this notice, dated June 30, 2006, to the patient/parent/legal representative in conformance with the June 30, 2006

CDC Instructions for the Use of Vaccine Information Statements.

FOR FURTHER INFORMATION CONTACT: Anne Schuchat, M.D., Director, National Immunization Program, Centers for Disease Control and Prevention, Mailstop E–05, 1600 Clifton Road, NE., Atlanta, Georgia 30333, telephone (404) 639–8200.

SUPPLEMENTARY INFORMATION: The National Childhood Vaccine Injury Act of 1986 (Pub. L. 99–660), as amended by section 708 of Public Law 103–183, added section 2126 to the Public Health Service Act. Section 2126, codified at 42 U.S.C. 300aa–26, requires the Secretary of Health and Human Services to develop and disseminate vaccine information materials for distribution by all health care providers in the United States, whether public or private, to any patient (or to the parent or legal representative in the case of a child) receiving vaccines covered under the National Vaccine Injury Compensation Program. Development and revision of the vaccine information materials, also known as Vaccine Information Statements (VIS), have been delegated by the Secretary to the Centers for Disease Control and Prevention (CDC).

The vaccines initially covered under the National Vaccine Injury Compensation Program were diphtheria, tetanus, pertussis, measles, mumps, rubella and poliomyelitis vaccines. Since April 15, 1992, any health care provider in the United States who intends to administer one of these covered vaccines is required to provide copies of the relevant vaccine information materials prior to administration of any of these vaccines. Since June 1, 1999, health care providers are also required to provide copies of vaccine information materials for the following vaccines that were added to the National Vaccine Injury Compensation Program: hepatitis B, haemophilus influenzae type b (Hib), and varicella (chickenpox) vaccines. In addition, use of vaccine information materials for pneumococcal conjugate vaccine has been required since December 15, 2002, materials for trivalent influenza vaccines since January 1, 2006 and materials for hepatitis A vaccine since July 1, 2006.

Updated Influenza Vaccine Information Materials

Inactivated Influenza Vaccine Information Statement

Live, Intranasal Influenza Vaccine Information Statement

Initial vaccine information materials developed under 42 U.S.C. 300aa–26 for trivalent inactivated influenza vaccine and for trivalent live, intranasal influenza vaccine were published in the **Federal Register** on November 10, 2005 (70 FR 68461). The edition date of those materials was October 20, 2005. This notice announces availability of the 2006–07 editions of these influenza vaccine information materials. The only substantive revisions that appear in these updated materials are the addition of the influenza season date of 2006–07, the VIS edition date of 6/30/2006 and an update to note the expanded recommended schedule for administration of inactivated influenza vaccine to all children 6–59 months of age and to the household contacts and out-of-home caregivers of such children (with either inactivated or live, intranasal influenza vaccine as applicable).

Instructions for the Use of Vaccine Information Statements

The CDC Instructions for the Use of Vaccine Information Statements have been updated to note the new edition dates of the influenza vaccine information materials. Those updated instructions, dated June 30, 2006, can be downloaded at the CDC Web site at: *http://www.cdc.gov/nip/publications/VIS.*

In addition, copies of the updated influenza materials can be downloaded in PDF format at the same Web site. Alternatively, single camera-ready copies are available from State health departments. A list of State health department contacts for obtaining copies of these materials is included in a December 17, 1999 **Federal Register** notice (64 FR 70914).

Dated: August 16, 2006.

James D. Seligman,

Chief Information Officer, Centers for Disease Control and Prevention.

[FR Doc. E6–14030 Filed 8–23–06; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

President's Committee for People With Intellectual Disabilities; Notice of Meeting

AGENCY: President's Committee for People with Intellectual Disabilities (PCPID), Department of Health And Human Services.

ACTION: Notice of quarterly meeting.

DATES: Thursday, September 14, 2006, from 9 a.m. to 5:30 p.m., and Friday, September 15, 2006, from 9 a.m. to 5 p.m. The entire meeting of PCPID will be open to the public.

ADDRESSES: The meeting will be held in Room 800 of the Hubert H. Humphrey building, 200 Independence Ave., SW., Washington, DC 20201. Individuals who will need accommodations for a disability in order to attend the meeting (e.g., interpreting services, assistive listening devices, materials in alternative format such as large print or Braille) should notify Sally Atwater at 202–619–0634 no later than September 7, 2006. We will attempt to meet requests made after that date, but cannot guarantee availability. All meeting sites are barrier free.

Agenda: Day One—The new Committee members will take the oath of office, be sworn in as members of the President's Committee for People with Intellectual Disabilities and receive guidance on ethics regulations and the Federal Advisory Committee Act (FACA). Committee members will also hear from the various ex officio members regarding the programs and services provided by their respective Federal agencies.

Agenda: Day Two—The Committee will receive a briefing on the New Freedom Initiative and then begin discussion to set Committee priorities for the coming year.

FOR FURTHER INFORMATION CONTACT: Sally D. Atwater, Executive Director, President's Committee for People with Intellectual Disabilities, The Aerospace Center, Suite 701, 370 L'Enfant Promenade, SW., Washington, DC 20447. Telephone: 202–619–0634, fax: 202–205–9591. E-mail: *satwater@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: PCPID acts in an advisory capacity to the President and the Secretary of Health and Human Services on a broad range of topics relating to programs, services and supports for persons with intellectual disabilities. The Committee, by Executive Order, is responsible for evaluating the adequacy of current practices in programs, services and supports for persons with intellectual disabilities, and for reviewing legislative proposals that impact the quality of life experienced by citizens with intellectual disabilities and their families.

Dated: August 14, 2006.

Sally D. Atwater,

Executive Director, President's Committee for People with Intellectual Disabilities.

[FR Doc. E6–13996 Filed 8–23–06; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2006N–0326]

Agency Information Collection Activities; Proposed Collection; Comment Request; Inspection by Accredited Persons Program Under the Medical Device User Fee and Modernization Act of 2002

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the publication of the criteria FDA intends to use to accredit third parties to conduct inspections of eligible manufacturers of class II or class III medical devices.

DATES: Submit written or electronic comments on the collection of information by October 23, 2006.

ADDRESSES: Submit electronic comments on the collection of information to: *http://www.fda.gov/dockets/ecomments*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Denver Presley, Jr., Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1472.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Medical Devices: Inspection by Accredited Persons Program Under MDUFMA (OMB Control Number 0910–0510)—Extension

The Medical Device User Fee and Modernization Act of 2002 (MDUFMA) (Public Law 107–250) was signed into law on October 26, 2002. Section 201 of MDUFMA adds a new paragraph ''g'' to section 704 of the Federal, Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 374), directing FDA to accredit third parties (accredited persons or APs) to conduct inspections of eligible manufacturers of class II or class III devices. This is a voluntary program.

FDA has a guidance document that provides information for those interested in participating in this program. The guidance is entitled ''Implementation of the Inspection by Accredited Persons Program Under the Medical Device User Fee and Modernization Act of 2002; Accreditation Criteria.''

Description of Respondents: Businesses or other for profit organizations.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Information Collection:	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Request for Accreditation	3	1	3	80	240
Total Hours					240

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA based these estimates on conversations with industry, trade association representatives, and internal FDA estimates. Once an organization is accredited, it will not be required to reapply.

Dated: August 18, 2006.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E6–14056 Filed 8–23–06; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Food Safety and Security Monitoring Project—Radiological Health; Announcement Type: Cooperative Agreements Under a Limited Competition; Funding Opportunity Number: Request for Applications: RFA–FDA–ORA–2006–4; Catalog of Federal Domestic Assistance Number: 93.448

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

I. Funding Opportunity Description

The Food and Drug Administration (FDA), Office of Regulatory Affairs (ORA), Division of Federal-State Relations (DFSR), is announcing the availability of cooperative agreements for equipment, supplies, personnel, training, and facility upgrades to Food Emergency Response Laboratory Network (FERN) radiological laboratories of State, local, and tribal governments. The cooperative agreements are to enable the analyses of foods and food products in the event that redundancy and/or additional laboratory surge capacity is needed by FERN for analyses related to radiological terrorism or other emergency situation. These cooperative agreements are also intended to expand participation in networks to enhance Federal, State, local, and tribal governmental food safety and security efforts.

The goal of ORA's cooperative agreement program is to complement and improve State, local and Indian tribal governmental food safety and security testing programs. This will be accomplished through the provision of supplies, personnel, facility upgrades, training in current food testing methodologies, participation in proficiency testing to establish additional reliable laboratory sample analysis capacity, participation in method enhancement activities to extend analysis capability, and analysis of surveillance samples. In the event of a large-scale radiological terrorism event affecting foods or food products, the recipient may be required to perform selected radiological analyses of domestic and imported food samples collected and supplied to the laboratory by FDA or other Federal agencies through FDA. These samples may consist of, but are not limited to, the following: vegetables and fruits (fresh and packaged); juices (concentrate and diluted); grains and grain products; seafood and other fish products; milk and other dairy products; infant formula; baby foods; bottled water; condiments; and alcoholic beverage products.

All grant application projects that are developed at State, local, and tribal governmental levels must have national application that can enhance Federal food safety and security programs. At the discretion of the FDA, successful project formats will be made available to interested Federal, State, local and tribal government FERN laboratories.

There are two key project areas identified for this effort:

(1) The use of Gamma Spectrometry analysis for the screening and identification of gamma emitting radionuclides in foods; and

(2) The use of Beta Spectrometry analysis for the screening and identification of beta emitting radionuclides in foods.

FDA will support the projects covered by this notice under the authority of section 312 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act) (Public Law 107–188). This program is described in the Catalog of Federal Domestic Assistance under 93.448.

1. Background

ORA is the primary inspection and analysis component of FDA/ORA has approximately 1,600 investigators, inspectors, and analysts who cover the country's approximately 95,000 FDA regulated businesses. These investigators inspect more that 15,000 facilities a year; and ORA laboratories analyze several thousand samples per year. ORA conducts special investigations, food inspection recall audits, performs consumer complaint inspections, and collects samples of regulated products. Increasingly, ORA has been called upon to expand the testing program to address the increasing threat to food safety and security through intentional radiological terrorism events. ORA developed radiological screening and analysis methodologies that are used to evaluate foods and food products in such situations. However, in the event of a large-scale emergent incident, analytical sample capacity in ORA field laboratories has a finite limit. Information from ongoing relationships with state partners indicates limited redundancy in state food testing laboratories, both in terms of analytical capabilities and analytical sample capacity. Several state food testing laboratories lack the specialized equipment to perform the analyses and/or the specific methodological expertise in the types of analyses performed for screening foods and food products involving radiological terrorism events.

Subtitle A of Title III of the Bioterrorism Act, Protection of Food Supply, section 312-Surveillance and Information Grants and Authorities, amends part B of Title III of the Public Health Service Act to authorize the Secretary of Health and Human Services (the Secretary) to award grants to States and Indian tribes to expand participation in networks to enhance Federal, State, and local food safety efforts. This may include meeting the costs of establishing and maintaining the food safety surveillance, technical, and laboratory capacity needed for such participation.

2. Program Research Goals

The goal of ORA's cooperative agreement program is to complement and improve State, local and Indian tribal food safety and security testing programs. This will be accomplished through the provision of equipment, supplies, personnel, facility upgrades, training in current food testing methodologies, participation in proficiency testing to establish additional reliable laboratory sample analysis capacity, analysis of surveillance samples, and in cooperation with FDA, participation in method enhancement activities designed to extend analytical capabilities. In the event of a large-scale radiological terrorism event affecting foods or food products, the recipient may be required to perform selected radiological analyses of domestic and imported food samples collected and supplied to the laboratory by FDA or other Federal agencies through FDA. These samples may consist of, but are not limited to, the following: vegetables and fruits (fresh and packaged); juices (concentrate and diluted); grains and grain products; seafood and other fish products; milk and other dairy products; infant formula; baby foods; bottled

water; condiments; and alcoholic beverage products.

II. Award Information

Support will be in the form of a cooperative agreement. Substantive involvement by the awarding agency is inherent in the cooperative agreement award. Accordingly, FDA will have substantial involvement in the program activities of the project funded by the cooperative agreement. Substantive involvement includes, but is not limited to, the following: (1) How often samples will be sent, (2) directions on how tests should be executed, (3) onsite monitoring, (4) supply of equipment, (5) FDA's training on processes, and (6) enhancement and extension of analytical methodology.

FDA will provide specific procedures and protocols for the two project areas (see section I of this document) to be used for the analysis of collected food samples. FDA will provide guidance on the specific foods to be collected and analyzed by the successful applicant. State personnel will be responsible for the collection and analysis of surveillance samples.

FDA will purchase and have all needed major equipment delivered to the awardee's laboratory. The equipment purchased will remain the property of FDA and will be provided to the awarded labs on loan.

Proposed projects designed to fulfill the specific objectives of any one or more of the project areas will be considered for funding. Applicants may also apply for only facility upgrades, personnel, training, and surveillance sample collection if they have the necessary equipment and it will be available for these projects. These grants are not to fund or conduct food inspections for food safety regulatory agencies.

It should be emphasized that in all of the projects, there is a particular desire to promote a continuing, reliable capability and capacity for laboratory sample analyses of foods and food products for the rapid detection and identification of radionuclides. With this in mind, it is desirable that sample analyses will be completed within 2 weeks of receipt, and the results will be reported to FERN. The format and reporting media will be established by FERN. Shorter timeframes may be sought for special testing such as proficiency tests or special assignments.

1. Award Amount

The total amount of funding available in Fiscal Year (FY) 2006 is $500,000. Cooperative agreements will be awarded up to $250,000 in total (direct plus indirect) costs per year for up to 2 years. It is anticipated that two awards will be made. Support of these cooperative agreements will be for the funding of supplies, facility upgrades, surveillance sample collection, personnel, the provision of training in current analytical methodology, and for the analysis of foods and food products. All major needed equipment will be provided on loan from FDA and will not be included in the award amount.

2. Length of Support

The length of support is 2 years and all applicants must apply for the full 2 years of currently projected funding. All applicants must provide 2 years worth of budgets and program objectives. The initial competitive review and award process will provide all awardees with 1 year of funding. The second year of funding of noncompetitive continuation of support will depend on performance during the preceding year and availability of Federal funds.

3. Equipment

FDA will purchase and have all needed major equipment for the two project areas delivered to the awardee's laboratory. The equipment purchased by FDA will remain the property of FDA under loan to the awardee's laboratory for a specified time period. FDA may terminate the loan at any time. The equipment may not be transferred by the awardee's laboratory to a third party, and the awardee's laboratory assumes full responsibility and liability for any claims that may arise as a result of operation of this equipment for the period it is in the possession of the awardee's laboratory.

4. Funding Plan

It is anticipated that FDA will make 2 awards in FY 2006 for this program. The number of projects funded will depend on the quality of the applications received and is subject to availability of Federal funds to support the projects.

Funds may be requested in the budget to travel to FDA for meetings with program staff about the progress of the project and travel for training.

III. Eligibility Information

1. Eligible Applicants

Due to the sensitive counterterrorism nature of this project it is imperative that only state government entities with the regulatory authority to conduct onsite inspections be participatory members of this cooperative agreement program. This is to ensure that any regulatory action and/or laboratory analysis that must be completed in an emergent situation can be carried out in the most expeditious manner. Therefore, this cooperative agreement program is only available to current FERN radiological laboratories that at the time of the submission of this application also fall into one of the following categories: state laboratories, state regulatory agencies with the required lab capacity and university laboratories that are currently state adjunct laboratories connected to state laboratory and/or regulatory agencies with the required state regulatory authority.

All grant application projects that are developed for this competitive cooperative agreement program must have national implication or application that can enhance Federal food safety and security programs. At the discretion of FDA, successful project formats will be made available to interested Federal, State, local and tribal government FERN laboratories.

2. Cost Sharing or Matching

Cost sharing is not required.

3. Other

This cooperative agreement program is authorized by section 312 of the Bioterrorism Act.

Activities that take place under these cooperative agreements may involve agents and toxins subject to requirements under 42 CFR Part 72 (Interstate Shipment of Etiologic Agents) and Part 73 (Select Agents and Toxins). Further, persons participating in these cooperative agreements may be required to obtain security clearances. Therefore, such persons must be capable of meeting all security requirements.

A. Dun and Bradstreet Number (DUNS)

As of October 1, 2003, applicants are required to have a DUNS number to apply for a grant or cooperative agreement from the Federal Government. The DUNS number is a 9-digit identification number that uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, call 1–866–705–5711. Be certain that you identify yourself as a Federal grant applicant when you contact Dun & Bradstreet, Inc.

IV. Application and Submission

1. Addresses to Request Application

The application request and the completed application should be submitted to Michelle Caraffa, Grants Management Specialist, Division of Contracts and Grants Management (HFA–500), Food and Drug Administration, 5600 Fishers Lane,

Rockville, MD 20857, 301–827–7025, e-mail: *michelle.caraffa@fda.hhs.gov*. If the application is hand-carried or commercially delivered it should be addressed to 5630 Fishers Lane, rm. 2129, Rockville, MD 20857.

The original and two copies of the completed grant application form PHS 5161–1, with copies of the appendices for each of the copies, should be submitted to Michelle Caraffa (see previous paragraph). The outside of the mailing package should be labeled ''Response to RFA–FDA–ORA–2006–4.''

FDA is also accepting applications for this program electronically via *Grants.gov*. Applicants are strongly encouraged to apply electronically by visiting the Web site *http://www.grants.gov* and following the instructions under ''APPLY.'' In order to apply electronically, the applicant must have a DUNS number and register in the Central Contractor Registration (CCR) database as described in section IV.6.A of this document.

If the submission is electronic, the application package is posted under the ''APPLY'' section of this announcement under *http://www.grants.gov*. The required application PHS 424, which is part of the PHS 5161–1 form, can be completed and submitted online.

2. Content and Form of Application

A. Content of Application

The ad hoc expert panel will review the application based on the following criteria that each applicant should address in their cooperative agreement application.

1. The rationale and design to meet the goals of the cooperative agreement:

A full description of the prospective project's intended goals and objectives and how each will guide a full project plan. This section should lay out foundation for the entire program.

2. Expertise in the use of gamma or beta spectroscopy in the analysis of foods or animal tissues: Specifically address and provide the qualifications of all personnel that will be assigned to the project. Including cv/resumes of key laboratory personnel, which should include information on personnel that have experience in gamma and beta spectroscopy.

3. Sample Analysis Commitment: The variety and number of samples analyzed in the current food or animal tissue programs. The laboratory will be required to analyze surveillance and emergency response food samples. Therefore, an estimate of the number of food samples that can be analyzed for radionuclides by each project area (i.e., gamma spectroscopy, beta spectroscopy), must be submitted. This estimate should be for a 2-year period. The estimate should also address the number of samples that can be analyzed in a 2-week period. The procedures to be used will be supplied by FDA. This information will be provided after the award is given so recipients will be aware of requirements/responsibilities. In addition, if a cooperative agreement is awarded, awardees will be informed of any additional documentation that should be submitted to FERN.

4. The adequacy of facilities, support services and quality control and quality assurance procedures and practices for food and animal tissue analysis. This section should include the following:

- A summary description of procedures in place to monitor sample workflow, including the tracking and monitoring of sample analyses and a description of the current quality assurance program.
- A discussion of the laboratory's ability to complete and report on a given sample analysis within the required 2-week time frame.
- The name and address of the laboratory facility where the equipment will be installed and the name of the most responsible individual of that facility.
- A complete description of the laboratory facility, specifically addressing the following information:

(1) Floor diagrams of the current laboratory;

(2) A description of the envisaged space, to include a floor-plan diagram;

(3) Area where the equipment is to be installed. The installation of equipment in a laboratory will require adequate and appropriate space and physical plant supplies, such as power, water, etc.;

(4) A detailed description of the proposed facilities upgrade including drawings and cost estimates;

(5) Operational support areas to be used for the project, including details about the availability of ancillary laboratory safety and support equipment and facilities, such as the numbers and types of chemical fume hoods available;

(6) Details describing the sample receiving and sample storage areas and a description of any existing chain-of-custody procedures;

(7) A detailed description of laboratory access procedures, including a description of practices and systems which limit access to laboratory space by unauthorized personnel. Additional procedures for access to the space(s) dedicated to the equipment provided, if any, should also be included.

5. Laboratory Management Practices: Abilities and procedures in place to recall personnel and establish extended work weeks and commitment to analyze emergency response samples. For the laboratory, the following management information must be provided:

- A summary description of any quality management system defined, in development, or in place as it relates to quality control and quality assurance procedures and practices;
- A summary description of staffing management, specifically to include abilities and procedures in place to recall personnel, establish extended workweeks, etc.;
- A summary description of any security procedures or processes to evaluate the background of laboratory personnel. This should include any procedures to evaluate subcontractors who have access to laboratory space, such as cleaning personnel.

B. Format for Application

Submission of the application must be on grant application form PHS 5161–1 (revised 7/00). All ''General Information Instructions'' and specific instructions in the application kit must be followed. The face page of the application should reflect the request for application number RFA–FDA–ORA–2006–4 under ''Federal Identifier.''

Data and information included in the application will generally not be available publicly prior to the funding of the application. After funding has been awarded, data and information included in the application will be given confidential treatment to the extent permitted by the Freedom of Information Act (5 U.S.C. 552(b)(4)) and FDA's implementing regulations (including 21 CFR 20.61, 20.105, and 20.106 (21 CFR 20.61, 20.105, and 20.106)). By accepting funding, the applicant agrees to allow ORA to publish specific information about the grant.

The requirements requested on form SF 424/PHS 5161–1 (revised 7/00) have been sent by PHS to the Office of Management and Budget (OMB) and have been approved and assigned OMB control number 0248–0043.

3. Submission Dates and Times

The application receipt date is August 31, 2006.

Applications will be accepted from 8 a.m. to 4:30 p.m., Monday through Friday, until the established receipt date. Applications will be considered received on time if hand delivered to the address noted previously (see *Addresses to Request Application* in section IV of this document) before the established receipt date, or sent or mailed by the receipt date as shown by

a legible U.S. Postal Service dated postmark or a legible dated receipt from a commercial carrier. Private metered postmarks shall not be acceptable as proof of timely mailing. If not received on time applications will not be considered for review and will be returned to the applicant. (Applicants should note that the U.S. Postal Service does not uniformly provide dated postmarks. Before relying on this method, applicants should check with their local post office). Please do not send applications to the National Institutes of Health (NIH). Any application sent to NIH that is forwarded to FDA's Grants Management Office and not received in time for orderly processing will be judged nonresponsive and returned to the applicant.

Applications must be submitted via U.S. mail or commercial carrier or hand delivered as stated previously in this document. Applications submitted electronically must be received by close of business on the published receipt date.

No addendum material will be accepted after the receipt date.

4. Intergovernmental Review

The regulations issued under Executive Order 12372, Intergovernmental Review of Department of Health and Human Services Programs and Activities (45 CFR part 100) apply to the Food Safety and Security Monitoring Project. Applicants (other than federally recognized Indian tribal governments) should contact the State's Single Point of Contact (SPOC) as early as possible to alert the SPOC to the prospective application(s) and to receive any necessary instructions on the State's review process. A current listing of SPOCs is included in the application kit or at *http://www.whitehouse.gov/omb/grants/spoc.html*. (FDA has verified the Web site address, but FDA is not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.) The SPOC should send any State review process recommendations to the FDA administrative contact (see *Addresses to Request Application* in section IV of this document). The due date for the State process recommendations is no later than 60 days after the deadline date for the receipt of applications. FDA does not guarantee to accommodate or explain SPOC comments that are received after the 60-day cutoff.

5. Funding Restrictions

These grants are not to fund or conduct food inspections for food safety regulatory agencies. They may not be utilized for new building construction; however, remodeling of existing facilities is allowed, provided that remodeling costs do not exceed 25 percent of the grant award amount.

6. Other Submission Requirements

A. CCR

In anticipation of the *Grants.gov* electronic application process applicants are encouraged to register with the CCR database. This database is a governmentwide warehouse of commercial and financial information for all organizations conducting business with the Federal Government. Registration with CCR will eventually become a requirement and is consistent with the governmentwide management reform to create a citizen-centered web presence and build e-gov infrastructures in and across agencies to establish a ''single face to industry.'' The preferred method for completing a registration is via the Internet at *http://www.ccr.gov*. (FDA has verified the Web site address, but FDA is not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.) This Web site provides a CCR handbook with detailed information on data needed prior to beginning the online registration, as well as steps to walk applicants through the registration process. The applicant must have a DUNS number to begin registration. Call Dun & Bradstreet, Inc., at the number listed in the previous paragraph of this document if you do not have a DUNS number.

In order to access *Grants.gov* an applicant will be required to register with the Credential Provider. Information about this requirement is available at *http://www.grants.gov/applicants/get_registered.jsp*. (FDA has verified the Web site address, but FDA is not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.)

V. Application Review Information

1. Criteria

A. Scientific/Technical Review Criteria

All grant application projects that are developed at State, local, and tribal levels must have national implication or application that can enhance Federal food safety and security programs. At the discretion of FDA, successful project formats will be made available to interested Federal, State, local and tribal government FERN laboratories.

A. General Information

FDA grants management and program staff will review applications sent in response to this notice. To be responsive, an application must be submitted in accordance with the requirements of this notice and must bear the original signature of the applicant institution's/organization's authorized official. If submitted electronically the original signature requirement does not apply.

If an application is found to be nonresponsive it will be returned to the applicant without further consideration. Applicants are strongly encouraged to contact FDA to resolve any questions about criteria before submitting an application. Please direct all questions of a technical or scientific nature to ORA program staff and all questions of an administrative or financial nature to the grants management staff (see section VII of this document).

To be a FERN Radiological laboratory, an applicant institution must have an approval letter from the FERN National Program Office approving the applicant institution as a FERN Radiological laboratory prior to the application receipt date of August 31, 2006.

B. Program Review Criteria

Applications will be considered for funding on the basis of their overall technical merit as determined through the review process. Program criteria will include availability of funds and overall program balance in terms of geography with respect to existing and projected laboratory sample analysis and testing capacity and capability. Final funding decisions will be made by the Commissioner of Food and Drugs or his designee.

Responsive applications will be reviewed and evaluated for scientific and technical merit by an ad hoc panel of experts in the subject field of the specific application.

A score will be assigned to each responsive application based on the scientific/technical review criteria. The review panel may advise the program staff about the appropriateness of the proposal to the goals of the ORA/ORO/DFSR cooperative agreement.

3. Anticipated Announcement and Award

It is anticipated that all awards will be made by September 30, 2006.

VI. Award Administration Information

1. Award Notices

FDA'S Grants Management Office will notify applicants who have been selected for an award. Awards will

either be issued on a Notice of Grant Award (PHS 5152) signed by the FDA Chief Grants Management Officer and be sent to the applicant by mail or transmitted electronically.

2. Administrative and National Policy Requirements

These agreements will be subject to all policies and requirements that govern the research grant programs of PHS, including provisions of 42 CFR part 52, 45 CFR parts 74 and 92, and the PHS Grants Policy Statement.

Applicants must adhere to the requirements of this notice. Special terms and conditions regarding FDA regulatory requirements and adequate progress of the study may be part of the awards notice.

PHS strongly encourages all grant recipients to provide a smoke-free workplace and to discourage the use of all tobacco products. This is consistent with the PHS mission to protect and advance the physical and mental health of the American people.

FDA is committed to achieving the health promotion and disease prevention objectives of ''Healthy People 2010,'' a national effort designed to reduce morbidity and mortality and to improve quality of life. Applicants may obtain a paper copy of the ''Healthy People 2010'' objectives, vols. I and II, for $70 ($87.50 foreign) S/N 017–000–00550–9, by writing to the Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954. Telephone orders can be placed to 202–512–2250. The document is also available in CD–ROM format, S/N 017–001–00549–5 for $19 ($23.50 foreign) as well as on the Internet at *http://www.healthypeople.gov/* under ''Publications.'' (FDA has verified the Web site address, but FDA is not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.)

3. Reporting

A. Reporting Requirements

The original and two copies of an annual Financial Status Report (FSR) (SF–269) must be sent to FDA's grants management officer within 90 days of the budget period end date of the grant. Failure to file the FSR in a timely fashion will be grounds for suspension or termination of the grant. A final FSR will be due 90 days after the expiration of the project period as noted on the Notice of Grant Award.

For continuing cooperative agreements, quarterly reports and an annual program progress report are also required. For such cooperative agreements, the noncompeting continuation application (SF 424/PHS 5161–1) will be considered the program progress report for the fourth quarter of the budget period.

Quarterly progress reports must contain, but are not limited to the following:

1. A status report on the installation, training, and operational readiness of any equipment that is provided;

2. A summary report on any proficiency testing performed;

3. A summary status of samples analyzed and time to complete individual sample testing; and

4. A summary description of any other testing performed on the equipment.

A final program progress report, FSR, and invention statement must be submitted within 90 days after the expiration of the project period as noted on the Notice of Grant Award.

The final program progress report must provide full written documentation of the project, and summaries of laboratory operations, as described in the grant application. The documentation must be in a form and contain sufficient detail such that other State, local, and tribal government FERN laboratories could reproduce the final project.

B. Monitoring Activities

The program project officer will monitor grantees periodically. The monitoring may be in the form of telephone conversations, e-mails, or written correspondence between the project office/grants management office and the principal investigator. Periodic site visits with officials of the grantee organization may also occur. The results of these monitoring activities will be recorded in the official grant file and will be available to the grantee upon request consistent with applicable disclosure statutes and with FDA disclosure regulations. Also, the grantee organization must comply with all special terms and conditions of the cooperative agreement, including those which state that future funding of the study will depend on recommendations from the project officer. The scope of the recommendation will confirm that: (1) There has been acceptable progress on the project; (2) there is continued compliance with all FDA regulatory requirements; (3) if necessary, there is an indication that corrective action has taken place; and (4) assurance that any replacement of personnel will meet the testing requirements.

VII. Agency Contacts

Regarding the administrative and financial management aspects of this notice: Michelle Caraffa (see *Addresses to Request Application* in section IV of this document).

Regarding the programmatic or technical aspects of this notice: Alexandra Cossi, Division of Federal State Relations, Office of Regulatory Affairs, Food and Drug Administration (HFC–140), 5600 Fishers Lane, rm. 12–07, Rockville, MD 20857, 301–827–2899, e-mail: *alexandra.cossi@fda.hhs.gov*.

VIII. Other Information

Data included in the application, if restricted with the legend specified in this section of the document, may be entitled to confidential treatment as trade secret or confidential commercial information within the meaning of the Freedom of Information Act and FDA's implementing regulations (21 CFR 20.61).

Unless disclosure is required under the Freedom of Information Act as amended (5 U.S.C. 552), as determined by the freedom of information officials of the Department of Health and Human Services or by a court, data contained in the portions of this application that have been specifically identified by page number, paragraph, etc., by the applicant as containing restricted information, shall not be used or disclosed except for evaluation purposes.

Dated: August 18, 2006.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 06–7124 Filed 8–21–06; 12:49 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[FDA 225–06–8403]

Memorandum of Understanding Between the U.S. Food and Drug Administration, the National Cancer Institute, and the National Institute of Standards and Technology

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The purpose of this Memorandum of Understanding (MOU) is to set forth an agreement between the National Cancer Institute (NCI), the National Institute of Standards and Technology (NIST), and the Food and

Drug Administration (FDA) (collectively ''the Parties'', or individually as a ''Party'') regarding the roles, responsibilities, and financial commitments of each Party relating to the collaboration through working groups and steering committees to develop strategic plans, set priorities, and leverage resources and expertise from multiple sources, including the private sector, toward the goal of facilitating the development of nanotechnologies that constitute novel research tools and safer, more effective cancer therapies by establishing a framework for effective risk identification, assessment and evaluation of emerging products based on nanotechnology. This collaboration among the Parties will be focused primarily on the Nanotechnology Characterization Laboratory and directly related activities.

DATES: The agreement became effective June 22, 2006.

FOR FURTHER INFORMATION CONTACT:

For FDA: Wendy R. Sanhai, Senior Scientific Advisor, Office of the Commissioner (HF–18), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–7867, FAX: 301–443–9718.

For NCI: Gregory J. Downing, Director, Office of Technology and Industrial Relations, Office of the Director, National Cancer Institute, 31 Center Dr., rm. 10A52, Bethesda, MD 20892, 301–496–1550, FAX: 301–496–7807.

For NIST: Debra Kaiser, Chief, Ceramics Division, Materials Science and Engineering Laboratory, National Institute of Standards and Technology, 100 Bureau Dr., Stop 8522, Gaithersburg, MD 20899, 301–975–6119, FAX: 301–975–5334.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20.108(c), which states that all written agreements and MOUs between FDA and others shall be published in the **Federal Register**, the agency is publishing notice of this MOU.

Dated: August 16, 2006.

Jeffrey Shuren,

Assistant Commissioner for Policy.

BILLING CODE 4160–01–S

FDA No. 225-06-8403

MEMORANDUM OF UNDERSTANDING

BETWEEN THE

FOOD AND DRUG ADMINISTRATION (FDA)

THE

THE NATIONAL CANCER INSTITUTE (NCI)

AND THE

NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY (NIST)

FOR THE

NANOTECHNOLOGY CHARACTERIZATION LABORATORY (NCL)

AND

RELATED NANOTECHNOLOGY ACTIVITIES

Whereas extensive cross-sector and multi-disciplinary efforts are needed to understand and develop nanotechnology-based platforms and tools for cancer research as well as diagnostic and therapeutic applications;

Whereas the FDA, NCI, and NIST, hereafter referred to as the Parties, find that it is in the best interests of the three Parties (NCI is an institute within an agency, NIH) to develop a partnership that leverages each Party's core expertise and resources to facilitate nanotechnology development that will lead to new clinical products;

Whereas FDA, with its unique perspective on research and development activities and in-depth understanding of clinical trial design, regulatory policy, and scientific know-how in reviewing medical products, is interested in anticipating the impact of nanotechnology development and facilitating regulatory review and evaluation of new medical products that incorporate nanotechnology by working to clearly establish the critical path for such impending applications;

Whereas NCI, with its significant cancer research infrastructure and advanced technology programmatic investments, is interested in eliminating suffering and death due to cancer and seeks to develop technologies to improve the detection, diagnosis, treatment, and prevention of cancer;

Whereas NIST, with it world-class metrology facilities and standardization capabilities and expertise, is interested in improving translational research, commercialization, and national economy overall;

Whereas the private sector has expressed interest in further scientific exploration and nanotechnology development for novel diagnostic and therapeutic application;

Whereas FDA and NCI formed an Interagency Oncology Task Force (IOTF) in 2003 whose nanotechnology subcommittee, with a mission to foster greater understanding of the biomedical applications of nanotechnology, directly supports this Memorandum of Understanding (MOU) to support collaborations on oncology-related issues in nanotechnology development for clinical benefit, and standardization of approaches for evaluating nanotechnology devices and materials for cancer diagnosis and treatment;

Now, therefore, the Parties agree to collaborate through working groups and steering committees to develop strategic plans, set priorities, and leverage resources and expertise from multiple sources, including the private sector, toward the goal of facilitating the development of nanotechnologies that constitute novel research tools and safer, more effective cancer therapies by establishing a framework for effective risk identification, assessment, and evaluation of emerging products based on nanotechnology. This MOU sets forth the framework for collaboration among the Parties and for pursuing specific collaborative projects that may involve additional partners and will be implemented through separate agreements, as needed. This collaboration among the Parties will be focused primarily on the Nanotechnology Characterization Laboratory (NCL) and directly related activities. The Parties anticipate that concepts developed and activities undertaken under the auspices of this MOU may lead to partnerships that will be implemented through separate agreements.

The Parties agree as follows:

RESPONSIBILITIES OF THE PARTIES

In order to pursue the goals described above, the Parties agree to work through the process described below.

1. The Parties will collaborate on nanotechnology characterization and related development activities, primarily in the context of the NCI's NCL. Through this collaboration, the Parties intend to share best practices and know-how with each other, and will provide access to data regarding the assessment tools for use in FDA's regulatory evaluation and guidance development to facilitate cancer drug development. The close collaboration among the Parties, including sharing of data, characterization approaches, and best practices, is expected to a) support understanding and resolution of potential implications of nanotechnology-based products for clinical application; b) facilitate the development of measurement methods and standard protocols appropriate to innovative and disruptive technologies; and c) facilitate transfer of cancer science and engineering discovery and development through commercialization, with the measurement science and standards programs and regulatory science and evaluation policy development.

2. Within the framework of this MOU, related collaborations and separate agreements may be developed as appropriate, and may include, but may not be limited to the following areas and activities, as time and staff resources permit:

   i. Development and refinement of the preclinical and early clinical pathway(s) for nanotechnology-based drugs and diagnostic devices to guide NCI-supported technology development leading to medical products;
   ii. Development and validation of standards, risk/benefit analyses and other evaluative tools to identify risks and assess safety and efficacy in newly emerging nanotechnology-based products;
   iii. Development of publicly available master files containing data, e.g. protocols, assay cascades and other pre-competitive tools developed collaboratively by the Parties and that may guide further development of the field;
   iv. Development, validation and assessment of assays and other appropriate test methods, including close review and input from all Parties prior to standardization of those assays;
   v. Development of joint research programs that fund academic scientists or trainees identified under the joint IOTF training program to perform research at FDA and NIST in collaboration with FDA and NIST scientists, respectively, as well as potential research collaborations in the NCL by FDA and NIST scientists;
   vi. Representation for each agency on the Nanotechnology Characterization Laboratory Scientific Oversight Committee; and
   vii. Development of scientific collaborations to capitalize on opportunities generated by NCL activities.

3. Additional concepts or ideas for developing collaborations or activities involving joint projects or integrated approaches to conducting science or technology development specifically aimed at commercializing products will be formally presented by submission of concepts to the designated contact from each Party. These designated contacts will meet quarterly to review progress and address new opportunities for collaboration. When necessary, technical and programmatic advisory working groups made up of employees from the respective agencies may be assembled to make formal recommendations for collaboration. The designated contacts shall obtain appropriate agreement by each agency, in writing, on each significant activity to be undertaken pursuant to this MOU, including agreement on the scope of work; tasks, deliverables (if any) and delivery dates; anticipated products and outcomes; periods of performance; levels of funding and resources to be provided for each activity by the Parties; parameters of data sharing in compliance with all applicable statutory and regulatory requirements; and any other appropriate and necessary aspects of mutual activities. The designated contacts shall seek to resolve any dispute concerning the MOU through good-faith discussions.

4. To the extent that implementation of specific projects involves working with the non-federal government sector, the Parties will, consistent with all applicable statutory and regulatory requirements, facilitate dialogue with the appropriate potential collaborators or partners of interest, and commemorate agreements with non-federal entities in writing. Such interactions with the non-federal government sector may include a range of stakeholders, such as private non-profit organizations, industry, industry trade organizations, academic institutions, professional organizations, and patient advocacy groups.

5. In addition to nanotechnology characterization activities, the Parties will collectively develop and validate standards, nomenclature, assessment tools, and toxicology approaches to facilitate and accelerate the development of, and the evidence base for, new diagnostics and anticancer drugs within the applicable statutory and regulatory framework. The parties will also develop educational tools to make this information more widely available to patients, clinicians, and researchers.

GENERAL PROVISIONS

1. Proprietary and/or nonpublic information will not be disclosed under this MOU, unless such disclosure is governed by appropriate confidentiality disclosure agreements, or to the extent such disclosure is permitted by law.

2. It is understood that while the Parties have aligned interest, there may be opportunities for independent collaborations and activities outside the scope of this MOU, but which are under their respective public health missions. As such, the Parties may, as appropriate, enter into independent negotiations and agreements with prospective partners. All such agreements shall be in writing and in compliance with all applicable legal requirements.

3. A member of the NCL Scientific Oversight Committee shall recuse him/herself from any review of data if such a representative is involved in related activities or agreements with outside partners.

SIGNATURES OF RESPONSIBLE PARTIES

We, the undersigned, agree to abide by the terms and conditions of this MOU.

APPROVED AND ACCEPTED FOR THE FDA

Date 6/22/00

Janet Woodcock, M.D.
Deputy Commissioner for Operations
and Chief Operating Officer (COO)
U.S. Food and Drug Administration

APPROVED AND ACCEPTED FOR THE NCI

Date 06/15/06

Anna D. Barker, Ph.D.
Deputy Director
National Cancer Institute

APPROVED AND ACCEPTED FOR THE NIST

Date 6/19/06

William Jeffrey, Ph.D.
Director
National Institute of Standards and Technology

[FR Doc. 06–7127 Filed 8–23–06; 8:45 am]
BILLING CODE 4160–01–C

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2006–24850]

Collection of Information Under Review by Office of Management and Budget: OMB Control Numbers 1625–0066 and 1625–0069

AGENCY: Coast Guard, DHS.

ACTION: Request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the Coast Guard is forwarding two Information Collection Requests (ICRs), abstracted below, to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB) to request approval of a revision of the following collections of information: 1625–0066, Vessel and Facility Response Plans (Domestic and Int'l), and Additional Response Requirements for Prince William Sound, Alaska, and (2) 1625–0069, Ballast Water Management for Vessels with Ballast Tanks Entering U.S. Waters. Our ICRs describe the information we seek to collect from the public. Review and comment by OIRA ensures that we impose only paperwork burdens commensurate with our performance of duties.

DATES: Please submit comments on or before September 25, 2006.

ADDRESSES: To make sure that your comments and related material do not reach the docket [USCG–2006–24850] or OIRA more than once, please submit them by only one of the following means:

(1)(a) By mail to the Docket Management Facility, U.S. Department of Transportation (DOT), room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. (b) By mail to OIRA, 725 17th Street, NW., Washington, DC 20503, to the attention of the Desk Officer for the Coast Guard.

(2)(a) By delivery to room PL–401 at the address given in paragraph (1)(a) above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329. (b) By delivery to OIRA, at the address given in paragraph (1)(b) above, to the attention of the Desk Officer for the Coast Guard.

(3) By fax to (a) the Facility at (202) 493–2298 or by contacting (b) OIRA at (202) 395–6566. To ensure your comments are received in time, mark the fax to the attention of Mr. Nathan Lesser, Desk officer for the Coast Guard.

(4)(a) Electronically through the Web site for the Docket Management System (DMS) at *http://dms.dot.gov.*

(b). By e-mail to *nlesser@omb.eop.gov.*

The Docket Management Facility maintains the public docket for this notice. Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, 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, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://dms.dot.gov.*

Copies of the complete ICRs are available through this docket on the Internet at *http://dms.dot.gov,* and also from Commandant (CG–611), U.S. Coast Guard Headquarters, room 1236 (Attn: Ms. Barbara Davis), 2100 2nd Street, SW., Washington, DC 20593–0001. The telephone number is (202) 475–3523.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Davis, Office of Information Management, telephone (202) 475–3523 or fax (202) 475–3929, for questions on these documents; or Ms. Renee V. Wright, Program Manager, Docket Operations, (202) 493–0402, for questions on the docket.

SUPPLEMENTARY INFORMATION: The Coast Guard invites comments on the proposed collection of information to determine whether the collection is necessary for the proper performance of the functions of the Department. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collection; (2) the accuracy of the estimated burden of the collection; (3) ways to enhance the quality, utility, and clarity of the information that is the subject of the collection; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology.

Comments to DMS or OIRA must contain the OMB Control Number of the ICR. Comments to DMS must contain the docket number of this request, [USCG 2006–24850]. For your comments to OIRA to be considered, it is best if OIRA receives them on or before September 25, 2006.

Public participation and request for comments: We encourage you to respond to this request for comments by submitting comments and related materials. We will post all comments received, without change, to *http://dms.dot.gov,* they will include any personal information you have provided. We have an agreement with DOT to use their Docket Management Facility. Please see the paragraph on DOT's ''Privacy Act Policy'' below.

Submitting comments: If you submit a comment, please include your name and address, identify the docket number for this request for comment [USCG–2006–24850], indicate the specific section of this document or the ICR to which each comment applies, and give the reason for each comment. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**, but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

The Coast Guard and OIRA will consider all comments and material received during the comment period. We may change the documents supporting this collection of information or even the underlying requirements in view of them.

Viewing comments and documents: To view comments, as well as documents mentioned in this notice as being available in the docket, go to *http://dms.dot.gov* at any time and conduct a simple search using the docket number. You may also visit the Docket Management Facility in room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of all comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review the Privacy Act Statement of DOT in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov*.

Previous Request for Comments: This request provides a 30-day comment period required by OIRA. The Coast Guard has already published the 60-day notice (71 FR 30683, May 30, 2006) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments.

Information Collection Request

1. *Title:* Vessel and Facility Response Plans (Domestic and Int'l), and Additional Response Requirements for Prince William Sound, Alaska.

OMB Control Number: 1625–0066.

Type of Request: Revision of a currently approved collection.

Affected Public: Owners and operators of vessels and facilities.

Forms: CG–6083.

Abstract: This information is needed to ensure that vessels and facilities are prepared to respond in the event of an oil spill incident. The information will be reviewed by the Coast Guard to assess the effectiveness of the response plan.

Burden Estimate: The estimated burden has increased from 137,199 hours to 220,559 hours a year.

2. *Title:* Ballast Water Management for Vessels with Ballast Tanks Entering U.S. Waters.

OMB Control Number: 1625–0069.

Type of Request: Revision of a currently approved collection.

Affected Public: Owners and operators of certain vessels.

Forms: CG–5662.

Abstract: The information is needed to carry out the reporting requirements of 16 U.S.C. 4711 regarding the management of ballast water, to prevent the introduction and spread of aquatic nuisance species into U.S. waters.

Burden Estimate: The estimated burden has decreased from 106,193 hours to 60,769 hours a year.

Dated: August 11, 2006.

C.S. Johnson, Jr.,

Captain, U.S. Coast Guard, Acting Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. E6–14060 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2006–24849]

Collection of Information Under Review by Office of Management and Budget: OMB Control Number 1625–0105

AGENCY: Coast Guard, DHS.

ACTION: Request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the Coast Guard is forwarding one Information Collection Request (ICR), abstracted below, to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB) to request an extension of its approval of the following collection of information: 1625–0105, Regulated Navigation Area; Reporting Requirements for Barges Loaded with Certain Dangerous Cargoes, Inland Rivers, Eighth Coast Guard District and the Illinois Waterway, Ninth Coast Guard District. Our ICR describes the information we seek to collect from the public. Review and comment by OIRA ensures that we impose only paperwork burdens commensurate with our performance of duties.

DATES: Please submit comments on or before September 25, 2006.

ADDRESSES: To make sure that your comments and related material do not reach the docket [USCG–2006–24849] or OIRA more than once, please submit them by only one of the following means:

(1)(a) By mail to the Docket Management Facility, U.S. Department of Transportation (DOT), room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001. (b) By mail to OIRA, 725 17th Street, NW., Washington, DC 20503, to the attention of the Desk Officer for the Coast Guard.

(2)(a) By delivery to room PL–401 at the address given in paragraph (1)(a) above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329. (b) By delivery to OIRA, at the address given in paragraph (1)(b) above, to the attention of the Desk Officer for the Coast Guard.

(3) By fax to (a) the Facility at (202) 493–2298 or by contacting (b) OIRA at (202) 395–6566. To ensure your comments are received in time, mark the fax to the attention of Mr. Nathan Lesser, Desk officer for the Coast Guard.

(4)(a) Electronically through the Web site for the Docket Management System (DMS) at *http://dms.dot.gov.*

(b) By E-mail to *nlesser@omb.eop.gov.*

The Docket Management Facility maintains the public docket for this notice. Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, 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, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://dms.dot.gov.*

Copies of the complete ICR is available through this docket on the Internet at *http://dms.dot.gov*, and also from Commandant (CG–611), U.S. Coast Guard Headquarters, room 1236 (Attn: Ms. Barbara Davis), 2100 2nd Street, SW., Washington, DC 20593–0001. The telephone number is (202) 475–3523.

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Davis, Office of Information Management, telephone (202) 475–3523 or fax (202) 475–3929, for questions on these documents; or Ms. Renee V. Wright, Program Manager, Docket Operations, (202) 493–0402, for questions on the docket.

SUPPLEMENTARY INFORMATION: The Coast Guard invites comments on the proposed collection of information to determine whether the collection is necessary for the proper performance of the functions of the Department. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collection; (2) the accuracy of the estimated burden of the collection; (3) ways to enhance the quality, utility, and clarity of the information that is the subject of the collection; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology.

Comments to DMS or OIRA must contain the OMB Control Number of the ICR. Comments to DMS must contain the docket number of this request, [USCG 2006–24849]. For your comments to OIRA to be considered, it is best if OIRA receives them on or before September 25, 2006.

Public participation and request for comments: We encourage you to respond to this request for comments by submitting comments and related materials. We will post all comments received, without change, to *http://dms.dot.gov,* they will include any personal information you have provided. We have an agreement with DOT to use their Docket Management Facility. Please see the paragraph on DOT's ''Privacy Act Policy'' below.

Submitting comments: If you submit a comment, please include your name and address, identify the docket number for this request for comment [USCG–2006–24849], indicate the specific section of this document or the ICR to which each comment applies, and give the reason for each comment. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**, but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

The Coast Guard and OIRA will consider all comments and material

received during the comment period. We may change the documents supporting this collection of information or even the underlying requirements in view of them.

Viewing comments and documents: To view comments, as well as documents mentioned in this notice as being available in the docket, go to *http://dms.dot.gov* at any time and conduct a simple search using the docket number. You may also visit the Docket Management Facility in room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of all comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review the Privacy Act Statement of DOT in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov.*

Previous Request for Comments: This request provides a 30-day comment period required by OIRA. The Coast Guard has already published the 60-day notice (71 FR 30682, May 30, 2006) required by 44 U.S.C. 3506(c)(2). That notice elicited no comments.

Information Collection Request

Title: Regulated Navigation Area; Reporting Requirements for Barges Loaded with Certain Dangerous Cargoes (CDCs), Inland Rivers, Eighth Coast Guard District and the Illinois Waterway, Ninth Coast Guard District.

OMB Control Number: 1625–0105.

Type of Request: Extension of a currently approved collection.

Affected Public: Owners, agents, masters, towing vessel operators, or persons in charge of barges loaded with CDCs or having CDC residue operating on the inland rivers located within the Eighth and Ninth Coast Guard Districts.

Forms: None.

Abstract: This information is used to ensure port safety and security and to ensure the uninterrupted flow of commerce.

Burden Estimate: The estimated burden has increased from 911 hours to 1,179 hours a year.

Dated: August 11, 2006.

C. S. Johnson, Jr.,

Captain, U.S. Coast Guard, Acting Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. E6–14061 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Extension of Agency Information Collection Activity Under OMB Review: Transportation Security Officer (TSO) Medical Questionnaire

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and approval of an extension and revision 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 April 19, 2006, 71 FR 20118.

DATES: Send your comments by September 25, 2006. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Comments may be e-mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, DHS–TSA Desk Officer at *nathan.lesser@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Katrina Wawer, Attorney-Advisor, Office of the Chief Counsel, TSA–2, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220; telephone (571) 227–1995; facsimile (571) 227–1381.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. Therefore, in preparation for OMB review and approval of the following information collection, 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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Title: Transportation Security Officer (TSO) Medical Questionnaire.

Type of Request: Revision of a currently approved collection.

OMB Control Number: 1652–0032.

Forms(s): Transportation Security Officer Medical Questionnaire; further evaluation forms.

Affected Public: Candidates under employment consideration for Transportation Security Officer positions.

Abstract: TSA is requesting approval to revise this collection of information to comply with 49 U.S.C. 44935, which requires TSA to establish qualification standards for the employment of security screening personnel. With approval from OMB, TSA currently collects information via a Transportation Security Officer (TSO) Medical Questionnaire. TSA now seeks approval to make revisions to the form (and to adjust the title as a result of the conversion from Transportation Security Screeners to Transportation Security Officers on February 5, 2005). TSA also seeks approval to include additional supplemental medical forms, which are required in circumstances where TSA needs the additional medical information to make a determination regarding the candidate's qualifications for the TSO job. Only those TSOs who are required to undergo a follow-up medical exam will be required to bring a supplemental form (or forms) to the exam, a portion of which their physician will complete. This collection of information assists the agency in ensuring that candidates under employment consideration for TSO positions meet the qualification standards to perform the functions of the positions successfully. TSA collects the information through a medical questionnaire and supplemental forms.

Estimated Number of Respondents: 57,038. After further evaluation of the annual respondent population, TSA is revising the estimate noted in its April 2006 notice from 22,800 respondents.

Estimated Annual Burden Hours: 19,013. After further evaluation of the respondent population and hour burden estimate, TSA is revising the estimate

noted in its April 2006 notice from 6,346 hours.

Issued in Arlington, Virginia, on August 21, 2006.

Peter Pietra,

Director of Privacy Policy and Compliance.

[FR Doc. E6–14072 Filed 8–23–06; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5043–N–08]

Notice of Proposed Information Collection for Public Comment: The PATH Survey of Homebuilding Product Manufacturers

AGENCY: Office of the Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* October 23, 2006.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control number and should be sent to: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Dr. Carlos Martin, (202) 708–4370, extension 5845 for copies of the proposed forms and other available documents. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (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 collection techniques or other forms of information technology (e.g., permitting electronic submission of responses.)

This Notice also lists the following information:

Title of Proposal: The Survey of Homebuilding Product Manufacturers.

Description of the need for the information and proposed use: This request is for the clearance of a telephone survey instrument designed to assess the state of operational and organizational performance among homebuilding product manufacturers (both large and small) with regard to product development and technological innovation. The purposes of the survey implementation and analysis are: (1) To gauge through a national sample the kinds of internal organization and operations associated with homebuilding product manufacturers; (2) ascertain correlations between organizational type and formalization of product development; and (3) improve the activities of the Partnership for Advancing Technology in Housing based on the insight of the survey findings.

OMB Approval Number: Pending.

Agency form numbers: None.

Members of Affected Public: Individuals in homebuilding product manufacturing firms.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: 150 individuals will be surveyed through the telephone survey (100 sampled from small manufacturers and 50 from large manufacturers). The average time to complete the phone survey is 25 minutes. Respondents will only be contacted once. Total burden hours are 62.5 for the survey.

Status of the proposed information collection: Pending OMB approval.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: August 15, 2006.

Darlene F. Williams,

Assistant Secretary for Policy Development and Research.

[FR Doc. E6–13993 Filed 8–23–06; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5043–N–07]

Notice of Proposed Information Collection for Public Comment on Satisfaction With Service Coordinator Program

AGENCY: Office of Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* October 23, 2006.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8226, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Cheryl A. Levine, Ph.D., Department of Housing and Urban Development, Office of Policy Development and Research, 451 7th Street, SW., Room 8140, Washington, DC 20410; telephone (202) 708–3700, extension 3928 (this is not a toll-free number). Copies of the proposed data collection and other available documents may be obtained from Dr. Levine.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995, 44 (U.S.C. Chapter 35, as amended).

This Notice solicits comments from members of the public and affected agencies concerning the proposed collection of information for the following purposes: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (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 collection

techniques or other forms of information technology that will reduce respondent burden (e.g., permitting electronic submission of responses).

This Notice also lists the following information:

Title of Proposal: Study of the HUD Service Coordinator Program.

Description of the need for the information and proposed use: The Department does not know the extent of properties with HUD Service Coordinator Grants. This research effort will provide important information about the extent and impact of the Service Coordinator Program that is not otherwise available from HUD records. This research serves two purposes. First, through developing an estimate of the number of eligible projects that actually have service coordinators. This study will assess the availability of service coordinators for residents of Multifamily assisted housing. Second, to better understand what difference service coordination makes in providing supportive services to elderly and non-elderly people with disabilities living in HUD-assisted housing. This study will provide some evidence of the importance of service coordinators for improving the ability to age in place. This study will provide a comparison of satisfaction with provisions of service coordination in HUD Multifamily-assisted properties that do or do not participate in the Service Coordinator Program.

Members of the affected public: This information collection involves a telephone survey of Multifamily property managers. The survey will be administered to a statistical sample of properties that are eligible for the Service Coordinator Program. The Service Coordinator Program provides grants and rental subsidy funding for the employment and support of Service Coordinators in insured and assisted housing, Multifamily developments that were designed for elderly or non-elderly persons with disabilities and continue to operate as such. However, not all housing properties that are eligible for this program participate. Also, due to limitations in HUD data, we do not know to what extent housing properties are able to provide service coordination if they do not participate in the Service Coordinator Program.

Estimation of the total number of hours needed to prepare information collection including number of respondents, frequency of response, and hours of response: Approximately 400 Multifamily property managers will be surveyed on a one-time basis. Each survey is expected to take 30 minutes. Total burden hours are 200.

Status of the proposed information collection: Pending OMB approval.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35 (as amended).

Dated: August 15, 2006.

Darlene F. Williams,

Assistant Secretary for Policy Development and Research.

[FR Doc. E6–13994 Filed 8–23–06; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Invasive Species Advisory Committee

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of public meetings of the Invasive Species Advisory Committee.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act, notice is hereby given of meetings of the Invasive Species Advisory Committee. The purpose of the Advisory Committee is to provide advice to the National Invasive Species Council, as authorized by Executive Order 13112, on a broad array of issues related to preventing the introduction of invasive species and providing for their control and minimizing the economic, ecological, and human health impacts that invasive species cause. The Council is co-chaired by the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Commerce. The duty of the Council is to provide national leadership regarding invasive species issues. The purpose of a meeting on September 12–13, 2006 is to convene the full Advisory Committee and to discuss implementation of action items outlined in the National Invasive Species Management Plan, which was finalized on January 18, 2001.

DATES: Meeting of Invasive Species Advisory Committee: Tuesday, September 12, 2006, through Wednesday, September 13, 2006; beginning at approximately 8 a.m., and ending at approximately 5 p.m. each day.

ADDRESSES: Hotel Washington, 515 15th Street, NW., Washington, DC 20004. Meeting will be held both days in the Washington Room.

FOR FURTHER INFORMATION CONTACT: Kelsey Brantley, National Invasive Species Council Program Analyst; Phone: (202) 513–7243; Fax: (202) 371–1751.

Dated: August 8, 2006.

Lori C. Williams,

Executive Director, National Invasive Species Council.

[FR Doc. 06–7135 Filed 8–22–06; 9:46 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of 48 Applications and Availability of Environmental Assessment for Incidental Take Permits for Single-Family and Duplex Residential Developments on the Fort Morgan Peninsula, Baldwin County, AL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: We, the Fish and Wildlife Service, have received applications from Alabama South Pools, Ms. Debbie Bankster, Baron Investments, Mr. Horton Bateman, BIOA LLC, Mr. Christopher Celeslie, Mr. Claud Clark, Mr. Robin Crick, Mr. Lawrence Dalgo, Mr. Erik Daniels, Mr. William Erwin, Mr. Mark Freeman, Mr. Mike Halliday, Mr. Leo Hastings, Harrison Building, Mr. Walter Lindsey, Mr. William Lingsch, Mr. Brian Litton, LK&K LLC, Mr. Michael Llop, Mr. Danny Mason, Mr. Lannie McRill, Mr. Michael Molleston, Mr. Johnny Moore, Ms. Margaret Pickering, Mr. Robert Relinski, Mr. Michael Sciortino Sr., Mr. Preston Simmons, Mr. Claude Sims, Mr. Gary Smith, Mr. Ron Spivey, Mr. Mike Stoddard, Mr. Larkin Strong, Mr. Robert Susko, TBI LLC, Mr. John Wales, and Mr. Kenneth Wallis (applicants) for incidental take permits (ITPs) pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) (Act), as amended for the take of Alabama beach mouse (*Peromyscus polionotus ammobates*) (ABM). The proposed take would be incidental to the otherwise lawful activity of constructing 32 single-family residences, 13 duplex residences, and expansion of 3 existing residences on the Fort Morgan Peninsula in Baldwin County, Alabama. The applicants have prepared Habitat Conservation Plans (HCPs) specifying, among other things, the impacts that are likely to result from the taking and the measures each applicant would undertake to minimize and mitigate such impacts. We have prepared an environmental assessment (EA), which assesses the impacts of the proposed actions.

DATES: Written comments on the ITP applications, HCPs, and EA should be

sent to the Service's Regional Office (*see* **ADDRESSES**) and should be received on or before September 25, 2006.

ADDRESSES: Persons wishing to review the applications, HCPs, and EA may obtain an electronic copy by writing the Service's Southeast Regional Office, Atlanta, Georgia, at the address below. Documents will also be available for public inspection by appointment during normal business hours at the Regional Office, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: Endangered Species Permits), or the Daphne Ecological Services Field Office, 1208-B Main Street, Daphne, Alabama 36526. Written data or comments concerning the application or HCP should be submitted to the Regional Office. Please reference ''Batch III'' in requests for the documents discussed herein.

FOR FURTHER INFORMATION CONTACT: Mr. Aaron Valenta, Regional HCP Coordinator (*see* **ADDRESSES**), telephone: 404/679–4144, or Mr. Darren LeBlanc, Fish and Wildlife Service Biologist, Daphne Field Office (*see* **ADDRESSES**), telephone: 251/441–5859.

SUPPLEMENTARY INFORMATION: The EA is a combined assessment addressing the environmental impacts associated with these projects both individually and cumulatively. This notice advises the public that we have opened the comment period on the ITP applications and the EA. This notice is provided pursuant to section 10 of the Act and National Environmental Policy Act regulations at 40 CFR 1506.6.

We specifically request information, views, and opinions from the public on the Federal action, including the identification of any other aspects of the human environment not already identified in our EA. Further, we specifically solicit information regarding the adequacy of the HCPs as measured against our ITP issuance criteria found in 50 CFR parts 13.21 and 17.22.

If you wish to comment, you may submit comments by any one of several methods. Please reference ''Batch III'' in such comments. You may mail comments to our Regional Office (*see* **ADDRESSES**). You may also e-mail comments to *aaron_valenta@fws.gov*. Please also include your name and return mailing address in your e-mail message. If you do not receive a confirmation from us that we have received your e-mail, contact us directly at either telephone number listed (*see* **FOR FURTHER INFORMATION CONTACT**).

Finally, you may hand-deliver comments to either Service office listed (*see* **ADDRESSES**). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the administrative record. We will honor such requests to the extent allowable by law. There may also be other circumstances in which we would withhold from the administrative record a respondent's identity, as allowable by law. If you wish us to withhold your name and address, you must state this prominently at the beginning of your comments. We will not, however, consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

The EA considers the direct, indirect, and cumulative effects of the proposed incidental take of the ABM and the measures that will be implemented to minimize and mitigate such impacts. The EA contains an analysis of three alternatives for each site, including: (1) No action alternative; (2) development with wholesale clearing, grading, and formal landscaping; and (3) the applicant's preferred alternative. Under alternative 1, we would not issue the ITPs and no new construction would result. Alternative 2 would result in the construction of single-family and duplex residences and the loss of 15.69 acres of ABM habitat. Alternative 3 would result in a loss of 4.59 acres, consisting of the footprint of the residences and access driveways. Access roads through State and County rights-of-way would result in the loss of an additional 0.46 acre of habitat for both Alternatives 2 and 3. Project effects are considered in the EA in terms of the affected environment, environmental consequences, and cumulative effects to the human and natural environment.

The ABM is one of eight subspecies of the old field mouse restricted to coastal habitats. It was listed as endangered in 1985 and is currently believed to occupy approximately 2,544 acres in Baldwin County, Alabama. The three species of sea turtle are found along the Gulf coast: The threatened green turtle (*Chelonia mydas*), the threatened loggerhead (*Caretta caretta*) and the endangered Kemp's ridley (*Lepidochelys kempii*). Implementation of the minimization and conservation measures proposed in the applicants' HCPs to minimize incidental take of the ABM will also benefit nesting sea turtles.

Under section 9 of the Act and its implementing regulations, ''taking'' of endangered or threatened wildlife is prohibited. However, we, under limited circumstances, may issue permits to take such wildlife if the taking is incidental to and not the purpose of otherwise lawful activities. The applicants have prepared HCPs that include measures for the long-term protection, management, and enhancement of ABM habitat as required for the ITP application as part of the proposed project.

We will evaluate the HCPs and comments submitted to determine whether the applications meet the requirements of section 10(a) of the Act. We will also evaluate whether the proposed issuance of the section 10(a)(1)(B) ITPs complies with section 7 of the Act by conducting an intra-Service section 7 consultation. The results of the biological opinion, in combination with the above findings, will be used in the final analysis to determine whether or not to issue the ITPs.

Dated: August 8, 2006.

Cynthia K. Dohner,

Acting Regional Director, Southeast Region.

[FR Doc. E6–14029 Filed 8–23–06; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Advisory Board for Exceptional Children

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Bureau of Indian Affairs is announcing that the Advisory Board for Exceptional Children will hold its next meeting in Seattle, Washington. The purpose of the meeting is to meet the mandates of the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA) on Indian children with disabilities.

DATES: The Board will meet on Thursday, September 21, 2006, from 6 p.m. to 9 p.m.; Friday, September 22, 2006, 8 a.m. to 4 p.m., and Saturday, September 23, 2006, 8 a.m. to 4 p.m. Local Time.

ADDRESSES: The meetings will be held at the Marriott Sea-Tac Airport Hotel, 3201 South 176th Street, Seattle, Washington 98188.

Written statements may be submitted to Mr. Thomas M. Dowd, Director,

Bureau of Indian Education, 1849 C Street, NW., MS–3609 MIB, Washington, DC 20240; Telephone (202) 208–6123; Fax (202) 208–3312.

FOR FURTHER INFORMATION CONTACT: Lynann Barbero, Acting Supervisory Education Specialist—Special Education, Bureau of Indian Education, Division of Compliance, Monitoring and Accountability, P.O. Box 1088, Suite 332, Albuquerque, New Mexico 87103; Telephone (505) 563–5270.

SUPPLEMENTARY INFORMATION: The Advisory Board was established to advise the Secretary of the Interior, through the Assistant Secretary—Indian Affairs, on the needs of Indian children with disabilities, as mandated by the Individuals with Disabilities Education Improvement Act of 2004 (Pub. L. 108–446).

The following items will be on the agenda:

- State Performance Plan.
- Special Education Supervisor Report.
- Part B State Administrative set-aside budget.
- Updates on Priority Issues.
- Compliance and Monitoring.
- Procedural Safeguards.
- Institutionalized Handicapped Program.
- Early Childhood Program.
- Coordinated Services Plan.
- Update on final IDEIA regulations.

The meetings are open to the public.

Dated: August 21, 2006.

Michael D. Olsen,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. E6–14055 Filed 8–23–06; 8:45 am]

BILLING CODE 4310–6W–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–039–1020–PK]

Notice of Public Meeting, Dakotas Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM), Dakotas Resource Advisory Council will meet as indicated below.

DATES: A meeting will be held October 26 and 27, 2006, at the Bureau of Land Management and U.S. Forest Service Lands and Minerals Center at 99 23rd Avenue West, Dickinson, ND 58601, beginning at 1 p.m. The public comment period will begin at 8 a.m. on October 27, 2006.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in North and South Dakota. All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, or other reasonable accommodations, should contact the BLM as provided below. The Council will hear updates to Recreation Resource Advisory Committee roles, Sage Grouse Conservation, and upcoming resource management planning efforts.

FOR FURTHER INFORMATION CONTACT: Marian Atkins, Field Manager, South Dakota Field Office, 310 Roundup St., Belle Fourche, South Dakota, 605.892.7000, or Lonny Bagley, Field Manager, North Dakota Field Office, 2933 3rd Ave. W. Dickinson, North Dakota, 701.227.7700.

Dated: August 17, 2006.

Lonny R. Bagley,

Field Manager.

[FR Doc. E6–14027 Filed 8–23–06; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on August 8, 2006, a proposed Consent Decree in *United States* v. *University of Miami,* Civil Action Number 06–22000–CIV–JORDAN, was lodged with the United States District Court for the Southern District of Florida.

In this action the United States sought, under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607, recovery of response costs incurred by the Army Corps of Engineers in response to releases of hazardous substances at a site located on land that was formerly the Richmond Naval Air Station, in Perrine, Florida. Under the Consent Decree, the Defendant will pay $393,473 for past response costs associated with the site, and the United States gives a covenant not to sue for past response costs associated with the site.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *University of Miami,* DOJ Ref. #90–11–3–08486.

The Consent Decree may be examined at the Office of the United States Attorney for the Southern District of Florida, 99 NE 4th Street, Miami, Florida. During the public comment period, the proposed Consent Decree may be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/consent__Decrees.html.* A copy of the proposed Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or E-mailing a request to Tonia Fleetwood, *tonia.fleetwood@usdoj.gov,* Fax No. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $4.25 (25 cents per page reproduction cost) payable to the U.S. Treasury, or, if by E-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Henry Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 06–7106 Filed 8–23–06; 8:45am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. *Mittal Steel Company N.V.* Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a Complaint, proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement were filed with the United States District Court for the District of Columbia in *United States* v.

Mittal Steel Company N.V. Civil Action No. 1:06CY01360. On August 1, 2006, the United States filed a Complaint to enjoin Mittal Steel Company N.Y. (''Mittal Steel'') from acquiring Arcelor S.A. (''Arcelor''). The Complaint alleges that Mittal Steel's acquisition of Arcelor would substantially lessen competition in the development, manufacture, and sale of Tin Mill Products in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, throughout the United States east of the Rocky Mountains (the ''Eastern United States''). The proposed Final Judgment, filed August 1, 2006, requires defendant, Mittal Steel, to divest one of their three North American tin mills it will own after the acquisition to preserve competition in the sale of Tin Mill Products. A Hold Separate Stipulation and Order, entered by the Court on August 2, 2006, requires defendant to maintain, prior to divestiture, the competitive independence and economic viability ofthe assets subject to divestiture under the proposed Final Judgment. A Competitive Impact Statement filed by the United States describes the Complaint, proposed Final Judgment, Hold Separate Stipulation and Order, and the remedies available to private litigants who may have been injured by the alleged violations.

Copies of the Complaint, proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement are available for inspection at the U.S. Department of Justice, Antitrust Division, 325 Seventh Street, NW., Room 215, Washington, D.C. 20530 (telephone: 202–514–2481), and at the Clerk's Office of the United States District Court for the District of Columbia, Washington, DC. Copies of these materials may be obtained upon request and payment of a copying fee set by the U.S. Department of Justice regulations.

Public comment is invited within the statutory 60-day comment period. Such comments and responses thereto will be published in the **Federal Register** and filed with the Court. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 1401 H Street, N.W., Suite 3000, Washington, D.C. 20530 (telephone: 202–307–0924).

J. Robert Kramer: II,

Director of Operations.

United States District Court for the District of Columbia

United States of America, U.S. Department of Justice, Antitrust Division, 1401 H Street, NW., Suite 3000, Washington, DC 20530. Plaintiff, v. Mittal Steel Company N.V., Hofplein 20, 15th Floor, Rotterdam, The Netherlands, 3032. Defendant.

Case No.
JUDGE:
DECK TYPE: Antitrust
DATE STAMP:

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to obtain equitable and other relief against the defendant, Mittal Steel Company N.V. (''Mittal Steel''), to prevent its proposed acquisition of Arcelor S.A. (''Arcelor''), and alleges as follows:

I. Nature of the Action

1. Mittal Steel formally launched a tender offer for Arcelor on May 19, 2006, and on June 25, 2006 the Arcelor board recommended Mittal's offer to Arcelor's shareholders. The acceptance period for Mittal's tender offer cJosed on July 13,2006, and Mittal Steel can take ownership of the shares beginning on August 1, 2006.

2. Mittal Steel is an integrated steelmaker that manufactures, among other products, finely rolled tin or chrome coated steel sheets known as ''Tin Mill Products.'' Tin Mill Products are used in manufacturing steel cans for packaging a wide range of food products such as soup, fruits, and vegetables, and non-food products such as paints, aerosols, and shaving cream. Mittal Steel is the second largest supplier of Tin Mill Products to the portion of the United States east of the Rocky Mountains (the ''Eastern United States''), accounting for about 31 percent of Tin Mill Products tonnage sold in 2005.

3. Arcelor accounted for about two percent of Tin Mill Products tonnage sold in the Eastern United States in 2005. Arcelor acquired its subsidiary Dofasco Inc. (''Dofasco'') in February 2006. In 2005 Dofasco accounted for an additional four percent of the Tin Mill Products tonnage sold in 2005 in the Eastern United States.

4. Mittal Steel's proposed acquisition of Arcelor would eliminate Arcelor, including its subsidiary Dofasco, as an independent competitor in the sale of Tin Mill Products in the Eastern United States, further consolidating an already highly concentrated market. The largest supplier of Tin Mill Products sold in the Eastern United States, another integrated steelmaker, accounted for over 44 percent of the tons sold in 2005. If this merger were not enjoined, the two largest suppliers of Tin Mill Products would account for over 81 percent of 2005 sales in the Eastern United States.

5. The acquisition would remove current constraints on coordination and increase the incentives of the two largest firms to coordinate their behavior. The acquisition would thus substantially increase the likelihood of coordination and would likely lead to higher prices, lower quality, less innovation, and less favorable delivery terms in the Tin Mill Products market in the Eastern United States.

6. Accordingly, the acquisition would substantially lessen competition in Tin Mill Products in the Eastern United States, in violation of Section 7 of the Clayton Act.

II. Jurisdiction and Venue

7. Plaintiff United States brings this action against defendant Mittal Steel under Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain the violation by defendant of Section 7 of the Clayton Act, 15 U.S.C. 18.

8. Defendant manufactures and sells Tin Mill Products in the flow of interstate commerce. Defendant's activities in developing, manufacturing and selling Tin Mill Products substantially affect interstate commerce. This Court has subject matter jurisdiction over this action and the defendant pursuant to Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1331, 1337(a), and 1345.

9. Venue is proper in this District pursuant to 28 U.S.C. 1391(d). Furthermore, defendant has consented to venue and personal jurisdiction in this judicial district.

III. Parties to the Proposed Transaction

10. Defendant Mittal Steel is a Netherlands corporation with its corporate headquarters and principal place of business in Rotterdam, The Netherlands, and operations in sixteen countries on four continents. Mittal Steel produces both flat and long steel products for all of the major steel consuming sectors, including automotive, appliance, machinery, and construction. Mittal Steel's total worldwide revenues exceeded $28 billion in 2005, and its total annual steel

production exceeded 55 million tons. Mittal Steel produces Tin Mill Products in Sparrows Point, Maryland and Weirton, West Virginia. In 2005, Mittal Steel sold over 800,000 tons of Tin Mill Products in the Eastern United States.

11. Arcelor is a Luxembourg corporation with its corporate headquarters and principal place of business in the City of Luxembourg. Arcelor, with operations primarily in Europe and Brazil, produces flat and long products for the automotive, appliance, packaging, and general industries. In 2005, Arcelor had approximately $41.5 billion in total worldwide revenues and steel production of 46 million tons.

12. In February 2006 Arcelor acquired Dofasco, a wholly-owned Canadian subsidiary with its corporate headquarters and principal place of business in Hamilton, Ontario, Canada. Dofasco shipped 4.8 million tons of steel and had $3.9 billion in revenues in 2005. Arcelor, which shipped Tin Mill Products to the Eastern United States primarily from its European facilities, and Dofasco, which shipped Tin Mill Products to the Eastern United States from its Canadian facility, sold a combined 170,615 tons of Tin Mill Products in the Eastern United States in 2005.

IV. The Proposed Transaction

13. On January 27, 2006, Mittal Steel announced its intention to launch a hostile tender offer to acquire Arcelor for approximately $23 billion in cash and securities. Mittal Steel simultaneously announced an agreement to sell Dofasco for approximately $5 billion to a German steelmaker, ThyssenKrupp A.G. (''ThyssenKrupp''), if Mittal Steel acquired Arcelor. Arcelor initially resisted the hostile takeover. One of the steps Arcelor's Board of Directors took to resist the takeover was to transfer legal title to the shares of Dofasco to an independent Dutch foundation known as a ''stichting.''

14. Mittal Steel subsequently increased its tender offer to approximately $33 billion in cash and securities and formally launched its tender offer on May 19, 2006. After Mittal Steel agreed to improve the financial, corporate govemance, and other terms of its offer for Arcelor, the Arcelor Board agreed on June 25, 2006 to recommend Mittal's offer to Arcelor's shareholders. The acceptance period for Mittal's initial tender offer, during which 92.6 percent of Arcelor's shares were tendered, closed on July 13, 2006. Mittal Steel can take ownership of the shares beginning on August 1, 2006.

V. Trade and Commerce

A. Relevant Product Market

15. Tin Mill Products are finely rolled steel sheets, usually coated with a thin protective layer of tin or chrome. Tin Mill Products are manufactured using a sequence of processing steps in which steel is rolled into successively thinner sheets, then hardened, and finally coated with either tin or chrome.

16. Tin Mill Products are comprised of three types of steel: Black plate, electrolytic tin plate (''ETP''), and tin free steel (''TFS''). Black plate is a light-gauge cold-rolled bare steel sheet that serves as the substrate for production of both ETP and TFS and can be used bare for some applications, such as pails or larger containers. Black plate is coated with tin to produce ETP and with chrome to produce TFS. ETP and TFS are both used for packaging, although each provides different advantages and disadvantages (including, *inter alia*, organic coating acceptance, strength, surface finish and formability) that are considered by purchasers in making their purchase decisions.

17. The majority of Tin Mill Products shipments are used to produce sanitary cans, often referred to as food cans. Other uses include aerosol cans, general line cans, pails, larger containers, metal buildings, and oil and fuel filter sheets.

18. For most Tin Mill Products purchasers, including downstream food can customers, there are no close substitutes for Tin Mill Products. Packaging alternatives, such as plastic containers, are generally not viewed by can customers as replacements for products normally packaged in cans because of cost differences and the performance advantages associated with cans. Some of the advantages of steel cans compared to alternative packaging include their longer shelf life and greater durability, familiarity, and security. Alternative packaging generally costs at least as much as a steel can and sometimes costs as much as eight times as much as a can, and significant additional capital investments are necessary to incorporate alternative packaging materials into a customer's packaging process.

19. A small but significant increase in the price of Tin Mill Products would not cause can manufacturers or their downstream customers to substitute non-Tin Mill Products containers, or otherwise to reduce their purchases of Tin Mill Products, in sufficient quantities so as to make such a price increase unprofitable. The use of alternative packaging containers is driven primarily by capital equipment investment considerations and by marketing factors such as consumer convenience, rather than by small but significant changes in the prices of Tin Mill Products. For example, can customers often use alternative packaging in order to extend an existing product line, such as using alternative materials for portable microwavable containers for soup, while continuing to package the bulk of soup products in steel cans.

20. Accordingly, the development, manufacture, and sale of Tin Mill Products is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

B. Relevant Geographic Market

21. The Eastern United States is a geographically distinct market for the sale of Tin Mill Products. The only Tin Mill Products manufacturer in the United States west of the Rocky Mountains (the ''Western United States'') is located in California, and it does not have substantial sales in the Eastern United States due to its distance from can manufacturers in that part of the country, which tend to be located in proximity to agricultural regions. That California Tin Mill Products manufacturer, half owned by one of the two largest Tin Mill Products producers in the Eastern United States, accounts for over 84 percent of the Tin Mill Products sold in the Western United States but ships only small quantities to the Eastern United States. Similarly, Tin Mill Products producers in the Eastern United States generally do not sell significant quantities in the Western United States because their treight costs are higher than those of the single manufacturer located in the Western United States.

22. A small but significant increase in the price of Tin Mill Products would not cause Tin Mill Products customers in the Eastern United States to substitute purchases from outside of the Eastern United States in sufficient quantities so as to make such a price increase unprofitable.

23. Accordingly, the Eastern United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

C. Anticompetitive Effects

24. Currently, Mittal Steel and its primary competitor account for over 75 percent of Tin Mill Products sales in the Eastern United States. Were Mittal Steel to acquire ArceJor, the largest two firms would account for over 81 percent of such sales. In 2005, Mittal Steel, Arcelor, Dofasco, and one other firm sold more than 2.1 million tons of Tin

Mill Products in the Eastern United States.

25. The market for Tin Mill Products in the Eastern United States would thus become substantially more concentrated if Mittal Steel were to acquire Arcelor and its Dofasco subsidiary. Using a measure of market concentration called the Herfindahl-Hirschman Index (''HHI'') (defined and explained in Appendix A), the proposed transaction will increase the HHI in the market for Tin Mill Products in the Eastern United States by approximately 412 points to a post-acquisition level of approximately 3,522, well in excess of levels that raise significant antitrust concerns.

26. Purchasers of Tin Mill Products in the Eastern United States have benefitted from competition between Mittal Steel and Arcelor through lower prices, higher quality, more innovation, and better delivery terms for Tin Mill Products. Arcelor and its subsidiary Dofasco are known for high quality and innovation, which forces Mittal Steel and other domestic producers to compete on these aspects as well. By acquiring Arcelor, Mittal Steel would eliminate that competition.

27. Mittal Steel's elimination of Arcelor as an independent competitor in the manufacture and sale of Tin Mill Products within the Eastern United States is likely to facilitate anticompetitive coordination among the two major Tin Mill Products manufacturers by making such coordination more profitable and harder to defeat. If the two largest Tin Mill Products firms in the Eastern United States were to seek to raise prices or reduce output today, purchasers of Tin Mill Products could purchase Tin Mill Products from Arcelor and its subsidiary Dofasco. Arcelor has substantial excess and divertible capacity in Europe, and Arcelor's Dofasco subsidiary has significant divertible capacity in Canada. Were Arcelor and Dofasco no longer available as independent suppliers, the remaining domestic and foreign fringe producers would likely not have sufficient capacity and/or incentives to increase production enough to defeat an anticompetitive price increase or output reduction by the two largest firms. In particular, the only other incumbent producer located in the Eastern United States does not have the ability to manufacture cold-rolled substrate, and its ability to obtain the additional substrate needed to increase its output is constrained.

D. Entry and Expansion

28. De novo entry into the development, manufacture and sale of Tin Mill Products is difficult, time-consuming, and costly, and such entry would not be timely, likely, or sufficient to defeat coordination by the two largest Tin Mill Products firms in the Eastern United States post-merger. To produce Tin Mill Products, a firm needs a reliable source of cold-rolled substrate and a Tin Mill Products finishing facility. A facility to finish cold-rolled substrate into Tin Mill Products would likely cost in the range of $60 to $100 million and take approximately two years to design and build. In addition, entry by a firm that lacks the ability to manufacture cold-rolled substrate or to increase its output of cold-rolled substrate would be more risky as it may not gain access to sufficient substrate to compete effectively. The cost of entry is largely ''sunk,'' *i.e.*, it cannot be recovered or converted to other uses, raising the risk to entry, and there is a very high risk that a new entrant may not receive any profits from its entry.

29. Significant new foreign entry or expansion of shipments to the Eastern United States by existing foreign producers is unlikely due to longer delivery lead times occasioned by the need for oceangoing transportation, additional shipping costs, trade barriers, the possibility of future import restrictions, and the reluctance of foreign Tin Mill Products manufacturers to abandon existing markets elsewhere in order to enter or expand in the Eastern United States. Overseas shipping increases the time between order and delivery by up to four months, which is unacceptable for most customers in the Eastern United States because their demand requirements fluctuate with hard-to-predict fruit and vegetable harvests. Capacity constraints also limit certain foreign producers from expanding their sales into the Eastern United States.

30. Therefore, entry or expansion by any other finn into the Eastern United States Tin Mill Products market would not be timely, likely, or sufficient to deter post-acquisition coordination.

VI. Violation Alleged

31. The effect of the proposed acquisition of Arcelor by Mittal Steel would be to substantially lessen competition in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

32. Unless restrained, the transaction will likely have the following effects, among others:

a. Competition generally in the development, manufacture and sale of Tin Mill Products in the Eastern United States would be substantially lessened;

b. Actual and potential competition between Mittal Steel and Arcelor in the development, manufacture and sale of Tin Mill Products will be eliminated; and

c. The prices for Tin Mill Products will likely increase, the quality of Tin Mill Products will likely decline, innovation relating to Tin Mill Products will likely decline, and the delivery terms currently offered in the Tin Mill Products market will likely become less favorable to customers.

VII. Requested Relief

33. Plaintiff requests that:

a. Mittal Steel's proposed acquisition of Arcelor be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. 18;

b. Defendant and all persons acting on its behalf be permanently enjoined and restrained from consummating the proposed acquisition or from entering into or carrying out any contract, agreement, plan, or understanding, the effect of which would be to combine Mittal Steel with the operations of Arcelor;

c. Plaintiff be awarded its costs for this action; and

d. Plaintiff receive such other and further relief as the case requires and the Court deems just and proper.

Dated: August 1, 2006.

Respectfully submitted,

For Plaintiff United States of America:

Thomas O. Barnett,

Assistant Attorney General D.C. Bar #426840.

David L. Meyer,

Deputy Assistant Attorney General, D.C. Bar #414420.

J. Robert Kramer II,

Director of Operations.

Maribeth Petrizzi,

Chief, Litigation II Section, D.C. Bar #435204.

Robert W. Wilder,

Acting Assistant Chief, Litigation II Section.

Kerrie J. Freeborn,
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Appendix A—Herfindahl-Hirschman Index Calculations

''HHI'' means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the BBI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a

large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated and those in which the HHI is in excess of 1800 points are considered to be highly concentrated. Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the U.S. Department of Justice and the Federal Trade Commission. *See Horizontal Merger Guidelines* 1.51.

United States District Court for the District of Columbia

United States of America, Plaintiff; v. Mittal Steel Company N.V., Defendant

Case No.
DECK TYPE: Antitrust
DATE STAMP:

Final Judgment

Whereas, plaintiff, United States of America, filed its Complaint on August 1, 2006 and plaintiff and defendant, Mittal Steel Company N.V., by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

And Whereas, defendant agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

And Whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the defendant to assure that competition is not substantially lessened;

And Whereas, plaintiff requires defendant to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And Whereas, defendant has represented to the United States that the divestitures required below can and will be made and that defendant will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now Therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *Ordered, Adjudged and Decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendant under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

II. Definitions

As used in this Final Judgment:

A. ''Acquirer'' means the entity or entities to whom defendant divests either the Dofasco Business or the Selected Business.

B. ''Arcelor'' means Arcelor, S.A., a Luxembourg corporation with its headquarters in Luxembourg City, Luxembourg, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

C. ''Divested Business'' means either the Dofasco Business or the Sparrows Point Business or the Weirton Business, whichever is being offered for sale by the defendant or by a trustee appointed pursuant to Section V of this Final Judgment.

D. ''Dofasco Business'' means all assets, interests, and rights in Dofasco Inc. (''Dofasco''), including any additions, improvements, or expansions made by Arcelor after Arcelor's acquisition of Dofasco on or about February 20, 2006, and includes but is not limited to:

1. All tangible assets that comprise Dofasco, including research and development activities, all manufacturing equipment, tooling and fixed assets, personal property, inventory, office furniture, materials, supplies, on- or off-site warehouses or storage facilities and other tangible property, and all assets used exclusively in connection with the Dofasco business; all licenses, permits and authorizations issued by any governmental organization relating to Dofasco; all supply agreements relating to Dofasco; all contracts, teaming agreements, agreements, leases, certifications, commitments, and understandings; all customer contracts, lists, accounts, and credit records relating to Dofasco; and all other records relating to Dofasco;

2. All intangible assets used in the development, production, servicing, and sale of products by Dofasco, including but not limited to all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, and all manuals and technical information provided to the employees, customers, suppliers, agents or licensees of Dofasco; all research data concerning historic and current research and development efforts relating to products produced or sold by Dofasco, including but not limited to designs of experiments, and the results of successful and unsuccessful designs and experiments, provided, however, that Dofasco does not include Dofasco's interest in Sorevco.

E. ''DoSol Joint Venture'' means DoSol Galva Limited Partnership, the hot dip galvanizing facility located in Hamilton, Ontario, Canada, that is a joint venture between Dofasco and Arcelor.

F. ''Mittal Steel'' means defendant Mittal Steel Company, N.V., a Netherlands public limited liability company with its headquarters in Rotterdam, The Netherlands, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

G. ''QCM'' means Quebec Cartier Mining Company, a producer of iron ore products, headquartered in Montreal, Quebec, Canada.

H. ''Selected Business'' means whichever of the Sparrows Point Business or the Weirton Business is selected by the United States in its sole discretion to be offered for sale by the defendant or by a trustee appointed pursuant to Section V of this Final Judgment.

I. ''Sorevco'' mean Sorevco and Company, Limited, the hot dip galvanizing operation located in Montreal, Quebec, Canada, that is a joint venture between Dofasco and Mittal.

J. ''Sparrows Point Facility'' means the steel making, rolling, and coating facility owned by Mittal Steel and located in or near Sparrows Point, Maryland.

K. ''Sparrows Point Business'' means all assets, interests, and rights in the Sparrows Point Facility, and includes but is not limited to:

1. All tangible assets used in the development, production, servicing, and sale of all products produced at the Sparrows Point Facility, including but not limited to all real property; any facilities used for research, development, and engineering support, and any real property associated with those facilities; manufacturing and sales assets, including all manufacturing equipment, tooling and fixed assets, capital equipment, vehicles, supplies, personal property, inventory, office

furniture, fixed assets and fixtures, materials, on-or off-site warehouses or storage facilities, and other tangible property or improvements; all licenses, permits and authorizations issued by any governmental organization relating to the Sparrows Point Business; supply agreements; all contracts, teaming agreements, agreements, leases, certifications, commitments, and understandings relating to the Sparrows Point Business; all customer contracts, lists, accounts, and credit records; and all other records maintained by Mittal Steel in connection with the operation of the Sparrows Point Business; provided, however, that with respect to any assets covered by Section II(K)(1) that relate primarily to Mittal's non-divested businesses, but also relate in part to the Sparrows Point Business, the defendant shall have the option, subject to the written approval of the United States in its sole discretion, to substitute equivalent assets or arrangements (a substituted asset or arrangement will not be deemed equivalent unless it provides the Sparrows Point Business the same benefits, or enables the Sparrows Point Business to perform the same function at the same or less cost); and further provided, that the Sparrows Point Business does not include Mittal Steel's contract to supply hot-rolled steel to the The Ford Motor Company, which contract is supplied in part by the Sparrows Point Facility;

2. All intangible assets currently used exclusively or primarily in the development, production, servicing, and sale of all products produced at the Sparrows Point Facility, including but not limited to all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names (except to the extent such trademarks, trade names, service marks, or service names contain the trademark or name ''Mittal Steel'' or any variation thereof), technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, and all manuals and technical information provided to the employees, customers, suppliers, agents or licensees of the Sparrows Point Business;

3. With respect to any other identified intangible assets that are not subject to Section II(K)(2) and that prior to the filing of the Complaint were used both in connection with the Sparrows Point Business and in connection with Mittal Steel's non-divested businesses, the defendant shall provide to the Acquirer a non-exclusive, non-transferable, fully-paid-up license(s) for such intangible asset(s) to the extent and for the period of time that defendant has rights to such intangible assets, provided, however, that any such license may be transferable to any future purchaser of the Sparrows Point Business; and

4. All research data concerning historic and current research and development efforts related to the Sparrows Point Business, including but not limited to designs of experiments, and the results of successful and unsuccessful designs and experiments. To the extent that any such data also relates to historic and current research and development efforts related to businesses other than the Sparrows Point Business, providing a non-exclusive copy of such data shall fulfill defendant's obligations under this provision.

L. ''ThyssenKrupp'' means ThyssenKrupp AG, a German corporation with its headquarters in Dusseldorf, Germany, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

M. ''Tin Mill Products'' means collectively black plate, i.e., light-gauge cold-rolled bare steel sheet; electrolytic tin plate, i.e., black-plate electrolytically coated with tin; and tin free steel, i.e., black plate electrolytically coated with chromium.

N. ''Weirton Facility'' means the steel making, rolling, and coating facility owned by Mittal Steel and located in or near Weirton, West Virginia.

O. ''Weirton Business'' means all assets, interests, and rights in Weirton Facility, and includes but is not limited to:

1. All tangible assets used in the development, production, servicing, and sale of all products produced at the Weirton Facility, including but not limited to all real property; any facilities used for research, development, and engineering support, and any real property associated with those facilities; manufacturing and sales assets, including all manufacturing equipment, tooling and fixed assets, capital equipment, vehicles, supplies, personal property, inventory, office furniture, fixed assets and fixtures, materials, on-or off-site warehouses or storage facilities, and other tangible property or improvements, including but not limited to all of defendant's rights and interests in the Half Moon tin warehouse and processing facility near the Weirton Facility; all licenses, permits and authorizations issued by any governmental organization relating to the Weirton Facility; supply agreements; all contracts, teaming agreements, agreements, leases, certifications, commitments, and understandings relating to the Weirton Facility; all customer contracts, lists, accounts, and credit records; and all other records maintained by Mittal Steel in connection with the operation of the Weirton Business; provided, however, that with respect to any assets covered by Section II(O)(I) that relate primarily to Mittal's non-divested businesses, but also relate in part to the Weirton Business, the defendant shall have the option, subject to the written approval of the United States in its sole discretion, to substitute equivalent assets or arrangements (a substituted asset or arrangement will not be deemed equivalent unless it provides the Weirton Business the same benefits, or enables the Weirton Business to perform the same function at the same or less cost);

2. All intangible assets currently used exclusively or primarily in the development, production, servicing, and sale of all products produced at the Weirton Facility, including but not limited to all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names (except to the extent such trademarks, trade names, service marks, or service names contain the trademark or name ''Mittal Steel'' or any variation thereof), technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, and all manuals and technical information provided to the employees, customers, suppliers, agents or licensees of the Weirton Business;

3. With respect to any other identified intangible assets that are not subject to Section II(O)(2) and that prior to the filing of the Complaint were used both in connection with the Weirton Business and in connection with Mittal Steel's non-divested businesses, the defendant shall provide to the Acquirer a non-exclusive, non-transferable, fully paid-up license(s) for such intangible asset(s) to the extent and for the period of the time that defendant has rights to such intangible assets, provided, however, that any such license may be

transferable to any future purchaser of the Weirton Business; and

4. All research data concerning historic and current research and development efforts related to the Weirton Business, including but not limited to designs of experiments, and the results of successful and unsuccessful designs and experiments. To the extent that any such data also relates to historic and current research and development efforts related to businesses other than the Weirton Business, providing a non-exclusive copy of such data shall fulfill defendant's obligations under this provision.

III. Applicability

A. This Final Judgment applies to Mittal Steel, as defined above, and all other persons in active concert or participation with Mittal Steel who receive actual notice of this Final Judgment by personal service or otherwise.

B. Defendant shall require, as a condition of the sale or other disposition of all or substantially all of its assets or of lesser business units that includes the Divested Business, that the purchaser agrees to be bound by the provisions of this Final Judgment.

IV. Divestiture

A. In the event defendant acquires Arcelor, defendant is ordered and directed to divest the Dofasco Business to ThyssenKrupp within (1) 120 calendar days after the filing of the Complaint in this matter or (2) five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed in total sixty (60) calendar days, and shall notify the Court in each such circumstance. At its option, defendant may elect to sell Dofasco to an alternative Acquirer acceptable to the United States in the sole discretion of the United States. Defendant agrees to use its best efforts to divest the Dofasco Business as expeditiously as possible.

B. In the event defendant acquires Arcelor but is unable to accomplish the divestiture of the Dofasco Business within the time period specified in Section IV(A), then at the option of the United States, defendant shall divest either the Sparrows Point Business or the Weirton Business. The United States shall provide defendant written notice of its selection. Defendant is ordered and directed, within ninety (90) calendar days of the receipt of such notice, to divest the Selected Business in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed in total sixty (60) calendar days, and shall notify the Court in each such circumstance. Defendant agrees to use its best efforts to divest the Selected Business as expeditiously as possible. Once the United States has provided defendant with written notice of its selection under Section IV(B), the defendant will cease to have any obligation under Section IV(A) to divest the Dofasco Business.

C. In accomplishing the divestiture ordered by the Final Judgment, defendant promptly shall make known, by usual and customary means, the availability of the Divested Business. Defendant shall inform any person making inquiry regarding a possible purchase of the Divested Business that it will be divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendant shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divested Business that customarily are provided in a due diligence process except such information or documents subject to the attorney-client or work-product privilege. Defendant shall make available such information to the United States at the same time that such information is made available to any other person.

D. Defendant shall provide the Acquirer and the United States information relating to personnel involved in the research, development, production, operation, and sale of the products of the Divested Business to enable the Acquirer to make offers of employment. Defendant will not interfere with any negotiations by the Acquirer to employ any employee of the Divested Business whose primary responsibility is the production, operation, development, or sale of the products of the Divested Business.

E. Defendant shall permit prospective Acquirers of the Divested Business to have reasonable access to personnel and to make inspections of the physical facilities of the Divested Business; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, and other documents and information customarily provided as part of a due diligence process.

F. Defendant shall warrant to the Acquirer of the Divested Business that each asset of the Divested Business is in a condition and state of repair equal to the condition and state of repair as of, (1) in the case that the Selected Business is divested, the date the defendant publicly announced its intention to acquire Arcelor, *i.e.*, January 27, 2006, or (2) in the case that the Dofasco Business is divested, the date of the filing of the Complaint in this matter.

G. Defendant shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divested Business.

H. The defendant will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divested Business. If the Selected Business is divested, the defendant shall warrant to the Acquirer of the Selected Business that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of the Selected Business as operated by the defendant.

I. Nothing in this Final Judgment shall be construed to require the Acquirer as a condition of any license granted by defendant pursuant to Sections II(K)(3) or II(O)(3) to extend to defendant the right to use the Acquirer's improvements to processes used in connection with the Selected Business.

J. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire business and assets of the Divested Business, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divested Business can and will be used by the Acquirer as a viable, ongoing business engaged in producing Tin Mill Products. The divestiture, whether pursuant to Section IV or Section V of this Final Judgment,

1. Shall be made to an Acquirer that, in the United States's sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) to compete effectively in the production and sale of Tin Mill Products; and

2. Shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and defendant gives defendant the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise interfere in the ability of the Acquirer to compete effectively in the production and sale of Tin Mill Products.

V. Appointment of Trustee To Effect Divestiture

A. If the defendant has not divested the Selected Business pursuant to Section IV(B) of this Final Judgment within the time period specified in that Section, defendant shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Selected Business pursuant to Section IV(B).

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Selected Business. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the trustee may hire at the cost and expense of defendant any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendant shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objection by defendant must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of defendant, on such terms and conditions as plaintiff approves, and shall account for all monies derived from the sale of the Selected Business all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendant and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Selected Business and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendant shall use its best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the Selected Business, and defendant shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to customary confidentiality protection for trade secret or other confidential research, development, or commercial information. Defendant shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring the Selected Business, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Selected Business.

G. If the trustee has not accomplished the divestiture of the Selected Business within six months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture; (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished; and (3) the trustee's recommendations. To the extent such report contains information that the trustee deems confidential, such report shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the plaintiff, who shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

VI. Notice of Proposed Divestiture

A. Within two (2) business days following execution of a definitive divestiture agreement, defendant or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendant. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Selected Business.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendant, the proposed Acquirer, any other third party, or the trustee if applicable additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendant and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within (a) thirty (30) calendar days after receipt of the notice or (b) twenty (20) calendar days after the United States has been provided the additional information requested from defendant, the proposed Acquirer, any third party, or the trustee, whichever is later, the United States shall provide written notice to defendant and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendant's limited right to object to the sale under Section V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by defendant under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendant shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished defendant shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendant shall take no action that would jeopardize the divestiture order by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, defendant shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgement. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divested Business, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendant has taken to solicit buyers for the Divested Business, and to provide required information to any prospective Acquirer, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendant, including limitations on the information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendant shall deliver to the United States an affidavit that describes in reasonable detail all actions defendant has taken and all steps defendant has implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendant shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendant's earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendant shall keep all records of all efforts made to preserve and divest the Divested Business until one year after a divestiture has been completed.

X. Compliance Inspection

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant, be permitted:

1. Access during defendant's office hours to inspect and copy, or at plaintiff's option, to require defendant to provide copies of, all books, ledgers, accounts, records and documents in the possession, custody, or control of defendant, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendant.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendant shall submit written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If, at the time information or documents are furnished by defendant to the United States, defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendant mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then the United States shall give defendant ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. No Reacquisition

Defendant may not reacquire any part of any assets divested during the term of this Final Judgment, provided, however, that nothing in this decree shall prevent defendant from (1) reacquiring any of the assets of QCM, subject to the written consent of the United States in its sole discretion; or (2) increasing its interest in the DoSol Joint Venture to 50 percent.

XII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIII. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XIV. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

_____

United States District Judge

United States District Court for the District of Columbia

United States of America, Plaintiff, v. Mittal Steel Company N.V., Defendant

Case No.
JUDGE:
DECK TYPE: Antitrust
DATE STAMP:

Competitive Impact Statement

Plaintiff United States of America (''United States''), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

The United States filed a civil antitrust Complaint on August 1, 2006, seeking to obtain equitable and other relief against defendant Mittal Steel Company N.V. (''Mittal Steel'') to prevent its proposed acquisition of

Arcelor S.A. (''Arcelor''). Mittal Steel and Arcelor, including its Canadian subsidiary Dofasco Inc. (''Dofasco'' or the ''Dofasco Business''), are two of only a limited number of suppliers to the portion of the United States east of the Rocky Mountains (the ''Eastern United States'') of finely rolled tin or chrome coated steel sheets (''Tin Mill Products''). Tin Mill Products are used in manufacturing steel cans for packaging a wide range of food products, such as soup, fruits, and vegetables, and non-food products, such as paints, aerosols, and shaving cream. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially in the development, manufacture and sale of Tin Mill Products in the Eastern United States, in violation of Section 7 of the Clayton Act. This loss of competition would likely result in higher prices, lower quality, less innovation, and less favorable delivery terms to customers in the Eastern United States Tin Mill Products market.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order and a proposed Final Judgment. These are designed to remedy the anticompetitive effects of the acquisition while permitting Mittal Steel to complete its acquisition of Arcelor. Under the proposed Final Judgment, which is explained more fully below, the defendants are required to divest certain assets including Arcelor's Dofasco subsidiary to ThyssenKrupp AG (''ThyssenKrupp''), a German corporation with its headquarters in Dusseldorf, Germany, or, if defendant chooses, to another acquirer of the divested business (''Acquirer'') acceptable to the United States in its sole discretion. If the defendant is unable to sell the Dofasco Business to ThyssenKrupp or an alternative acceptable buyer, then the defendant is required to divest, at the United States's option, either Mittal Steel's Sparrows Point, Maryland, facility (''Sparrows Point Business'') or Mittal Steel's Weirton, West Virginia, facility (''Weirton Business'') to an Acquirer acceptable to the United States in its sole discretion (with the business so selected referred to as the ''Selected Business''). The divestiture of either the Dofasco Business or the Selected Business is designed to enable the Acquirer to become a viable and active competitor in the Eastern United States Tin Mill Products market.

The United States and defendant have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendant and the Proposed Transaction

Mittal Steel, a Netherlands corporation, has its corporate headquarters and principal place of business in Rotterdam, The Netherlands, and has operations in sixteen countries, located on four continents. As one of the largest steel producers in the world, Mittal Steel is primarily engaged in making a variety of steel products for all the major steel consuming sectors, including automotive, appliance, machinery, and construction. Among its many steel product lines is Tin Mill Products. In 2005, Mittal Steel reported total worldwide revenues that exceeded $28 billion and total annual steel production that exceeded 55 million tons. Mittal Steel maintains seventeen production facilities within the United States, and produces Tin Mill Products in Sparrows Point and Weirton. Mittal Steel operates in the United States through its wholly-owned subsidiary Mittal Steel USA, located in Chicago, Illinois, which markets and sells in the United States Tin Mill Products and other products manufactured by Mittal Steel. Tin Mill Products manufactured at Mittal Steel's U.S. tin mills are shipped primarily to customers in the United States. In 2005, Mittal Steel sold over 800,000 tons of Tin Mill Products in the Eastern United States.

Arcelor, a Luxembourg corporation, has its corporate headquarters and principal place of business in the City of Luxembourg. Like Mittal Steel, Arcelor is one of the world's largest steel producers and makes a variety of steel products for the automotive, appliance, packaging, and other industries. In 2005, Arcelor reported total worldwide revenues of approximately $41.5 billion and steel production of 46 million tons. In February 2006, Arcelor acquired Dofasco, a wholly-owned Canadian subsidiary with its principal place of business in Hamilton, Ontario, Canada. In 2005, Dofasco shipped 4.8 million tons and had $3.9 billion in revenues. Among Arcelor's many steel product lines is Tin Mill Products, which it makes at mills in Europe and Brazil and at Dofasco's Hamilton mill. In 2005, Arcelor, which shipped Tin Mill Products to the Eastern United States primarily from its European facilities, and Dofasco, which shipped Tin Mill Products to the Eastern United States from its Canadian facility, sold a combined 170,615 tons of Tin Mill Products in the Eastern United States.

On January 27, 2006, Mittal Steel announced its intention to launch a hostile tender offer to acquire Arcelor for approximately $23 billion in cash and securities. Mittal Steel simultaneously announced an agreement to sell Dofasco for approximately $5 billion to ThyssenKrupp if Mittal Steel acquired Arcelor. Arcelor initially resisted the hostile takeover. One of the steps Arcelor's Board of Directors took to resist the takeover was to transfer legal title to the shares of Dofasco to an independent Dutch foundation known as a ''stichting.''

Mittal Steel subsequently increased its tender offer to approximately $33 billion in cash and securities and formally launched its tender offer on May 19, 2006. After Mittal Steel agreed to improve the financial, corporate governance, and other terms of its offer for Arcelor, the Arcelor Board agreed on June 25, 2006 to recommend Mittal Steel's offer to Arcelor's shareholders. The acceptance period for Mittal's initial tender offer, during which 92.6 percent of Arcelor's shares were tendered, closed on July 13, 2006. Mittal Steel can take ownership of the shares beginning on August 1, 2006.

Mittal Steel's acquisition of Arcelor would, among other things, combine the operations of two significant providers of Tin Mill Products in the Eastern United States. The United States alleges in its Complaint that this proposed transaction would lessen competition substantially in the market for Tin Mill Products in the Eastern United States, in violation of Section 7 of the Clayton Act.

B. The Competitive Effects of the Transaction on the Tin Mill Products Market

1. Relevant Product Market: The Development, Manufacture and Sale of Tin Mill Products

The Complaint alleges that the development, manufacture and sale of Tin Mill Products is a relevant product market within the meaning of Section 7 of the Clayton Act. Tin Mill Products are finely rolled steel sheets, usually coated with a thin protective layer of tin or chrome. Tin Mill Products are manufactured using a sequence of processing steps in which steel is rolled

into successively thinner sheets, then hardened, and finally coated with either tin or chrome. Tin Mill products are comprised of three types of steel: black plate, electrolytic tin plate (''ETP''), and tin free steel (''TFS''). Black plate is a light-gauge cold-rolled bare steel sheet that serves as the substrate for production of both ETP and TFS and can be used bare for some applications such as pails or larger containers. Black plate is coated with tin to produce ETP and with chrome to produce TFS. ETP and TFS are both used in packaging, although each provides different advantages and disadvantages (including, *inter alia*, organic coating acceptance, strength, surface finish, and formability) that are considered by purchasers in making their purchase decisions. The majority of Tin Mill Products are used to produce sanitary cans, often referred to as food cans. Other uses include aerosol cans, general line cans, pails, larger containers, metal buildings, and oil and fuel filter sheets.

For most Tin Mill Products purchasers, including downstream food can customers, there are no close substitutes for Tin Mill Products. Packaging alternatives, such as plastic containers, are generally not viewed by can customers as replacements for products normally packaged in cans because of cost differences and the performance advantages associated with cans. Some of the advantages of steel cans compared to alternative packaging include their longer shelf life and greater durability, familiarity, and security. Alternative packaging generally costs at least as much as a steel can and sometimes costs as much as eight times as much as a can, and significant additional capital investments are necessary to incorporate alternative packaging materials into a customer's packaging process.

The Complaint alleges that a small but significant increase in the price of Tin Mill Products would not cause can manufacturers or their downstream customers to substitute non-Tin Mill Products containers or otherwise to reduce their purchases of Tin Mill Products in sufficient quantities so as to make such a price increase unprofitable. The use of alternative packaging containers is driven primarily by capital equipment investment considerations and by marketing factors such as consumer convenience, rather than by small but significant changes in the prices of Tin Mill Products. For example, can customers often use alternative packaging in order to extend an existing product line, such as using alternative materials to package soup in portable microwavable containers, while continuing to package the bulk of their soup products in steel cans. Accordingly, the Complaint alleges that the development, manufacture, and sale of Tin Mill Products is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

2. Relevant Geographic Market: Eastern United States

The Complaint also alleges that the Eastern United States is a geographically distinct market for the sale of Tin Mill Products. The only Tin Mill Products manufacturer in the United States west of the Rocky Mountains (the ''Western United States'') is located in California, and it does not have substantial sales in the Eastern United States due to its distance from can manufacturers in that part of the country, which tend to be located in proximity to agricultural regions. The California Tin Mill Products manufacturer, which is half owned by one of the two largest Tin Mill Products producers in the Eastern United States, accounts for more than 84 percent of the Tin Mill Products sold in the Western United States but ships only small quantities to the Eastern United States. Similarly, Tin Mill Products producers in the Eastern United States generally do not sell significant quantities in the Western United States because their freight costs are higher than those of the single manufacturer located in the Western United States.

Customers are reluctant to rely on offshore suppliers of Tin Mill Products for their general production requirements. More than 89 percent of Tin Mill Products sold in the Eastern United States are manufactured by firms located either in the Eastern United States or eastern Canada. Among the factors that tend to limit import penetration are the longer lead times required for offshore orders, higher shipping costs, the inability of some importers to provide the full range of product specifications required by some customers, anti-dumping duties currently in force against several Japanese producers, and voluntary self-restraint by importers who are fearful of prompting additional scrutiny of and tariff protection against imports.

Thus, a small but significant increase in the price of Tin Mill Products would not cause Tin Mill Products customers in the Eastern United States to substitute purchases from outside of the Eastern United States in sufficient quantities so as to make such a price increase unprofitable. Accordingly, the Eastern United States is a relevant geographic market in which to assess the competitive effects of Mittal Steel's proposed acquisition of Arcelor on sales of Tin Mill Products.

3. Anticompetitive Effects of the Acquisition

The complaint alleges that, in this highly concentrated market for Tin Mill Products, a combination of Mittal Steel and Arcelor likely would: (i) Substantially lessen competition generally in the development, manufacture and sale of Tin Mill Products in the Eastern United States; (ii) eliminate actual and potential competition between Mittal Steel and Arcelor in the development, manufacture and sale of Tin Mill Products; and (iii) increase the prices for Tin Mill Products, lessen the quality of Tin Mill Products, lessen the innovation relating to Tin Mill Products, and adversely affect the delivery terms currently offered to the customers in the Tin Mill Products market.

The market for Tin Mill products in the Eastern United States is highly concentrated and is dominated by two firms, Mittal Steel, an integrated steelmaker which accounted for 31 percent of the tons sold in 2005, and another integrated steelmaker, which accounted for more than 44 percent of the tons sold in 2005. Luxembourg-based Arcelor is a significant competitor, which accounted for about two percent of tons sold in the Eastern United States in 2005. Dofasco, which Arcelor acquired in February 2006, accounts for about four percent of the tons sold in 2005 in the Eastern United States. Were Mittal Steel to acquire Arcelor, the largest two remaining firms would account for more than 81 percent of Tin Mill Products sales in the Eastern United States. In 2005, Mittal Steel and one other firm accounted for more than 2.1 million tons of such sales.

The acquisition of Arcelor by Mittal would thus substantially increase the concentration in the Eastern United States Tin Mill Products market. Using a measure of market concentration called the Herfindahl-Hirschman Index (''HHI'') (defined and explained in Appendix A), the proposed transaction will increase the HHI in the market for Tin Mill Products in the Eastern United States by approximately 412 points to a post-acquisition level of approximately 3,522, well in excess of levels that raise significant antitrust concerns.

Mittal Steel's elimination of Arcelor as an independent competitor in the manufacture and sale of Tin Mill Products within the Eastern United States is likely to facilitate anticompetitive coordination among the two major Tin Mill Products

manufacturers by making such coordination more profitable and harder to defeat. If The two largest Tin Mill Products firms in the Eastern United States were to seek to raise prices or reduce output today, purchasers of Tin Mill Products could purchase Tin Mill Products from Arcelor and its subsidiary Dofasco. Arcelor has substantial excess and divertible capacity in Europe, and Arcelor's Dofasco subsidiary has significant divertible capacity in Canada. Were Arcelor and Dofasco no longer available as independent suppliers, the remaining domestic and foreign fringe producers would likely not have sufficient capacity and/or incentives to increase sales in the Eastern United States enough to defeat an anti competitive price increase or output reduction by the two largest firms. In particular, the only other incumbent producer located in the Eastern United States lacks the ability to manufacture cold-rolled substrate, and its ability to obtain the additional substrate needed to increase its output is uncertain.

De novo entry into the development, manufacture and sale of Tin Mill Products is difficult, time-consuming, and costly, and such entry would not be timely, likely, or sufficient to defeat coordination by the two largest Tin Mill Products firms in the Eastern United States post-merger. To produce Tin Mill Products, a firm needs a reliable source of cold-rolled substrate and a Tin Mill Products finishing facility. Entry by a firm that lacks the ability to manufacture cold-rolled substrate would be extremely difficult. A facility to finish cold-rolled substrate into Tin Mill Products would likely cost in the range of $60 to $100 million and take approximately two years to design and build. The cost of entry is largely ''sunk,'' *i.e.*, it cannot be recovered or converted to other uses, raising the risk to entry, and there is a very high risk that a new entrant may not receive any profits from its entry.

Significant new foreign entry or expansion of shipments to the Eastern United States by existing foreign producers is unlikely due to longer delivery lead times occasioned by oceangoing transportation, additional shipping costs, trade barriers, the possibility of future import restrictions, and the reluctance of foreign Tin Mill Products manufacturers to abandon existing markets elsewhere in order to enter the Eastern United States market. Overseas shipping increases the time between order and delivery by up to four months, which is unacceptable for many customers because their demand requirements fluctuate with hard-to-predict fruit and vegetable harvests. Capacity constraints also limit the ability of certain foreign producers from expanding their sales into the Eastern United States. Therefore, entry or expansion by any other firm into the Eastern United States Tin Mill Products market would not be timely, likely, or sufficient to deter post-acquisition coordination.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment will preserve competition in the market for Tin Mill Products in the Eastern United States by requiring the divestiture of one of the three North American tin mills that Mittal Steel will own following its acquisition of Arcelor: (1) The Dofasco mill, currently owned by Arcelor; (2) Mittal's Sparrows Point facility; or (3) Mittal's Weirton facility. The proposed Final Judgment provides for the divestiture of the entire steel mill and not simply the finishing lines for Tin Mill Products, and in the case of Dofasco requires divesting the entirety of Dofasco's steel business. The proposed Final Judgment sets forth a procedure under which Mittal Steel is first required to use its best efforts to sell Dofasco to ThyssenKrupp or an alternative purchaser approved by the United States. If Mittal Steel is unable to sell Dofasco because it proves impossible to dissolve the stichting created by Arcelor to hold legal title to its Dofasco shares, then the Department of Justice can select either the Sparrows Point or Weirton facilities for divestiture.

The required divestiture of Dofasco will remedy the anticompetitive effects of the acquisition alleged in the Complaint, and in the event such a divestiture is not possible, the alternate divestiture of either Sparrows Point or Weirton (as selected by the United States) would likewise be sufficient to remedy those effects. The divestiture of the Dofasco Business or a Selected Business would preserve an independent competitor with sufficient Tin Mill Products capacity to replace Arcelor/Dofasco as an impediment to profitable and successful coordination post-merger. In either case, the preserved competitor would have modern and efficient facilities located close enough to customers in the Eastern United States to compete effectively.

The proposed Final Judgment provides that for any divestiture to be approved, it must be demonstrated to the satisfaction of the United States, in its sole discretion, that the Divested Business can and will be used by the Acquirer as a viable ongoing business that will remedy the competitive harm alleged in the Complaint. The divestiture must be made to an Acquirer that in the United States's judgment has the intent and capability (including the necessary managerial, operational, technical, and financial capability) to compete effectively in the development, production and sale of Tin Mill Products; the divestiture also must be accomplished in a manner that satisfies the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and the defendant gives the defendant the ability unreasonably to raise the Acquirer's costs, reduce the Acquirer's efficiency, or otherwise interfere in the ability of the Acquirer to compete effectively in the development, production and sale of Tin Mill Products. Mittal Steel must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

The proposed Final Judgment requires Mittal Steel, within one hundred and twenty (120) days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest the Dofasco Business to ThyssenKrupp. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed in total sixty (60) calendar days, and shall notify the Court in each such circumstance. At its option, defendant may elect to sell the Dofasco Business to an alternative Acquirer acceptable to the United States in the sole discretion of the United States. Mittal Steel agrees to use its best efforts to divest expeditiously the Dofasco Business.[1]

In the event Mittal Steel is unable by virtue of the stichting to accomplish the divestiture of the Dofasco Business within the period prescribed by the proposed Final Judgment, then defendant shall divest, at the option of the United States, either the Sparrows

[1] Under the terms of the Hold Separate Stipulation and Order, Mittal Steel must maintain and preserve the Dofasco Business, the Sparrows Point Business, and the Weirton Business as ongoing, economically viable competitive businesses from the date of entry of the Hold Separate Stipulation and Order until the divestiture required by the proposed Final Judgment is accomplished. In addition, the Hold Separate Stipulation and Order requires that Mittal Steel ensure that Dofasco operates as an independent, economically viable, and ongoing competitive business concern, held separate and apart from Mittal Steel's other operations, and that it will remain independent and uninfluenced by Mittal Steel while the divestiture of Dofasco is pending or until the United States selects either the Sparrows Point Business or the Weirton Business for divestiture.

Point Business or the Weirton Business. In the event that defendant does not accomplish the divestiture of the Selected Business within 90 days or within an extension to this time period, not to exceed 60 calendar days, which may be granted by the United States in its sole discretion, the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture of the Selected Business.

In the event that a trustee is to be appointed, the proposed Final Judgment provides that the United States shall select a trustee to be approved by the Court. If a trustee is appointed, the proposed Final Judgment provides that defendant will pay all costs and expenses of the trustee. The trustee's fee arrangement will be structured so as to provide an incentive for the trustee based on the price and terms of the divestiture and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months after appointment of the trustee, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act (15 U.S.C. 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. 16(a)), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendant.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the **Federal Register**. All comments received during this period will be considered by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: Maribeth Petrizzi, Chief, Litigation II Section, U.S. Department of Justice, Antitrust Division, 1401 H St., NW., Suite 3000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the proposed Final Judgment.

VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendant. The United States could have continued the litigation and sought preliminary and permanent injunctions against Mittal Steel's acquisition of Arcelor. The United States is satisfied, however, that the divestitures described in the proposed Final Judgment will avoid the transaction's anticompetitive effects in the provision of Tin Mill Products, and, thus, would achieve all or substantially all of the relief the government would have obtained through litigation, but without the time and expense of a trial.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the Court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the Court shall consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) and (B).[2] As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1458–62 (D.C. Cir. 1995).

With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to deterrnine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate

[2] In 2004, Congress amended the APPA to ensure that courts take into account the above-quoted list of relevant factors when making a public interest determination. *Compare 15* U.S.C. 16(e) (2004) *with* 15 U.S.C. 16(e)(l) (2006) (substituting ''shall'' for ''may'' in directing relevant factors for court to consider and amending list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms). On the points discussed herein, the 2004 amendments did not alter the substance of the Tunney Act, and the pre-2004 precedents cited below remain applicable.

requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted) [3] In making its public interest determination, a district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case. *United States* v. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003).

Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft*, 56 F.3d at 1459. Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Id.* at 1459–60.

In its 2004 amendments to the Tunney Act, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). This language codified the intent of the original 1974 statute, expressed by Senator Tunney in the legislative history: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather:

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. *Mid-America Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: August 1, 2006.

Respectfully submitted,

Kerrie Freeborn,

John Greaney,

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[3] *Cf* BNS, 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''); see generally *Microsoft*, 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Peter A. Ahles, M.D.; Revocation of Registration

On August 15, 2005, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and further ordered the immediate suspension of DEA Certificate of Registration, AA0092558, issued to Peter A. Ahles, M.D. (Respondent), of Anaheim, California. The Show Cause Order proposed to revoke Respondent's registration as a practitioner and to deny any pending applications for renewal or modification of the registration, on the ground that Respondent's continued registration would be inconsistent with the public interest. *See* 21 U.S.C. 823(f) and 824(a)(4). The Show Cause Order also immediately suspended Respondent's registration based on my preliminary finding that his continued registration ''would constitute an immediate danger to the public health and safety because of the substantial likelihood that [he would] continue to acquire large amounts of narcotic controlled substances and * * * illegally distribute these narcotic controlled substances to potential abusers and other unauthorized persons in exchange for cash.'' Show Cause Order at 3.

The Show Cause Order specifically alleged that based on a review of transaction reports filed by DEA registrants, Respondent, during the period March 2004 to March 2005, had received ''nearly 570,000 tablets of Schedule III hydrocodone and codeine tablets, most of which were packaged in 500 and 1000 count bottles.'' *Id.* at 1–2. The Show Cause Order alleged that ''[t]hese are excessive amounts of narcotics to be legitimately dispensed or administered from a single practitioner's office in a one-year period.'' *Id.* The Show Cause Order further alleged that in the thirteen month period ending in April 2005, Respondent ''had purchased over one million dosage units of Schedule II through V controlled substances, [which were] predominately narcotic tablets.'' *Id.* at 2.

The Show Cause Order also alleged that on three occasions during May 2005, a DEA Special Agent and a cooperating source (CS) had visited Respondent's office and made undercover buys of hydrocodone, a Schedule III controlled substance. *Id.* The Show Cause Order alleged that on two occasions, the Special Agent observed the CS pay Respondent $500 in cash and receive a plastic bag containing approximately 500 tablets of hydrocodone. *Id.* The Show Cause Order alleged that on the other occasion, the Special Agent observed the CS pay Respondent $600 and receive a plastic bag containing 500 tablets of Norco, another hydrocodone product. *Id.* The Show Cause Order further alleged that Respondent made each of the dispensings without asking the CS for his medical complaint, taking a medical history, or conducting a physical examination. The Show Cause Order thus alleged that the distributions were made ''without any legitimate medical purpose and [were] not in the course of legitimate medical practice'' and violated 21 U.S.C. 841(a)(1). *Id.*

Finally, the Show Cause Order alleged that Respondent had, in submitting his DEA renewal application, answered

''No'' the question whether his state license had ever been revoked, suspended, or placed on probation. *Id.* The Show Cause Order alleged that the Medical Board of California had, in fact, placed Respondent's state license on probation three different times and that Respondent had thus ''materially falsified [his] application for registration in violation of 21 U.S.C. 843(a)(4)(A).'' *Id.* at 2–3. Based on evidence in the investigative file supporting the above allegations, I further made the preliminary finding that Respondent had ''grossly avoided [his] responsibilities as a registrant and [had] been responsible for the actual diversion of controlled substances into other than legitimate channels in violation of 21 U.S.C. 841(a)(1).'' [1]

On August 16, 2005, a DEA Diversion Investigator (DI) personally served the Show Cause Order on Respondent. Since that time, neither Respondent, nor anyone purporting to represent him, has responded. Because (1) more than thirty days have passed since Respondent's receipt of the Show Cause Order, and (2) no request for a hearing has been received, I conclude that Respondent has waived his right to a hearing. *See* 21 CFR 1309.53(c). I therefore enter this final order without a hearing based on information contained in the investigative file.

Findings

Respondent is the holder of DEA Certificate of Registration No. AA0092588, which expired on June 30, 2005. On May 5, 2005, Respondent applied for a renewal of his registration and sought authority to prescribe Schedule II through V controlled substances including Schedule II and III narcotics. On his renewal application, Respondent answered ''No'' the question: ''Has the applicant ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, or placed on probation?''

According to the Medical Board of California's records, at the time Respondent filed his renewal application, he had been the subject of three separate disciplinary proceedings. In each of these cases, the California Board placed Respondent on probation.[2] I also take official notice of the records of the California Board which indicate that on February 24, 2006, Respondent surrendered his state license.

The investigative file further establishes that between March 2004 and April 2005, Respondent purchased over one million dosage units of Schedule III through Schedule V controlled substances from ANDA Pharmaceuticals. Respondent obtained hydrocodone 7.5 and 10 mg. tablets, codeine #4, Stadol (butorphanol tartrate), and Phenergan with codeine.

The investigative file also establishes that in April 2005, a DEA Special Agent and a DEA Diversion Investigator debriefed a cooperating source (CS). The CS stated that he/she had purchased various controlled substances including hydrocodone, Norco, and Xanax from Respondent. During the interviews, the CS related that Respondent performed little to no medical examination and did not require that the CS give a medical reason before selling the drugs to the CS. The CS further asserted that Respondent charged $500 cash for 500 pills/tablets of controlled substances, but charged $600 for 500 pills/tablets of Norco. The CS also stated that Respondent would prescribe any drug including Schedule II controlled substances such as Oxycontin to persons he knows well. Finally, the CS related that Respondent had few legitimate patients and that most of the people he saw visited him to obtain prescription drugs either for personal use or to resell the drugs on the street.

The investigative file further establishes that following the interviews, a DEA special agent accompanied the CS to Respondent's office on three separate dates. On May 12, 2005, the Special Agent observed as the CS paid Respondent $500 and received a black plastic bag containing approximately 500 hydrocodone tablets. Respondent did not perform a physical examination on the CS and did not discuss with the CS a medical reason for the dispensing. Moreover, Respondent did not give the CS any directions for use of the drugs. The Special Agent further observed that Respondent appeared to be under the influence of some substance.

On May 18, 2005, the same Special Agent and the CS returned to Respondent's office. On this occasion, the CS paid $600 and received from Respondent a black plastic bag containing 500 tablets of Norco. While on this occasion Respondent weighed the CS, the CS offered no medical complaint and Respondent did not perform a physical exam. Respondent also failed to give the CS any directions for use of the drugs.

Finally, on May 19, 2005, the Special Agent and the CS returned to Respondent's office. On this occasion, the Special Agent paid Respondent $500 and requested 500 hydrocodone tablets. Respondent handed the Special Agent a black plastic bag containing approximately 500 Norco tablets. The Special Agent did not complain of any medical symptoms and Respondent did not perform a physical examination.

Discussion

As pertinent here, Section 304 of the Controlled Substances Act (CSA) provides that a registration to:

> Dispense a controlled substance * * * may be suspended or revoked * * * upon a finding that the registrant—
>
> (1) Has materially falsified any application filed pursuant to or required by this subchapter or subchapter II of this chapter;
>
> * * * * *
>
> (3) Has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the * * * distribution, or dispensing of controlled substances * * *;
>
> (4) Has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section[.]

21 U.S.C. 824(a).

In this case, I conclude that each of the above provisions provide independent grounds for revoking Respondent's registration.

First, it is clear that Respondent materially falsified his May 5, 2005 application for renewal of his registration. On that application, Respondent was asked whether he had ''ever surrendered (for cause) or had a state professional license or controlled substance registration revoked, suspended, denied, restricted, *or placed on probation*?'' (emphasis added). Respondent answered ''No,'' notwithstanding that the Medical Board of California had placed him on probation on three separate occasions. Given that the question specifically asked Respondent whether his medical license had ever been ''placed on probation,'' it is indisputable that Respondent's answer was a material falsification.

The CSA requires DEA to determine whether the issuance of a registration would be consistent with the public interest. *See* 21 U.S.C. 823(f). The provision of truthful information on applications is absolutely essential to effectuating this statutory purpose. *See* 21 U.S.C. 824(a)(1); *see also VI Pharmacy, Rushdi Z. Salem*, 69 FR 5584, 5585 (2004); *Terrance E. Murphy, M.D.*, 61 FR 2841, 2845 (1996). As the

[1] The Show Cause Order also notified Respondent of his right to a hearing and the procedure for requesting one.

[2] The proceedings were commenced in June 1975, September 1992, and October 1996.

Sixth Circuit recently observed: ''Candor during DEA investigations * * * is considered by the DEA to be an important factor when assessing whether a physician's registration is consistent with the public interest.'' *Hoxie* v. *DEA*, 419 F.3d 477, 483 (2005). Our cases accordingly hold that '''falsification cannot be tolerated.''' *VI Pharmacy*, 69 FR at 5585 (quoting *Murphy*, 61 FR at 2845) (other citation omitted). Respondent's failure to truthfully answer the question regarding prior state disciplinary actions is thus reason alone to revoke his registration.

Respondent's drug dealing provides an additional ground for revoking his registration. Such conduct clearly constitutes acts which ''render his registration * * * inconsistent with the public interest.'' *See* 21 U.S.C. 824(a)(4). Moreover, while the CSA sets forth five factors to be considered in determining the public interest, *see id.* § 823(f), I am ''not required to make findings as to all of the factors, and can give each factor the weight [I] determine[] is appropriate.'' *Hoxie*, 419 F.3d at 482; *see also Morall* v. *DEA*, 412 F.3d 165, 173–74 (D.C. Cir. 2005). Where, as here, a registrant has engaged in such egregious misconduct as drug dealing, a lengthy analysis of each of the factors is unnecessary.

It is indisputable that Respondent did not comply with applicable State and Federal laws ''relating to controlled substances'' and that his conduct ''threaten[s] public health and safety.'' 21 U.S.C. 823(f)(4) and (5). Furthermore, while the investigative file does not contain evidence establishing what action the Medical Board of California took in response to this investigation, *see id.* § 823(f)(1), I have taken official notice of the fact that on February 24, 2006, Respondent surrendered his California medical license in response to the State Board's accusation that Respondent committed unprofessional conduct for, *inter alia*, violating state and federal drug laws.[3] *See also id.* § 824(a)(3). Thus, it is clear that Respondent ''has committed such acts as would render his registration * * * inconsistent with the public interest as determined under'' section 823(f). Id. § 824(a)(4). The revocation of Respondent's registration is therefore necessary to protect the public interest.

Order

Accordingly, pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I hereby order that DEA Certificate of Registration, AA0092558, issued to Peter A. Ahles, M.D., be, and it hereby is, revoked. I further order that any pending applications for renewal or modification of such registration be, and they hereby are, denied. This order is effective September 25, 2006.

Dated: August 15, 2006.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E6–14050 Filed 8–23–06; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 05–27]

Michael's Discount Pharmacy; Revocation of Registration

On April 8, 2005, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and further ordered the immediate suspension of DEA Certification of Registration, BM8291572, issued to Michael's Discount Pharmacy (Respondent) of Kenner, Louisiana. The Show Cause Order proposed to revoke Respondent's registration and to deny any pending applications for renewal or modification of its registration on the ground that Respondent's continued registration as a retail pharmacy would be inconsistent with the public interest. *See* 21 U.S.C. 823(f) and 824(a). The Show Cause Order also immediately suspended Respondent's registration based on my preliminary finding that Respondent's continued registration constitutes an imminent danger to public health and safety ''because of the substantial likelihood that [Respondent would] continue to divert controlled substances to drug abusers.'' *See* Show Cause Order at 17; *see also* 21 U.S.C. 824(d). The Order further notified Respondent of its right to a hearing. *See* Show Cause Order at 17–18.

The Show Cause Order specifically alleged that Respondent was purchasing enormous amounts of hydrocodone products, a Schedule III controlled substance, and that its purchases dwarfed the quantities of the same drugs that were bought by other retail pharmacies in the same area. For example, the Show Cause Order alleged that from January 2, 2004, through February 3, 2005, Respondent purchased 2,486,600 dosage units of Hydrocodone 10/650. *Id.* at 3. The Order further alleged that the next largest pharmacy purchaser had bought only 13,500 dosage units in the same time period. *Id.* The Order also alleged that during the year 2004, Respondent was the second largest purchaser of hydrocodone products in the State of Louisiana. *Id.*

The Show Cause Order alleged that Respondent was filling large amounts of combination prescriptions consisting of hydrocodone, either alprazolam or diazepam (both Schedule IV depressants), and carisoprodol, a non-controlled analgesic that metabolizes into meprobamate, a Schedule IV depressant, and which is often used by drug abusers in conjunction with narcotics. *See id.* at 4. The Show Cause Order alleged that these ''combination prescriptions are issued to persons of all types, regardless of their age, weight, height, gender and complaint.'' *Id.* The Order also alleged that an accountability audit had found multiple discrepancies which included large underages of hydrocodone, diazepam, and alprazolam products. *See id.* at 5.

Most significantly, the Show Cause Order alleged that the Kenner Police Department (KPD) had received numerous complaints of persons illegally selling prescription drugs in Respondent's parking lot. *Id.* at 8. The Show Cause Order described the arrests of more than twenty individuals (who were first observed either leaving Respondent's store or in its parking lot) for either the illegal possession of controlled substances or the illegal distribution of controlled substances which had been obtained from Respondent. *See id.* at 9–17. The Show Cause Order further alleged that many of the arrestees had continued to obtain large quantities of combination prescriptions from Respondent even after their arrests. *See id.* The Order also alleged that a number of the arrestees possessed other controlled substances such as marijuana and

[3] Although the Show Cause Order did not allege Respondent's loss of state authority as a ground for this proceeding, the CSA does not authorize DEA ''to maintain a registration if the registrant is without state authority to handle controlled substances in the state in which he practices.'' *Sheran Arden Yeates, M.D.*, 71 FR 39130, 39131 (2006). DEA has consistently applied this rule. *Id.; see also Dominick A. Ricci, M.D.*, 58 FR 51104 (1993); *Bobby Watts, M.D.*, 53 FR 11919 (1988). Because Respondent no longer has authority under California law to handle controlled substances, he is not entitled to maintain his DEA registration and revocation of his registration is warranted for this reason as well. Furthermore, an allegation that a practitioner has committed acts that render his continued registration inconsistent with the public interest incorporates the statutory factors of 21 U.S.C. 823(f). *See* 21 U.S.C. 824(a)(4). The first factor requires consideration of ''[t]he recommendation of the appropriate State licensing board or professional disciplinary authority.'' *See id.* § 823(f)(1). An allegation brought under section 824(a)(4) thus provides adequate notice that a loss of a State license may be considered during the proceeding.

methamphetamine. *See id.* at 9, 11–13. The Order also alleged that Respondent's employees knew that the KPD was arresting Respondent's customers, that customers would often complain about the police, and that the police would sometimes enter the pharmacy to look for a suspect. *See id.* at 16. In addition, many of Respondent's customers were from out of town. *See id.*

The Show Cause Order also recounted the facts surrounding a complaint that had been filed with the Louisiana Board of Pharmacy against Respondent. The complainant alleged that on both January 17 and February 3, 2004, her 19 year old son had obtained from Respondent a combination prescription of 90 hydrocodone 10 mg., 90 carisoprodol 350 mg., and 30 alprazolam 2mg. *See id.* at 16. On February 5, 2004, the complainant's son died of respiratory failure due to acute and chronic drug use. *Id.* The autopsy's toxicology tests found elevated levels of hydrocodone and alprazolam. *See id.*

Finally, the Show Cause Order alleged that the majority of prescriptions filled by Respondent were for the aforementioned drug combination and were issued by a small group of doctors. *See id.* at 17. The Order alleged that ''[b]ased upon the sheer volume of duplicate prescriptions from the large volume of customers written by the same group of doctors, and the knowledge that [Respondent's] customers were routinely being arrested * * * after leaving'' the pharmacy, Respondent ''knows or should know that the combination prescriptions it fills are not valid prescriptions.'' *Id.* The Order thus alleged that Respondent and its pharmacists were diverting ''massive amounts of controlled substances'' in violation of 21 U.S.C. 841(a)(1), and 21 CFR 1306.04. *Id.* at 17.

On May 5, 2005, Respondent requested a hearing; the case was assigned to Administrative Law Judge (ALJ) Mary Ellen Bittner. On May 25, 2005, the Government sought to stay the proceeding and moved for summary disposition. The basis for the motion was that on April 28, 2005, Respondent had entered into a consent agreement with the Louisiana Board of Pharmacy. Pursuant to the agreement, Respondent surrendered its Louisiana Controlled Dangerous Substances License. The Government thus contended that because Respondent no longer had authority under state law to engage in the distribution of controlled substances, *see* 21 U.S.C. 824(a)(3), it was no longer entitled to hold a Federal registration. The Government further contended that Respondent's request for a hearing should be dismissed.

On June 9, 2005, Respondent filed a response. Respondent advised that it did not oppose the Government's motion. Respondent further acknowledged that it had voluntarily surrendered its state license and was thus not eligible to hold a DEA registration.

On July 1, 2005, the ALJ granted the Government's motion for summary disposition. The ALJ observed that, under longstanding agency precedent, ''a registrant may not hold a DEA registration if it is without appropriate authority under the laws of the state in which it does business.'' ALJ Dec. at 2 (citing, *inter alia, Rx Network of South Florida, LLC,* 69 FR 62,093–01 (2004); *Wingfield Drugs, Inc.*, 52 FR 27,070 (1987)). The ALJ further noted that Respondent had admitted that it was no longer licensed in Louisiana and thus was not entitled to hold a DEA registration. *Id.* Because there were no material facts in dispute, the ALJ granted the Government's motion and recommended that I revoke Respondent's registration and deny any pending applications for renewal or modification of its registration. *See id.* at 2–3.

Having considered the record as a whole, I hereby issue this decision and final order. I adopt in its entirety the ALJ's opinion and recommended decision. Because the facts are straightforward and not in dispute, I conclude that there is no need to elaborate on them. As the ALJ found, Respondent is no longer authorized to distribute controlled substances under State law. Therefore, under our precedents, Respondent is not entitled to maintain its DEA registration. *See, e.g., Rx Network of South Florida,* 69 FR at 62095.

Order

Accordingly, pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I hereby order that DEA Certificate of Registration, No. BM8291572, issued to Michael's Discount Pharmacy, be, and it hereby is, revoked. I further order that any pending applications for renewal or modification of such registration be, and they hereby are, denied. This order is effective September 25, 2006.

Dated: August 15, 2006.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E6–14049 Filed 8–23–06; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 05–15]

Oakland Medical Pharmacy; Revocation of Registration

On October 27, 2004, I, the Deputy Administrator of the Drug Enforcement Administration, issued an Order to Show Cause and further ordered the immediate suspension of DEA Certificate of Registration, AO6837477, issued to Oakland Medical Pharmacy (Respondent) of Madison Heights, Michigan. The Show Cause Order proposed to revoke Respondent's pharmacy registration and to deny any pending applications for renewal or modification of its registration on the ground that Respondent's continued registration would be inconsistent with the public interest. *See* 21 U.S.C. 823(f) and 824(a). The Order of Immediate Suspension was based on my preliminary finding that Respondent's continued registration ''would constitute an imminent danger to the public health and safety because of the substantial likelihood'' that Howard Applebaum, Respondent's owner and chief pharmacist would ''continue to divert controlled substances to persons who will abuse them.'' Show Cause Order at 3. The Show Cause Order also notified Respondent of its right to a hearing. *Id.*

The Show Cause Order specifically alleged that between February 2002 and October 2004, Mr. Applebaum had ''[o]n many occasions * * * provided [two undercover] agents with refills of controlled substance prescriptions when refills had not been authorized by a physician.'' *Id.* at 2. The Show Cause Order further alleged that Mr. Applebaum had ''also provided the agents with excessive amounts of controlled substances that had not been authorized by a physician'' by providing the agents with refills when he dispensed the initial prescriptions. *Id.* The Order also alleged that Mr. Applebaum had provided refills to the agents long before their original prescriptions would have been used up. *Id.*

The Show Cause Order alleged that on July 26, 2004, Mr. Applebaum filled a controlled substance prescription for an agent ''with no authorization from her physician.'' *Id.* The Order also alleged that on the same day, the agent observed Mr. Applebaum provide another customer with two refills for a controlled substance. *Id.*

The Show Cause Order further alleged that a review Respondent's records for

the period January 2003 through May 2004 indicated that ''Mr. Applebaum routinely dispenses unauthorized controlled substances by providing early refills * * * and multiple refills of prescriptions for the same controlled substances on the same date.'' *Id.* The Order also alleged that Respondent's records show that ''Mr. Applebaum dispenses narcotic to drug addicts and to individuals obtaining treatment for narcotic addiction.'' *Id.*

The Show Cause Order alleged that ''Mr. Applebaum was ''routinely dispens[ing] contraindicated controlled substances at the same time to the same patient,'' and that he was also ''routinely dispens[ing] controlled substances'' to doctor shoppers. *Id.* Finally, the Show Cause Order alleged that from October 2003 through April 2004, Respondent had purchased 350,000 units of hydrocodone products and that 46 percent of the hydrocodone prescriptions it dispensed were issued by the same physician. *Id.* at 3. The Order thus alleged that there was a ''substantial likelihood that Mr. Applebaum will continue to divert controlled substances to'' drug abusers and that Respondent's continued registration ''would constitute an imminent danger to public health and safety.'' *Id.*

On December 13, 2004, the Office of the Administrative Law Judges received Respondent's request for a hearing. The case was assigned to Administrative Law Judge (ALJ) Gail A. Randall.

On December 22, 2004, the Government moved for summary disposition. The basis for the motion was that on November 16, 2004, the Michigan Board of Pharmacy had filed an Administrative Complaint against Respondent and had also summarily suspended Respondent's state pharmacy license. The State's Order of Summary Suspension was effective immediately. The Government thus contended that because Respondent no longer had authority under state law to distribute or dispense controlled substances, see 21 U.S.C. 824(a)(3), it was not entitled to hold its Federal registration. The Government further contended that there was no factual matter in dispute.[1]

On January 21, 2005, Respondent filed an opposition to the Government's motion. While Respondent acknowledged that the State had summarily suspended its registration, it contended that the State's action ''was predicated in large part on the immediate ex-parte suspension of respondent's DEA registration * * * and the facts developed by the DEA.'' Resp. Answer to Motion for Summary Disp. at 1. Respondent further contended that the hearing before the State ALJ was ongoing and that the state order was not final. See id. Respondent argued that for DEA to rely on the State's summary suspension when the State's action was based on the original DEA proceeding ''is a case of boot-strapping extraordinaire.'' *Id.* at 2.

Respondent thus contended that it would be ''fundamentally unfair'' to grant the Government's motion. *Id.* Respondent further contended that revocation was not required by the statutory language of 21 U.S.C. 824(a)(3). *See id.* (quoting 21 U.S.C. 824(a)(3) (''a registration * * * may be suspended or revoked by the Attorney General upon a finding that the registrant has had his State license or registration suspended, revoked or denied by competent State authority''). According to Respondent, ''[t]he action is not mandatory nor is it warranted in this situation where the respondent has specifically requested a hearing on the merits and is currently in the midst of'' a State hearing ''on the issue of whether * * * Respondent's conduct merits [an] order of summary suspension of the licenses by the State.'' *Id.* at 2–3. Respondent thus requested that the ALJ deny the Government's motion for summary disposition and that the Federal proceeding be stayed until the State issued a decision on the merits.

On February 4, 2005, the ALJ issued an Order for Status Report. In the order, the ALJ notified the parties that she had taken the matter under advisement and that the proceedings would remain stayed. The ALJ also ordered Respondent to file a status report with respect to its State license on or before April 18, 2005. The ALJ further notified Respondent that if it failed to file the report, the ALJ would rule on the government's motion based on the information then before her. *See* Order for Status Report at 1.

As of May 27, 2005, Respondent had not filed a status report. The ALJ therefore issued her order, opinion and recommended decision. In her order, the ALJ granted the Government's motion for summary disposition, denied the Respondent's request for a continued stay of the proceedings and recommended the revocation of Respondent's registration on the ground that Respondent lacked State authority to handle controlled substances. *See* ALJ Dec. at 5–7.

The ALJ specifically found that ''Respondent did not deny that it is currently without state authorization to handle controlled substances.'' ALJ Dec. at 5. The ALJ further noted that Respondent had failed to file a report advising her of the status of the state proceeding. *See id.* Because state authorization is an essential prerequisite to a DEA registration, *see id.* at 4, and it was undisputed that ''that the Respondent does not have authority to handle controlled substances in the jurisdiction where it seeks to maintain its DEA registration,'' the ALJ granted the Government's motion for summary disposition. *Id.* at 5.

The ALJ acknowledged Respondent's argument that it was ''unfair'' for DEA to revoke its registration based on the Michigan suspension, because it had been based on the DEA Order to Show Cause and Immediate Suspension of Registration. *Id.* at 5–6. The ALJ further noted that ''such an action is circular and may result in the Respondent being denied an opportunity to adjudicate the facts.'' *Id.* at 6.

The ALJ also denied Respondent's request for a stay until the conclusion of the state proceeding. According to the ALJ, ''[t]he fact remains that the Respondent currently lacks state authorization to handle controlled substances, and therefore *cannot* remain registered with the DEA.'' *Id.* The ALJ thus concluded that she had ''no choice but to grant summary disposition at the present time, and to deny'' Respondent's motion for a stay. *Id.*

Thereafter, Respondent sought reconsideration of the ALJ's recommended decision. The basis for Respondent's motion was that he had not intentionally failed to file a Status Report but had erroneously believed, based on a phone conversation with Government counsel that occurred on April 11, 2005, that Government counsel ''was going to investigate the matter and confirm with Respondent's counsel whether it was still necessary for him to file anything additional in writing given the status of the'' state hearing. Resp. Req. for Recon. at 2. Respondent's counsel stated that when he did not hear back from Government counsel, he ''wrongly assumed that the issue had been resolved.'' *Id.* Respondent further informed the ALJ that the state proceedings were continuing and that the proceeding had been ''an elongated and vigorously contested hearing,'' which had been held on five different dates with one additional date to follow, at which the State's ''expert pharmacy witness'' was to testify. *Id.* at 3.

The Government responded that while it did not object to the late filing of the status report, it did object to

[1] Upon receipt of the Government's motion, the ALJ ordered that the proceedings be stayed pending a decision on the motion and further order Respondent to file a reply.

reconsideration of the ALJ's decision. *See* Govt. Resp. at 2. While the Government counsel did not remember the aforementioned telephone conversation, he did not dispute that Respondent's counsel may have asked him whether he had to file anything. *Id.* The Government further pointed out that Respondent's counsel did not contend that he had not received the ALJ's Order for Status Report, and that the Order, which the Government had not received, presumably clearly stated the deadline for filing the Status Report. *See id.* at 2–3.

The Government contended that whether Respondent should be permitted to file a status report was irrelevant because Respondent's state license had been suspended in November 2004 and had remained so since then. The Government further argued that ''Respondent still does not know when the state proceedings will end, and there is no assurance that Respondent will regain its state authority.'' *Id.* at 3. According to the Government, ''[t]he ALJ based her Decision on the fact that Respondent had no state authority to handle controlled substances at the time of the Decision. That fact was true at the time of the deadline for the status report, at the time of the Decision and is true at the present.'' *Id.* Therefore, the Government argued that there was no basis for the ALJ to reconsider her decision.

The ALJ denied Respondent's motion for reconsideration. Again, the ALJ noted that ''under the Controlled Substances Act it is clear that the DEA does not have statutory authority to maintain a registration if the registrant is without state authority to handle controlled substances in the state in which the registrant conducts business.'' Order Denying Resp. Req. for Recon. at 2. The ALJ then transmitted the record to me.[2]

Having considered the record as a whole, I hereby issue this decision and final order. I adopt the ALJ's findings of fact and conclusions of law. I further adopt the ALJ's recommended decision to revoke Respondent's registration. I do not, however, adopt the opinion to the extent it suggests that it was ''unfair'' for this agency to revoke Respondent's Federal registration based on the State proceeding and that ''such an action is circular and may result in the Respondent being denied an opportunity to adjudicate the facts.'' ALJ Dec. at 6.

I acknowledge that the State's Administrative Complaint relied in part on my Order to Show Cause and Immediate Suspension of Registration. *See* Admin. Complaint at 3. But the state complaint did not rely solely on my action. The state complaint cited a variety of grounds under Michigan law for imposing sanctions including ''failing to comply with applicable Federal laws,'' *id.* at 2 (citing Mich. Comp. Laws § 333.7311(1)(f)); dispensing of ''controlled substances for other than legitimate medical purposes,'' *id.* (citing Mich. Comp. Laws § 333.7311(1)(g)); and ''if an officer or stockholder of the pharmacy lacks good moral character.'' *Id.* at 2–3 (citing Mich. Comp. Laws § 333.17768(2)(a)). The complaint further alleged that Respondent had violated these provisions of state law. *Id.* at 3–4. Furthermore, the State's Order of Summary Suspension was based on the ''careful consideration of the documentation filed'' in the State's administrative proceeding including the complaint. Order of Summary Suspension 1. The State's Order also provided a procedure for Respondent to petition for dissolution of the state suspension. *See id.*

I take the State on its word and conclude that its decision to summarily suspend Respondent's state license was not based solely on my order but was also based on its own evaluation of the evidence. Furthermore, as Respondent itself pointed out, the State proceeding has been ''an elongated and vigorously contested hearing,'' which included at least six days of hearings with the State putting on an expert witness. It is hard to imagine why a proceeding would take so long to litigate and require expert testimony if it did not involve an adjudication of the underlying facts. Thus, I do not accept the ALJ's conclusion that it is ''circular'' for this agency to revoke Respondent's registration based on the State's summary suspension order and that doing so ''may result in * * * Respondent being denied an opportunity to adjudicate the facts.'' ALJ Dec. at 6. Quite the opposite, it appears that the State entered its suspension order based on its own examination of the evidence; it further appears that Respondent has had a full and fair opportunity to litigate the facts in the State proceeding.

DEA's regulations make clear that the ALJ's decision is only a recommendation; it is not the final agency action. The revocation of Respondent's Federal registration becomes final only with this order. Yet in the interval between the ALJ's decision and the publication of this order, Respondent has submitted no evidence to show that the State has lifted its suspension.

As the ALJ correctly recognized, DEA has consistently held that a registrant may not hold a DEA registration if it is without appropriate authority under the laws of the state in which it does business. *See, e.g., Rx Network of South Florida, LLC*, 69 FR 62,093 (2004); *Wingfield Drugs, Inc.*, 52 FR 27,070 (1987). Respondent does not have authority under Michigan law to handle controlled substances. Therefore, it is not entitled to maintain its DEA registration. *See Rx Network of South Florida*, 69 FR at 62095.

Order

Accordingly, pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I hereby order that DEA Certificate of Registration, No. AO6837477, issued to Oakland Medical Pharmacy be, and it hereby is, revoked. I further order that any pending applications for renewal or modification of its registration be, and they hereby are, denied. This order is effective September 25, 2006.

Dated: August 15, 2006.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E6–14045 Filed 8–23–06; 8:45 am]

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[2] I emphasize that there is no provision in DEA's regulations for either party to request reconsideration of an ALJ's recommended decision. See generally 21 CFR Subpart D. The appropriate means of challenging the ALJ's decision is to file exceptions. See 21 CFR 1316.66.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Sujak Distributors; Denial of Application

On May 18, 2005, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Sujak Distributors (Respondent). The Show Cause Order proposed to deny Respondent's application for a DEA Certificate of Registration as a distributor of List I chemicals on the ground that Respondent's registration would be inconsistent with the public interest. *See* U.S.C. 823(h).

The Show Cause Order specifically alleged that Respondent was proposing to sell ephedrine and pseudoephedrine products, which are precursors used in the manufacture of methamphetamine, to convenience stores, gas stations and liquor stores in the Davenport, Iowa area. *See* Show Cause Order at 2. The

Show Cause Order alleged that only a small percentage of sales of non-prescription ephedrine and pseudoephedrine products occur in these retail outlets and that these establishments are a primary supply source of these products for the illegal manufacture of methamphetamine. *See id.* at 1–2. The Show Cause Order further alleged that Respondent's proposed registered location was at a storage unit rental facility and that Respondent's unit was not ''sufficiently secure from entry from adjacent units.'' *Id.* at 2.

The Show Cause Order also alleged that Respondent's co-owner, Mr. Dennis Carney, had told DEA Diversion Investigators that ''25 to 35 percent of his business would consist of listed chemical product sales to convenience stores, liquor stores and gas stations.'' *Id.* The Show Cause Order alleged that ''the average small store could expect to sell monthly only about $15.00 to $40.00 worth of pseudoephedrine products.'' *Id.* at 3. Finally, the Show Cause Order alleged that methamphetamine is ''one of the most popular and widely abused drugs throughout the Midwest.'' *Id.* The Show Cause order also notified Respondent of its right to a hearing. *Id.* at 4.

The Show Cause Order was served on Respondent by certified mail, return receipt requested, and on June 3, 2005, Respondent acknowledged receipt. Since that time, neither Respondent, nor anyone purporting to represent it, has responded. Because (1) more than thirty days have passed since Respondent's receipt of the Show Cause Order, and (2) no request for a hearing has been received, I conclude that Respondent has waived its right to a hearing. *See* 21 CFR 1309.53(c). I therefore enter this final order without a hearing based on relevant material in the investigative file and make the following findings.

Findings

Ephedrine and pseudoephedrine are List I chemicals that, while having therapeutic uses, are easily extracted from lawful products and used in the illicit manufacture of methamphetamine, a schedule II controlled substance. *See* 21 U.S.C. 802(34); 21 CFR 1308.12(d). As noted in numerous prior DEA orders, ''methamphetamine is an extremely potent central nervous system stimulant.'' *David M. Starr*, 71 FR 39367 (2006); *A–1 Distribution Wholesale*, 70 FR 28573 (2005). Methamphetamine abuse has destroyed lives and families, ravaged communities, and created serious environmental harms. *Starr*, 71 FR at 39637.

Respondent is organized as a partnership which is co-owned by Mr. and Mrs. Dennis Carney. The investigate file contains additional information suggesting that Mr. Greg Glowacki, an employee of Respondent, may also have a financial interest in Respondent. Respondent is located at 2501 N. Lincoln Ave, M–3, Davenport, Iowa. The location is a unit in a storage rental facility.

On July 16, 2004, Respondent, through its co-owner, submitted an application for a registration to distribute the List I chemicals ephedrine and pseudoephedrine. On November 18, 2004, two DEA Diversion Investigators (DIs) visited Respondent at its proposed registered location to conduct a pre-registration investigation. The DIs met with Mr. Carney and discussed the nature of Respondent's business. Respondent supplies general merchandise and seasonal items to convenience stores, gas stations, and liquor stores in the Davenport, Iowa area. Respondent's business includes customers in both Iowa and Illinois.

Mr. Carney advised the DIs that he was seeking registration in order to sell the following List I chemical products which contain ephedrine: Mini Two Way 12.5/200 mg. in 6 count packets, 12 count blister cards, and 48 count bottles; Twin Tabs 12.5/200 mg. in 48 count bottles; and Rapid Action 12.5/200 mg. in 48 count bottles. Mr. Carney further advised the DIs that neither he or his wife, nor his employee, had any experience in handling List I chemicals. Background checks on Mr. Carney, his wife, and Mr. Glowacki, did not find any adverse information.

Respondent's proposed registered location was a 10 foot by 20 foot unit in a rental storage facility with approximately 100 units. The facility's office hours were 9 a.m. to 5 p.m., Monday through Friday. All occupants have access to the main corridor where Respondent's unit is located and can apparently obtain access to the facility at any time through use of a key-pad entry system. Moreover, the main corridor is wide enough so that a motor vehicle can be driven into the facility. The facility has at least two video cameras in place; one covers the main entrance, another covers the corridor adjacent to Respondent's unit and the loading dock. The entry system records the identification number of any person who has entered or exited the facility. In the event of a break-in, the security company notifies the local police department. Respondent's unit is protected by a padlock. Mr. Carney also told the DIs that he intended to purchase a steel storage cabinet for the List I chemical products. However, Mr. Carney has not provided documentation that the cabinet was in fact purchased.

Upon entering Respondent's storage unit, the DIs observed that the unit did not have a solid ceiling. Instead, the top of the unit was comprised of wire, which was run both length and width wise at perhaps one foot intervals.[1] The DIs found that the wire could easily be tampered with and that a person could gain access to Respondent's unit from other storage units.

The DIs also discussed with Mr. Carney his firm's business practices. Mr. Carney told the DIs that he did not have any procedures to determine whether new customers are legitimate purchasers other than visiting their businesses and ''checking them out.'' The DIs found that Mr. Carney understood the record-keeping requirements. Mr. Carney also appears to have adequate procedures for receiving and delivering List I chemicals. Mr. Carney further told the DIs that he would not engage in any transactions triggering the reporting threshold, *see* 21 CFR 1310.04 and 1310.05, and that he would contact DEA in the event a customer placed a suspicious order.

Subsequent to the pre-registration investigation, the DIs conducted customer verifications. The verifications did not uncover any adverse information.

Discussion

Under 21 U.S.C. 823(h), an applicant to distribute List I chemicals is entitled to be registered unless I determine that the registration would be inconsistent with the public interest. In making this determination, Congress directed that I consider the following factors:

(1) Maintenance by the applicant of effective controls against diversion of listed chemicals into other than legitimate channels;

(2) Compliance by the applicant with applicable Federal, State, and local law;

(3) Any prior conviction record of the applicant under Federal or State laws relating to controlled substances or to chemicals controlled under Federal or State law;

(4) Any past experience of the applicant in the manufacture and distribution of chemicals; and

(5) Such other factors as are relevant to and consistent with the public health and safety.

Id. ''These factors are considered in the disjunctive.'' *Joy's Ideas*, 70 FR 33195, 33197 (2005). I ''may rely on any one or combination of factors, and may

[1] The estimates of the interval is based on the photographs. No actual measurement was taken.

give each factor the weight I deem appropriate in determining whether a registration should be revoked or an application for a registration be denied.'' *Starr*, 71 FR 39368. *See also Energy Outlet*, 64 FR 14269 (1999). In this case, I conclude that factors one, four and five establish that Respondent's application should be denied.

Factor One—Maintenance of Effective Controls Against Diversion

The investigative file does not establish that Respondent would fail to properly comply with DEA's regulations pertaining to recordkeeping and reports. But ''the adequacy [of an] applicant's systems for monitoring the receipt, distribution, and disposition of List I chemicals,'' 21 CFR 1309.71(b)(8), is only one part of the inquiry under factor one.

Determining whether an applicant will provide proper physical security of listed chemicals is also critical in evaluating the effectiveness of an applicant's controls against diversion. *See* 21 CFR 1309.71(b). Here, the investigative file establishes that Respondent's proposed location does not provide adequate security for listed chemicals for several reasons. First, Respondent's storage unit lacks an adequate ceiling. Thus, even individuals who have lawful access to the facility could easily break in to the unit.

Second, DEA's regulations specifically mandate that I consider ''the extent of unsupervised public access to the facility.'' *Id.* 1309.71(b)(5). Here, there are 100 rental units in the facility and it is apparent that a large number of people have access to the building. Beyond that, it appears that the facility has employees on-site only from Monday through Friday, and only between the hours of 9 a.m. to 5 p.m. The facility is however, accessible 24 hours a day, every day of the year. Thus, access to the facility is largely unsupervised.

Moreover, Respondent does not know whether any of the other tenants have criminal records. Nor does it control who the landlord rents to. While Respondent's owner claimed to the DIs that no other occupant of the facility would be aware that he was handling List I chemicals, it is certainly possible, if not likely, that other occupants would eventually find out either through word of mouth or by observing Respondent's employees. Perhaps none of the other tenants (and the acquaintances they may bring to the facility) is a criminal, but this is a risk I decline to assume. I thus conclude that Respondent's proposed registered location does not provide adequate security for storing listed chemicals. This factor thus weighs heavily in support of denying Respondent's application.[2]

Factors Two and Three—Compliance With Applicable Law and the Applicant's Prior Record of Relevant Criminal Convictions

While there is evidence that Respondent failed to comply with Federal regulations when it was run by its previous owner, I have already concluded that those violations are not relevant. The more important question is whether there is any evidence that either the co-owners of Respondent or its employee have failed to comply with applicable Federal, state or local laws. The investigative file does not establish that any of these persons has failed to comply with applicable laws. Relatedly, none of these persons has been convicted of a criminal offense relating to controlled substances or chemicals. I thus conclude that both of these factors support granting Respondent's application.

Factor Four—Past Experience in the Manufacture or Distribution of Controlled Substances

Neither of Respondent's co-owners, nor its sole employee, have any prior experience in the manufacture or distribution of List I chemicals. Because of the potential for diversion, DEA has repeatedly held that an applicant's lack of experience in distributing List I chemicals is a factor which weighs heavily against granting an application for registration. *See, e.g., Starr*, 71 FR at 39368; *Jay Enterprises*, 70 FR 24620, 24621 (2005); *ANM Wholesale*, 69 FR 11652, 11653 (2004). The fact that neither of Respondent's co-owners, nor its employee, has any experience thus provides a substantial reason to deny the application.

Factor Five—Other Factors That Are Relevant to and Consistent With Public Health and Safety

Numerous DEA cases recognize that the sale of certain List I chemical products by non-traditional retailers is an area of particular concern in preventing diversion of these products into the illicit manufacture of methamphetamine. *See, e.g., Joey Enterprises*, 70 FR 76866, 76867 (2005). As *Joey Enterprises* explains, ''[w]hile there are no specific prohibitions under the Controlled Substances Act regarding the sale of listed chemical products to [gas stations and convenience stores], DEA has nevertheless found that [these entities] constitute sources for the diversion of listed chemical products.'' *Id. See also TNT Distributors*, 70 FR 12729, 12730 (2005) (special agent testified that ''80 to 90 percent of ephedrine and pseudoephedrine being used [in Tennessee] to manufacture methamphetamine was being obtained from convenience stores''); *OTC Distribution Co.*, 68 FR 70538, 70541 (2003) (noting ''over 20 different seizures of [gray market distributor's] pseudoephedrine product at clandestine sites,'' and that in an 8-month period distributor's product ''was seized at clandestine laboratories in eight states, with over 2 million dosage units seized in Oklahoma alone.''); *MDI Pharmaceuticals*, 68 FR 4233, 4236 (2003) (finding that ''pseudoephedrine products distributed by [gray market distributor] have been uncovered at numerous clandestine methamphetamine settings throughout the United States and/or discovered in the possession of individuals apparently involved in the illicit manufacture of methamphetamine'').

Moreover, during clandestine lab seizures, DEA has frequently found high count List I chemical products, thus indicating that these are the preferred products for illicit methamphetamine manufacturers. *See OTC Distribution*, 68 FR at 70541, *MDI Pharmaceuticals*, 68 FR at 4236. Respondent proposed to sell similar high count products.

Significantly, all of Respondent's proposed customers participate in the non-traditional market for ephedrine and pseudoephedrine products. DEA final orders recognize that there is a substantial risk of diversion of List I chemicals into the illicit manufacture of methamphetamine when these products are sold by non-traditional retailers. *See, e.g., Joy's Ideas*, 70 FR at 33199 (finding that the risk of diversion was ''real, substantial and compelling''); *Jay Enterprises*, 70 FR at 24621 (noting ''heightened risk of diversion'' should application be granted); *Xtreme Enterprises*, 67 FR at 76197. Under DEA precedents, an applicant's proposal to sell into the non-traditional market weighs heavily against the granting of a registration under factor five. So too here.

Furthermore, DEA has repeatedly denied an application when an applicant proposed to sell into the non-traditional market and analysis of one of the other statutory factors supports the conclusion that granting the application would create an unacceptable risk of diversion. Thus, in *Xtreme Enterprises*, my predecessor denied an application

[2] Having concluded that Respondent's proposed location does not provide adequate security, I do not decide whether Respondent has adequate procedures for verifying the legitimacy of customers.

observing that the respondent's ''lack of criminal record, compliance with the law and willingness to upgrade her security system are far outweighed by her lack of experience with selling List I chemicals and the fact that she intends to sell ephedrine almost exclusively in the gray market.'' 67 FR at 76197. More recently, I denied an application observing that the respondent's ''lack of a criminal record and any intent to comply with the law and regulations are far outweighed by his lack of experience and the company's intent to sell ephedrine and pseudoephedrine exclusively to the gray market.'' *Jay Enterprises*, 70 FR at 24621. *Accord Prachi Enterprises,* 69 FR 69407, 69409 (2004).

I also note that the State of Iowa recently enacted legislation making all ephedrine products Schedule V controlled substances. *See* 2005 Iowa Acts Ch.15, S.F. 169 (codified at Iowa Code Ann. 124.212 (West 2006)). Under Iowa law, all ephedrine products must be sold in licensed pharmacies. Therefore, it appears that none of Respondent's customers can now lawfully sell the products that Respondent proposed to distribute.[3] *See* Iowa Code Ann. 124.302. Relatedly, Respondent can not distribute ephedrine products without obtaining an Iowa controlled substances registration. *See id.* As I have previously explained, where, as here, state efforts to combat the illicit manufacture of methamphetamine are consistent with Federal policy, it is appropriate to give them due weight in determining whether the granting of a registration would be consistent with public health and safety. *See McBride Marketing*, 71 FR 35710, 35711 (2006); *Joy's Ideas*, 70 FR 33195, 33199 (2005). I thus conclude that granting Respondent's application would be inconsistent with public health and safety.

In summary, there are several factors which support the conclusion that granting the application would be inconsistent with the public interest. Respondent's proposed security measures are plainly inadequate and are thus grounds alone to deny the application. Moreover, Respondent lacks experience in the distribution of List I chemicals and proposes to sell into the non-traditional market. Furthermore, none of Respondent's customers can lawfully sell ephedrine products under Iowa law. I therefore conclude that granting Respondent's application would be ''inconsistent with the public interest.'' 21 U.S.C. 823(h).

[3] The Iowa Act also placed limits on the sale of pseudoephedrine products, generally limiting their sale to pharmacies except for packages of liquid, liquid capsule, and liquid-filled gel caps that contain 360 milligrams or less.

Respondent also has customers in Illinois. Respondent did not, however, include any customers from Illinois in its list of potential List I chemical customers. I therefore do not consider the effect of Illinois' recently enacted Methamphetamine Precursor Control Act.

Order

Accordingly, pursuant to the authority vested in me by 21 U.S.C. 823(h) and 28 CFR 0.100(b) and 0.104, I hereby order that the application of Sujak Distributors for a DEA Certificate of Registration as a distributor of List I chemicals be, and it hereby is, *denied.* This order is effective August 24, 2006.

Dated: August 16, 2006.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E6–14048 Filed 8–23–06; 8:45 am]

BILLING CODE 4410–09–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–369 and 50–370]

Duke Power Company LLC; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating Licenses NPF–9 and NPF–17, issued to Duke Power Company (the licensee), for operation of the McGuire Nuclear Station, Units 1 and 2, located in Mecklenburg County, North Carolina.

The proposed amendment would revise the McGuire Nuclear Station's licensing basis to adopt the alternative source term radiological analysis methodology in accordance with Title 10 of the Code of Federal Regulations (10 CFR) section 50.67.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

Within 60 days after the date of publication of this notice, 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 2.309, which is available at the Commission's public document room (PDR), located at One White Flint North, Public File Area O1 F21, 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 a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner/requestor 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 general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for 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. The petition must include 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/requestor to relief. A petitioner/requestor who fails to satisfy 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.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i)–(viii).

A request for a hearing or a petition for leave to intervene must be filed by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff; (3) E-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HEARINGDOCKET@NRC.GOV*; or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. 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 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 Ms. Lisa F. Vaughn, Duke Power Company LLC, 422 South Church Street, Charlotte, North Carolina 28201–1006, attorney for the licensee.

If a request for a hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazards consideration in accordance with 10 CFR 50.91 and 50.92.

For further details with respect to this action, see the application for amendment dated December 20, 2005, as supplemented by letter dated May 4, 2006, which are available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the 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 21st day of August 2006.

For the Nuclear Regulatory Commission.

John F. Stang,

Senior Project Manager, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E6–14039 Filed 8–23–06; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 17i–3; SEC File No. 270–529; OMB Control No. 3235–0593.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 [1] the Securities and Exchange Commission (''Commission'') intends to submit to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below. The Code of Federal Regulation citation to this collection of information is the following rule: 17 CFR 240.17i–3.

Section 231 of the Gramm-Leach-Bliley Act of 1999 [2] (the ''GLBA'') amended Section 17 of the Securities Exchange Act of 1934 to create a regulatory framework under which a holding company of a broker-dealer (''investment bank holding company'' or ''IBHC'') may voluntarily be supervised by the Commission as a supervised investment bank holding company (or ''SIBHC'').[3] In 2004, the Commission promulgated rules, including Rule 17i–3, to create a framework for the Commission to supervise SIBHCs.[4] This framework includes qualification criteria for SIBHCs, as well as recordkeeping and reporting requirements. Among other things, this regulatory framework for SIBHCs is intended to provide a basis for non-U.S. financial regulators to treat the Commission as the principal U.S. consolidated, home-country supervisor for SIBHCs and their affiliated broker-dealers.[5]

Rule 17i–3 permits an SIBHC to withdraw from Commission supervision by filing a notice of withdrawal with the Commission. The Rule requires that an SIBHC include in its notice of withdrawal a statement that it is in compliance with Rule 17i–2(c) regarding amendments to its Notice of Intention to help to assure that the Commission has updated information when considering the SIBHC's withdrawal request.

The collection of information required by Rule 17i–3 is necessary to enable the Commission to evaluate whether it is necessary and appropriate in the furtherance of Section 17 of the Exchange Act for the Commission to allow an SIBHC to withdraw from supervision. Without this information, the Commission would be unable to make this evaluation.

We estimate, for Paperwork Reduction Act purposes only, that one SIBHC may wish to withdraw from Commission supervision as an SIBHC over a ten-year period. Each SIBHC that withdraws from Commission supervision as an SIBHC will require approximately 24 hours to draft a withdrawal notice and submit it to the Commission. An SIBHC likely would have an attorney perform this task. Further, an SIBHC likely will have a senior attorney or executive

[1] 44 U.S.C. 3501 *et seq.*

[2] Pub. L. 106–102, 113 Stat. 1338 (1999).

[3] See 15 U.S.C. 78q(i).

[4] See Exchange Act Release No. 49831 (Jun. 8, 2004), 69 FR 34472 (Jun. 21, 2004).

[5] See H.R. Conf. Rep. No. 106–434, 165 (1999). See also Exchange Act Release No. 49831, at 6 (Jun. 8, 2004), 69 FR 34472, at 34473 (Jun. 21, 2004).

officer review the notice of withdrawal before submitting it to the Commission, which will take approximately eight hours. Thus, we estimate that the annual, aggregate burden of withdrawing from Commission supervision as an SIBHC will be approximately 3.2 hours each year.[6]

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments should be directed to R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted within 60 days of this notice.

Dated: August 14, 2006.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–14020 Filed 8–23–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services; Washington, DC 20549.

Extension: Rule 17i–4; SEC File No. 270–530; OMB Control No. 3235–0594.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995[1] the Securities and Exchange Commission (''Commission'') intends to submit to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below. The Code of Federal Regulation citation to this collection of information is the following rule: 17 CFR 240.17i–4.

Section 231 of the Gramm-Leach-Bliley Act of 1999[2] (the ''GLBA'') amended Section 17 of the Securities Exchange Act of 1934 to create a regulatory framework under which a holding company of a broker-dealer (''investment bank holding company'' or ''IBHC'') may voluntarily be supervised by the Commission as a supervised investment bank holding company (or ''SIBHC'').[3] In 2004, the Commission promulgated rules, including Rule 17i–4, to create a framework for the Commission to supervise SIBHCs.[4] This framework includes qualification criteria for SIBHCs, as well as recordkeeping and reporting requirements. Among other things, this regulatory framework for SIBHCs is intended to provide a basis for non-U.S. financial regulators to treat the Commission as the principal U.S. consolidated, home-country supervisor for SIBHCs and their affiliated broker-dealers.[5]

Rule 17i–4 requires an SIBHC to comply with present Exchange Act Rule 15c3–4[6] as though it were a broker-dealer, which requires that the firm establish, document and maintain a system of internal risk management controls to assist it in managing the risks associated with its business activities (including market, credit, operational, funding, and legal risks). In addition, Rule 17i–4 requires that an SIBHC establish, document, and maintain procedures for the detection and prevention of money laundering and terrorist financing as part of its internal risk management control system. Finally, Rule 17i–4 requires that an SIBHC periodically review its internal risk management control system for integrity of the risk measurement, monitoring, and management process, and accountability, at the appropriate organizational level, for defining the permitted scope of activity and level of risk. The records required to be created pursuant to Rule 17i–4 must be preserved for a period of not less than three years.[7]

The collection of information required pursuant to Rule 17i–4 is needed so that the Commission can adequately supervise the activities of these SIBHCs, and to allow the Commission to effectively determine whether supervision of an IBHC as an SIBHC is necessary or appropriate in furtherance of the purposes of § 17 of the Act. Without this information, the Commission would be unable to adequately supervise the SIBHC as provided for under the Exchange Act.

We estimate that three IBHCs will file Notices of Intention with the Commission to be supervised by the Commission as SIBHCs. An SIBHC will require, on average, about 3,600 hours to assess its present structure, businesses, and controls, and establish and document its risk management control system. In addition, an SIBHC will require, on average, approximately 250 hours each year to maintain its risk management control system. Consequently, the total initial burden for all SIBHCs is approximately 10,800 hours[8] and the continuing annual burden is about 750 hours.[9] Thus, the total burden relating to Rule 17i–4 for all SIBHCs is approximately 11,550 hours[10] in the first year, and approximately 750 hours each year thereafter.[11]

We believe that an IBHC likely would upgrade its information technology (''IT'') systems in order to more efficiently comply with certain of the SIBHC framework rules (including Rules 17i–4, 17i–5, 17i–6 and 17i–7), and that this would be a one-time cost. Depending on the state of development of the IBHC's IT systems, it would cost an IBHC between $1 million and $10 million to upgrade its IT systems to comply with the SIBHC framework of rules. Thus, on average, it would cost each of the three SIBHCs about $5.5 million to upgrade their IT systems, or approximately $16.5 million in total. It is impossible to determine what percentage of the IT systems costs would be attributable to each Rule, so we allocated the total estimated upgrade costs equally (at 25% for each of the above-mentioned Rules), with $4,125,000 attributable to Rule 17i–5.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d)

[6] (1 SIBHC/every 10 years) × (24 hours to draft + 8 hours to review) = 3.2 hours.

[1] 44 U.S.C. 3501 *et seq.*

[2] Pub. L. 106–102, 113 Stat. 1338 (1999).

[3] See 15 U.S.C. 78q(i).

[4] See Exchange Act Release No. 49831 (Jun. 8, 2004), 69 FR 34472 (Jun. 21, 2004).

[5] See—H.R. Conf. Rep. No. 106–434, 165 (1999). See also—Exchange Act Release No. 49831, at 6 (Jun. 8, 2004), 69 FR 34472, at 34473 (Jun. 21, 2004).

[6] 17 CFR 240.15c3–4.

[7] 17 CFR 240.17i–5(b)(5).

[8] (3,600 hours × 3 SIBHCs) = 10,800 hours.

[9] (250 hours per year × 3 SIBHCs) = 750 hours per year.

[10] (3,600 hours × 3 SIBHCs) + (250 hours per year × 3 SIBHCs).

[11] (250 hours per year × 3 SIBHCs).

ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments should be directed to: R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted within 60 days of this notice.

Dated: August 15, 2006.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–14021 Filed 8–23–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 15c3–1; SEC File No. 270–197; OMB Control No. 3235–0200.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 15c3–1 (17 CFR 240.15c3–1) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) requires brokers and dealers to have at all times sufficient liquid assets to meet their current liabilities, particularly the claims of customers. The rule facilitates monitoring the financial condition of brokers and dealers by the Commission and the various self-regulatory organizations. It is estimated that approximately 6,100 active broker-dealer respondents registered with the Commission incur an aggregate burden of 88,181 hours per year to comply with this rule. Finally, the estimated cost for the annual hour burden for Rule 15c3–1 is approximately $22.7 million.

Written 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to: R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 60 days of this notice.

Dated: August 16, 2006.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–14022 Filed 8–23–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension: Rule 17Ad–15; SEC File No. 270–360; OMB Control No. 3235–0409.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 17Ad–15—Signature Guarantees

Rule 17Ad–15 (17 CFR 240.17Ad–15) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (the ''Act'') requires approximately 760 transfer agents to establish written standards for the acceptance or rejection of guarantees of securities transfers from eligible guarantor institutions. Transfer agents are required to establish procedures to ensure that those standards are used by the transfer agent to determine whether to accept or reject guarantees from eligible guarantor institutions. Transfer agents must maintain, for a period of three years following the date of a rejection of transfer, a record of all transfers rejected, along with the reason for the rejection, identification of the guarantor, and whether the guarantor failed to meet the transfer agent's guarantee standard. These recordkeeping requirements assist the Commission and other regulatory agencies with monitoring transfer agents and ensuring compliance with the rule.

There are approximately 760 registered transfer agents. The staff estimates that every transfer agent will spend about 40 hours annually to comply with Rule 17Ad–15. The total annual burden for all transfer agents is 30,400 hours. The average cost per hour is approximately $50. Therefore, the total cost of compliance for all transfer agents is $1,520,000.

Written 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 estimates 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be direct to: R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312 or by sending an e-mail to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 60 days of this notice.

Dated: August 16, 2006.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–14023 Filed 8–23–06; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and

Information Services, Washington, DC 20549.

Extension: Rule 17i–2, SEC File No. 270–528, OMB Control No. 3235–0592.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 [1] the Securities and Exchange Commission (''Commission'') intends to submit to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below. The Code of Federal Regulation citation to this collection of information is the following rule: 17 CFR 240.17i–2.

Section 231 of the Gramm-Leach-Bliley Act of 1999 [2] (the ''GLBA'') amended Section 17 of the Securities Exchange Act of 1934 to create a regulatory framework under which a holding company of a broker-dealer (''investment bank holding company'' or ''IBHC'') may voluntarily be supervised by the Commission as a supervised investment bank holding company (or ''SIBHC'').[3] In 2004, the Commission promulgated rules, including Rule 17i–2, to create a framework for the Commission to supervise SIBHCs.[4] This framework includes qualification criteria for SIBHCs, as well as recordkeeping and reporting requirements. Among other things, this regulatory framework for SIBHCs is intended to provide a basis for non-US financial regulators to treat the Commission as the principal U.S. consolidated, home-country supervisor [5] for SIBHCs and their affiliated broker-dealers.

Rule 17i–2 provides the method by which an IBHC can elect to become an SIBHC. In addition, Rule 17i–2 indicates that the IBHC will automatically become an SIBHC 45 days after the Commission receives its completed Notice of Intention unless the Commission issues an order indicating either that it will begin its supervision sooner or that it does not believe it to be necessary or appropriate in furtherance of Section 17 of the Act for the IBHC to be so supervised. Finally, Rule 17i–2 sets forth the criteria the Commission would use to make this determination. The records required to be created pursuant to Rule 17i–2 must be preserved for a period of not less than three years.[6]

The collections of information required by Rule 17i–2 are necessary to allow the Commission to effectively determine whether supervision of an IBHC as an SIBHC is necessary or appropriate in furtherance of the purposes of § 17 of the Act. In addition, these collections are needed so that the Commission can adequately supervise the activities of these SIBHCs. Finally, these rules enhance the Commission's supervision of the SIBHCs' subsidiary broker-dealers through collection of additional information and inspections of affiliates of those broker-dealers.

We estimate that three IBHCs will file Notices of Intention with the Commission to be supervised by the Commission as SIBHCs. Each IBHC that files a Notice of Intention to become supervised by the Commission as an SIBHC will require approximately 900 hours to draft the Notice of Intention, compile the various documents to be included with the Notice of Intention, and work with the Commission staff. Further, each IBHC likely will have an attorney review its Notice of Intention, and it will take the attorney approximately 100 hours to complete such a review. Consequently, we estimate the total one-time burden for all three firms to file their Notices of Intention would be approximately 3,000 hours.[7] Rule 17i–2 also requires that an IBHC/SIBHC update its Notice of Intention on an ongoing basis.[8] Each IBHC/SIBHC will require approximately two hours each month to update its Notice of Intention, as necessary. Thus, we estimate that it will take the three IBHC/SIBHCs, in the aggregate, about 72 hours each year to update their Notices of Intention.[9] Thus, the total burden relating to Rule 17i–2 for all SIBHCs would be approximately 3,072 hours in the first year,[10] and approximately 72 hours each year thereafter.

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments should be directed to: R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 60 days of this notice.

Dated: August 14, 2006.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E6–14024 Filed 8–23–06; 8:45 am]

BILLING CODE 8010–01–P

[1] 44 U.S.C. 3501 *et seq.*

[2] Pub. L. 106–102, 113 Stat. 1338 (1999).

[3] See 15 U.S.C. 78q(i).

[4] See Exchange Act Release No. 49831 (Jun. 8, 2004), 69 FR 34472 (Jun. 21, 2004).

[5] *See* H.R. Conf. Rep. No. 106–434, 165 (1999). See also Exchange Act Release No. 49831, at 6 (Jun. 8, 2004), 69 FR 34472, at 34473 (Jun. 21, 2004).

[6] 17 CFR 240.17i–5(b)(2).

[7] (900 hours + 100 hours) × 3 IBHCs/SIBHCs = 3,000 hours.

[8] An IBHC would be required to review and update its Notice of Intention to the extent it becomes inaccurate prior to a Commission determination, and an SIBHC would be required to update its Notice of Intention if it changes a mathematical model used to calculate its risk allowances pursuant to Rule 17i–7 after a Commission determination was made.

[9] (2 hours × 12 months each year) × 3 SIBHCs = 72.

[10] (3,000 hours to file the Notices of Intention + 72 hours to update them).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of August 28, 2006:

A Closed Meeting will be held on Tuesday, August 29, 2006 at 10 a.m.

Commissioners, Counsels to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (9)(B), (10) and 17 CFR 200.402(a) (3), (5), (7), (9)(ii), and (10) permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Casey, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matters of the Closed Meeting scheduled for Tuesday, August 29, 2006 will be:

Formal orders of investigation;
Institution and settlement of injunctive actions;
Institution and settlement of administrative proceedings of an enforcement nature;
An adjudicatory matter;
Requests for information in an investigative file;
Litigation matter; and
Other matters related to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551–5400.

Dated: August 22, 2006.

Nancy M. Morris,

Secretary.

[FR Doc. 06–7177 Filed 8–22–06; 3:54 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–54324; File No. SR–Amex–2006–63]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Transaction Based Fees for Supplemental Registered Options Traders

August 16, 2006.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act''), and Rule 19b–4 [2] thereunder, notice is hereby given that on August 15, 2006, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. Amex has designated the proposed rule change as establishing or changing a due, fee, or other charge applicable only to members, pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) [4] thereunder, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Amex proposes to amend its Options Fee Schedule to adopt transaction-based fees for Supplemental Registered Options Traders (''SROTs'').

The text of the proposed rule change is available on Amex's Web site at *http://www.amex.com*, at Amex's Office of the Secretary, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Amex proposes to amend its Options Fee Schedule to subject SROTs to the Exchange's options transactions fee, options comparison fee, options floor brokerage fee, options marketing fee and options licensing fee. SROTs are members of the Exchange.[5]

The Exchange proposes to adopt an aggregate transaction-based fee for SROTs of $0.23 per contract side (consisting of an options transaction fee of $0.13 per contract side, an options comparison fee of $.05 per contract side and an options floor brokerage fee of $0.05 per contract side) for equity options, ETF options, and trust issued receipt options. In addition, an aggregate transaction-based fee for SROTs of $0.36 per contract side (consisting of an options transaction fee of $0.26 per contract side, an options comparison fee of $0.05 per contract side and an options floor brokerage fee of $0.05 per contract side) for index options (including MNX and NDX options) is also proposed by the Exchange. The aggregate transaction-based fee for SROTs is set higher than the specialist and Registered Options Trader (''ROT'') transaction fees because the Exchange will incur additional systems and logistical costs in order to establish and maintain the infrastructure needed to enable the participation of a SROT.

The Exchange further proposes that the current options marketing fee for specialists and ROTs of $0.75 per contract side for equity options, ETF options (excluding SPY options), trust issued receipt options, and NDX and RUT Options, and $1.00 per contract side for SPY options, be equally applicable to SROTs.

[5] *See* Securities Exchange Act Release No. 53635 (April 12, 2006), 71 FR 20144 (April 19, 2006).

In addition, the Exchange also proposes that the options licensing fee on certain index options and ETF options be applicable to SROTs. The options licensing fee proposal for SROTs in connection with equity options, ETF options, and trust issued receipt options will equal the current charges applicable to specialists, ROTs, firms, non-member market makers, and broker-dealers. This options licensing fee varies in amount from $0.05 to $0.20 per contract side, depending on the particular index or ETF option.

Both the options order cancellation fee and broker-dealer auto-ex fees will be inapplicable to SROTs and RROTs, according to current footnote 4 and proposed footnote 10. Pursuant to footnote 4, cancellation fees are currently charged only to orders sent through the Amex Order File (''AOF''), which are not typically delivered in a market making capacity by an Amex specialist or ROT. Since, according to Amex rules, SROTs and RROTs act only in a market making capacity, and their orders are not delivered to the Exchange through AOF, the cancellation fee shall not apply to these participants.

Likewise, broker-dealer auto-ex fees are typically charged only to orders for the accounts of firms, broker-dealers and non-member market makers because these orders are not delivered to the Exchange in a market making capacity.[6] Currently, orders from ROTs and specialists in their market making capacity (*i.e.*, liquidity providers) are not charged a broker-dealer auto-ex fee. However, orders of ROTs and specialists, if delivered to the Exchange via AOF, would be charged a broker-dealer auto-ex fee because these orders would not be part of their market making function. RROT and SROT orders will not be charged the broker-dealer auto-ex fee because these market participants act only in a market making capacity, and their orders are not delivered through AOF.

Finally, the Exchange proposes to amend several of the footnotes to its Options Fee Schedule. Footnote 3 provides that the marketing fee will also be collected on SROT transactions involving electronically executed customer orders from firms accepting payment for directing their orders to the Exchange. Furthermore, if a specialist has negotiated a payment to a firm of less than the marketing fee, the difference between the marketing fee and the actual payment will also be

[6] Telephone conversation between Kristie Diemer, Special Counsel, Division of Market Regulation, Commission and Jeffrey P. Burns, Vice President and Associate General Counsel, Exchange, on August 16, 2006.

refunded to the SROT. Footnote 7 currently states that transactions by specialists and ROTs in connection with the Exchange's Broker-Dealer Auto-Ex Program are not subject to the options transactions fee, the options comparison fee, the options floor brokerage fee, the options marketing fee and the options licensing fee. The Exchange proposes to amend footnote 7 to provide that options allocated to SROTs and RROTs, in addition to specialists and ROTs, in connection with the Exchange's Broker-Dealer Auto-Ex Program are not subject to the options transactions fee, the options comparison fee, the options floor brokerage fee, the options marketing fee, and the options licensing fee.[7] The Exchange also proposes to add footnote 10 to its Options Fee Schedule to provide that the fees applicable to specialists and market makers (ROTs) also include RROTs, except for the broker-dealer auto-ex fee and the cancellation fee, as discussed above.

2. Statutory Basis

Amex believes that the proposed rule change is consistent with Section 6(b)(4) of the Act[8] because it is an equitable allocation of reasonable dues, fees and other charges among exchange members and other persons using exchange facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change does not 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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[9] and Rule 19b–4(f)(2)[10] thereunder, because it establishes or changes a due, fee, or other charge imposed by the Exchange, applicable only to members. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Amex–2006–63 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Amex–2006–63. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2006–63 and should be submitted on or before September 14, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Nancy M. Morris,

Secretary.

[FR Doc. E6–14025 Filed 8–23–06; 8:45 am]

BILLING CODE 8010–01–P

[7] The inapplicability of these fees acts as a rebate for those market participants acting as liquidity providers including, in this filing, SROTs and RROTs. See Securities Exchange Act Release No. 48219 (July 23, 2003), 68 FR 44823 (July 30, 2003).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Government/Industry Aeronautical Charting Forum Meeting

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of public meeting.

SUMMARY: This notice announces the bi-annual meeting of the Federal Aviation Administration (FAA) Aeronautical Charting (ACF) to discuss informational content and design of aeronautical charts and related products, as well as instrument flight procedures development policy and design criteria.

DATES: The ACF is separated into two distinct groups. The Instrument Procedures Group (IPG) will meet October 17, 2006, from 9 a.m. to 5 p.m. The Charting Group will meet October 18 and 19 from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the FAA National Aeronautical Charting Group, 1305 East-West Highway, SSMC–4, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: For information relating to the Instrument Procedures Group, contact Thomas E. Schneider, FAA, Flight Procedures Standards Branch, AFS–420, 6500 South MacArthur Blvd, P.O. Box 25082, Oklahoma City, OK 73125; telephone (405) 954–5852; fax: (405) 954–2528.

For information relating to the Charting Group, contact John A. Moore, FAA, National Aeronautical Charting Group, Requirements and Technology Team, AJW–352, 1305 East-West Highway, SSMC4–Station 5544, Silver Spring, MD 20910; telephone: (301) 713–2631 x 172, fax: (301) 713–1960.

SUPPLEMENTARY INFORMATION: Pursuant to § 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. II), notice is hereby given of a meeting of the FAA Aeronautical Charting Forum to be held from October 17, 2006, through October 19, 2006, from 9 a.m. to 5 p.m. at the FAA National Aeronautical Charting Group, 1305 East-West Highway, SSMC–4, Silver Spring, MD 20910.

The Instrument Procedures Group agenda will include briefings and discussions on recommendations regarding pilot procedures for instrument flight, as well as criteria, design, and developmental policy for instrument approach and departure procedures.

The Charting Group agenda will include briefings and discussions on recommendations regarding aeronautical charting specifications, flight information products, as well as new aeronautical charting and air traffic control initiatives.

Attendance is open to the interested public, but will be limited to the space available.

The public must make arrangements by September 22, 2006, to present oral statements at the meeting. The public may present written statements and/or new agenda items to the committee by providing a copy to the person listed in the **FOR FURTHER INFORMATION CONTACT** section by September 22, 2006. Public statements will only be considered if time permits.

Issued in Washington, DC, on August 18, 2006.

John A. Moore,

Co-Chair, Government/Industry, Aeronautical Charting Forum.

[FR Doc. 06–7111 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Special Committee 205/EUROCAE Working Group 71: Software Considerations in Aeronautical Systems Fourth Joint Plenary Meeting

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 205/EUROCAE Working Group 71 meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 205/EUROCAE Working Group 71: Software Considerations in Aeronautical Systems.

DATES: The meeting will be held September 11–15, 2006, from 8:30 a.m.–4:30 p.m.

ADDRESSES: The meeting will be held at SUPAERO, 10 av. Edouard Belin, Boite Postale 54032, 31055 Toulouse Cedex 4, France.

FOR FURTHER INFORMATION CONTACT: (1) RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC, 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org;* (2) Joint Secretaries, Europe: Mr. Ross Hannon, telephone +4478807–46650, e-mail: *ross__hannon@binternet.com;* U.S.: Mr. Michael DeWalt, telephone (206) 972–0170, e-mail: *mike.dewalt@certification.com.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 205/EUROCAE Working Group 71 meeting. **Note:** On arrival at SUPAERO please have photo identification available (either a passport, a drivers license bearing a photograph or an identity card) to assist in your badge being issued. To attend this meeting please provide the following pre-registration information to both of the Joint Secretaries to assist SUPAERO with their security obligations: Name, Nationality, Passport Number (only provided for security purposes), Organization Name and Nation of Origin (only the organizations location that you work for, regardless of where you're located), Address, Telephone, E-Mail Address.

The agenda will include:

- *September 11:*
  - Sub-group Meetings: Determined by Chairpersons.
  - New Members Induction Session.
- *September 12:*
  - Registration.
  - Opening Plenary Session (Welcome and Introductory Remarks, Review/Accept Agenda and 1st Joint Plenary Summary).
  - SUPAERO Presentation.
  - Web site Report.
  - Report of Sub-Group Activities.
  - Issue List.
  - Other Committee/Documents Reports.
  - Plenary Text Acceptance Process.
  - Presentation—''Functional Safety in Automotive Electronics: The ISO TC22/SC3 Standard.''
  - Sub-Group Break Out Sessions.
- *September 13:*
  - Sub-Group Break Out Sessions.
  - If required, Sub-Group Joint Sessions (Other Joint Sessions as Required).
  - Links between Safety and Security assessment process.
- *September 14:*
  - Stand-Up Plenary Session.
  - Sub-Group Break Out Sessions.
  - CAST Meeting (Closed Session).
- *September 15:*
  - Reports from Sub-Groups (including Sub-Group Product Outline Tracking).
  - Closing Plenary Session (Other Business, Date and Place of Next Meeting, Meeting Evaluation, Adjourn).

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Dated: Issued in Washington, DC, on August 14, 2006.

Francisco Estrada C.,

RTCA Advisory Committee.

[FR Doc. 06–7110 Filed 8–23–06; 8:45am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Eighth Meeting: RTCA Special Committee 207/Airport Security Access Control Systems

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 207 Meeting, Airport Security Access Control Systems.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting RTCA Special Committee 207, Airport Security Access Control Systems.

DATES: The meeting will be held September 14, 2006, from 10 a.m.–4 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., Colson Board Room, 1828 L Street, NW., Suite 805, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: (1) RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC, 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 207 meeting. The agenda will include:

- *September 14:*
- Opening Plenary Session (Welcome, Introductions, and Administrative Remarks).
- Agenda Overview.
- Workgroup Reports.
- *Workgroup 2:* System Performance Requirements.
- *Workgroup 3:* Subsystem Functional Performance Requirements.

- *Workgroup 4:* System Verification and validation.
- *Workgroup 5:* Biometrics.
- *Workgroup 6:* Credentials.
- *Workgroup 7:* Perimeter.
- ICAO Update.
- Closing Plenary Session (Other Business, Establish Agenda, Date and Place for Ninth and Tenth Meetings).

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on August 10, 2006.

Francisco C. Estrada,

RTCA Advisory Committee.

[FR Doc. 06–7112 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Sixth Meeting: RTCA Special Committee 206: Aeronautical Information Services Data Link

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 206 meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 206: Aeronautical Information Services Data Link.

DATES: The meeting will be held September 11–15, 2006, from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1828 L Street, NW., Suite 805, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC, 20036–5133; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 206 meeting. The agenda will include:

- *September 11:*
  - Opening Session (Chairman's Remarks and Introductions, Review and Approve Meeting Agenda and Minutes, Discussion, Action Item Review).
  - *Presentations:*
  - Robert Grapple—Data Link Applications Coding.
  - Robert Grapple—Open System Protocols for Aviation for Aviation Data Link Applications.
  - John Loynes or Jim Dieudoene—FAA SWIM and it's Relationship to AIS and Weather.
  - Doug Arbuckle—NGATS AIS Vision and Shared Situation Awareness.
  - Robert Swain—ADS–B UAT Broadcast Services Infrastructure.
  - Breakout meetings of Subgroup 1 and Subgroup 2.
- *September 12–14:*
  - Subgroup 1 and Subgroup 2 Meetings.
- *September 15:*
  - Subgroup 1 and Subgroup 2 Meetings.
  - Closing Session (Other Business, Chairman Wrap Up and Conclusions, Date and Place of Next Meeting, Closing Remarks, Adjourn).

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Dated: Issued in Washington, DC, on August 14, 2006.

Francisco, Estrada C.,

RTCA Advisory Committee.

[FR Doc. 06–7113 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Printing and Distribution Changes for Airworthiness Directives and Special Airworthiness Information Bulletins

AGENCY: Federal Aviation Administration (DOT).

ACTION: Notice of policy change.

SUMMARY: This notice announces the FAA's planned policy changes in the printing and distribution of airworthiness directives (AD) and special airworthiness information bulletins (SAIB). This planned change in policy is part of our transition to full electronic distribution of ADs and SAIBs.

DATES: Comments must be received on or before September 8, 2006.

ADDRESSES: Send your comments on the planned policy changes electronically by logging onto the following Web site: *http://www.faa.gov/aircraft/draft_docs/.* You may mail a hard copy of your comments to: Federal Aviation Administration, Aircraft Engineering Division, Delegation and Airworthiness Programs Branch, AIR–140, MMAC, P.O. Box 26460, Oklahoma City, OK 73125. Attn: Mary Ellen Anderson. Or deliver comments to: Federal Aviation Administration, Room 815, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Mary Ellen Anderson, Federal Aviation Administration, Aircraft Certification Service, Aircraft Engineering Division, Delegation and Airworthiness Programs Branch, AIR–140, 6500 S. MacArthur Blvd., Oklahoma City, Oklahoma 73125; phone: (405) 954–7071; fax: (405) 954–2209.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment on the planned policy changes by submitting written data, views, or arguments to the above address. Comments received may be examined, both before and after the closing date, at the Federal Aviation Administration, Room 815, 800 Independence Avenue, SW., Washington, DC 20591, weekends except Federal holidays, between 8:30 a.m. and 4:30 p.m. The Director, Aircraft Certification Service, will consider all comments received on or before the closing date.

Background

ADs are legally enforceable rules that apply to products (aircraft, aircraft engines, propellers, and appliances). ADs are issued when we find that an unsafe condition exists in a product, and the unsafe condition is likely to exist or develop in other products of the same design type design. All final rule ADs are offered to the public by: (1) Publishing in the **Federal Register** at *http://www.gpoaccess.gov/fr/advanced.html*; (2) accessing the FAA's Web site at: *http://www.faa.gov/aircraft/safety/alerts*; and (3) mailing to all registered owners and operators of the affected product.

Emergency ADs (EAD) are issued when an unsafe condition exists that requires immediate corrective action. These types of ADs are mailed or faxed to all registered owners and operators of the affected product. After we mail or fax the EAD, it is published as a final

rule in the **Federal Register** and this version is also mailed to owners and operators of the product, resulting in an owner or operator receiving the same information twice.

Special Airworthiness Information Bulletins (SAIB) provide recommended actions that owners and operators may use to improve the safety of their products. Because the information contained in SAIBs is not mandatory, they are not published in the **Federal Register**; instead we have mailed them to owners and operators as a public service.

Since the advent of the internet and the Federal Government's initiative to make more information available to the public electronically, it is the intent of this notice to inform the public of our policy initiative to make documents available to the public on the internet and eliminate what is now evident to be an unnecessary printing and mailing expense.

Policy

We will begin implementation of the following changes in the dissemination of all final rule ADs, EADs, and SAIBs effective immediately:

(a) We will no longer mail AD corrections (corrections that don't receive a new amendment number and AD number) to affected owners and operators. ADs requiring corrections will continue to be published in their entirety in the **Federal Register** and on our website. ADs resubmitted because of a required ''correction'' will be so identified on our AD web page.

(b) We will only mail ADs applicable to a certain engine model to the owners and operators who have registered their engine, not to the registered aircraft owners and operators referenced in the AD.

(c) We will only mail the regulatory text, or ''body'', of ADs to registered owners and operators. We will no longer include the preamble information along with the text of the AD. Note that the complete text of ADs can be viewed by logging onto the **Federal Register** or FAA Web site. We will include both internet addresses in every mailed AD.

(d) We will continue to mail or fax EADs to affected owners and operators. However, the final rule version of an EAD will no longer be mailed to owners and operators since this is a duplicate mailing.

(e) We will no longer mail SAIBs to individual owners, operators, or repair stations. Instead, we have a new e-mail subscription service available on our SAIB Web page. As such, we are advising those interested to sign up for the SAIB free e-mail service and check our Web site at *www.faa.gov/aircraft/safety/alerts* regularly for new SAIB postings.

Susan J.M. Cabler,

Assistant Manager, Aircraft Engineering Division, Aircraft Certification Service.

[FR Doc. 06–7114 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2006–25676]

Agency Information Collection Activities: Request for Comments for New Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: The FHWA has forwarded the information collection request described in this notice to the Office of Management and Budget (OMB) for approval of a new information collection. We published a **Federal Register** Notice with a 60-day public comment period on this information collection on June 19, 2006. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by September 25, 2006.

ADDRESSES: You may send comments within 30 days to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention DOT Desk Officer. You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burden; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. All comments should include the Docket number FHWA–2006–25676.

FOR FURTHER INFORMATION CONTACT: Mr. Chien-Tan Chang, Office of Bridge Technology, HIBT–1, (202) 366–6749, Fax (202) 366–3077, or e-mail *chien-tan.chang@dot.gov.* For legal questions, please contact Mr. Robert Black, Office of the Chief Counsel, (202) 366–1359, *robert.black@fhwa.dot.gov;* Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Innovative Bridge Research and Deployment (IBRD) program.

Background

Congress established the Innovative Bridge Research and Construction (IBRC) program, the predecessor of the IBRD program, in the *Transportation Equity Act for the 21st Century* (TEA–21) (Pub. L. 105–178). The IBRC program was continued in SAFETEA–LU, but was renamed as the IBRD program. Funds are provided to the States under the IBRD program to pay the Federal share of the cost of projects that demonstrate innovative accelerated bridge design and construction technology and the application of innovative material technology in the repair, rehabilitation, replacement, or new construction of bridges and other highway structures. For each of the fiscal years 2005 through 2009, approximately $13.1 million will be available. For FY 2006, approximately $2.2 million is available for the IBRC program, and approximately $5.1 million for the IBRD program after reduction of funds pursuant to the Departments of Transportation, Treasury, Housing and Urban Development, the Judiciary, and the District of Colombia, independent Agencies Appropriations Act 2006 (Pub. L. 109–115, Nov 30, 2005) the Department of Defense, Appropriations Act 2006, (Pub. L. 109–148, Dec. 30, 2005), and Sec. 5202(b)(3)(B) of the *Safe, Accountable, Flexible, Efficient Transportation Equity Act: Legacy for Users* (SAFETEA–LU). The IBRD activities include identification and selection of candidate projects from 50 State DOTs, Puerto Rico and the District of Columbia, which meet one or more goals of the program as established by the Congress. Approximately 25 projects will be selected that meet one or more program goals as follows:

A. The development of new, cost-effective, innovative highway bridge applications;

B. The development of construction techniques to increase safety and reduce construction time and traffic congestion;

C. The development of engineering design criteria for innovative products, materials, and structural systems for use in highway bridges and structures;

D. The reduction of maintenance costs and life-cycle costs of bridges, including costs of new construction, replacement or rehabilitation of deficient bridges;

E. The development of highway bridges and structures that will withstand natural disasters;

F. The documentation and wide dissemination of objective evaluations of the performance and benefits of these innovative designs, materials, and construction methods;

G. The effective transfer of resulting information and technology; and,

H. The development of improved methods to detect bridge scour and economical bridge foundation designs that will withstand bridge scour.

Additional activities include collection of project information, documentation, promotion and wide dissemination of objective evaluations of the performance and benefits of these innovative designs, materials, and construction methods resulting from the project studies.

Respondents: 50 State Departments of Transportation, the District of Columbia and Puerto Rico.

Frequency: Annual.

Estimated Average Burden per Response: 1 hour.

Estimated Total Annual Burden Hours: It is estimated that a total of 100 responses will be received to give us a total annual burden of 100 hours.

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,* 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued on: August 18, 2006.

James R. Kabel,

Chief, Management Programs and Analysis Division.

[FR Doc. E6–14068 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Annual Materials Report on New Bridge Construction and Bridge Rehabilitation

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice; correction.

SUMMARY: This document corrects a typographical error in the FHWA's notice published on August 17, 2006, at 71 FR 47558. The notice announced the availability of a report describing construction materials used in new Federal-aid bridge construction and bridge rehabilitation projects as required by 23 U.S.C. 144(r).

DATES: This action is effective August 24, 2006.

ADDRESSES: The report will be posted on the FHWA Web site at: *http://www.fhwa.dot.gov/bridge/britab.htm.*

FOR FURTHER INFORMATION CONTACT: Ms. Ann Shemaka, Office of Bridge Technology, HIBT–30, (202) 366–2997, or Mr. Thomas Everett, Office of Bridge Technology, HIBT–30, (202) 366–4675, Federal Highway Administration, 400 Seventh St., SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: On August 17, 2006, at 71 FR 47558, the FHWA issued a notice announcing the availability of a report describing construction materials used in new Federal-aid bridge construction and bridge rehabilitation projects as required by 23 U.S.C. 144(r). The address section of that notice inadvertently referenced an incorrect Web address to access the report. The purpose of this notice is to correct the Web address for the Annual Materials Report on New Bridge Construction and Rehabilitation. The correct Web address for the report is: *http://www.fhwa.dot.gov/bridge/britab.htm.*

(**Authority:** 23 U.S.C. 144(r); Sec. 1114(f), Pub. L. 109–59, 119 Stat. 1144.)

Issued on: August 21, 2006.

Frederick G. Wright, Jr.,

Federal Highway Executive Director.

[FR Doc. E6–14070 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Registration of Brokers and Freight Forwarders of Non-Household Goods

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), United States Department of Transportation (DOT).

ACTION: Notice of determination.

SUMMARY: Section 4142 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), which was enacted into law August 10, 2005, authorizes the Secretary of Transportation (Secretary) to register brokers and freight forwarders of non-household goods (otherwise known as general commodities brokers and freight forwarders) if the Secretary finds that such registration is needed for the protection of shippers. FMCSA, which has been delegated authority to exercise the Secretary's functions and activities regarding broker and freight forwarder registration, is making a finding that registration of brokers and freight forwarders of non-household goods is needed for the protection of shippers. Accordingly, the Agency will continue to register all general commodities brokers and freight forwarders subject to its jurisdiction.

FOR FURTHER INFORMATION CONTACT: Mr. Michael J. Falk, Office of Chief Counsel, 202–366–0834; Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Background

FMCSA's jurisdiction over interstate property brokers is conferred by 49 U.S.C. 13501, which gives the Secretary jurisdiction ''over transportation by motor carrier and the procurement of that transportation'' to the extent the transportation is in interstate or foreign commerce. FMCSA's jurisdiction over interstate freight forwarders is conferred by 49 U.S.C. 13531, which gives the Secretary jurisdiction ''over service that a freight forwarder undertakes to provide, or is authorized or required under [Part B of subtitle IV of title 49, United States Code] to provide'' to the extent the transportation involved is in interstate commerce.

Brokers and freight forwarders are transportation intermediaries who procure the services of motor carriers to transport property. Brokers generally do not handle the freight and do not assume legal liability for cargo loss and damage. On behalf of shippers, they arrange for motor carriers to transport individual shipments from origin to destination. Freight forwarders assemble small shipments into larger shipments, tender them to motor carriers and ensure that the larger shipment is disassembled into smaller shipments upon delivery. Freight forwarders may take physical possession of the shipment in carrying out these functions.[1] Freight forwarders issue bills of lading and assume liability for cargo loss and damage.

Brokers arranging for transportation of property in interstate commerce were first regulated by the Interstate Commerce Commission (ICC) in 1935; interstate freight forwarders were regulated beginning in 1942. These

[1] The statutory definitions of broker and freight forwarder are codified at 49 U.S.C. 13102(2) and 13102(8), respectively.

entities were required to obtain operating authority from the ICC and meet financial responsibility and other regulatory requirements. The Surface Freight Forwarder Deregulation Act of 1986, Pub. L. 99–521, deregulated general commodities freight forwarders by removing them from ICC licensing jurisdiction. The 1986 Act was intended to ''enable freight forwarders which deal with general commodities to compete more effectively with other transportation services and to improve the financial health of the freight forwarding industry''.[2] The 1986 Act retained ICC jurisdiction over household goods freight forwarders.

The ICC Termination Act (ICCTA) of 1995, Pub. L. 104–88, reinstated Federal jurisdiction over general commodities freight forwarders and required all freight forwarders to register with DOT. The Senate report accompanying the legislation noted that since the 1986 Act, freight forwarders of shipments other than household goods were not required to obtain a license from the ICC, but were required to maintain a minimum level of cargo liability insurance. The Senate report also stated that the ''insurance requirement has been difficult to monitor and enforce without a Federal licensing requirement. By extending the registration requirement to all freight forwarders, the bill would fill an inappropriate regulatory gap.'' [3]

The ICCTA continued the licensing (registration) and bond requirements for general commodities brokers, which, according to the Senate report, were ''needed to protect the public from unscrupulous brokers.'' [4] The Motor Carrier Safety Improvement Act of 1999 (MCSIA), Pub. L. 106–159, created FMCSA and, among other things, conferred on it jurisdiction over brokers and freight forwarders.

Prior to SAFETEA–LU, 49 U.S.C. 13903 and 13904 required FMCSA to register *all* freight forwarders and brokers, provided the prospective registrant was ''fit, willing and able'' to provide service and comply with applicable regulatory requirements. Section 4142 of SAFETEA–LU continued this registration requirement for freight forwarders and brokers of household goods. However, section 4142(b) amended § 13903 by providing that the Secretary *may register* a person as a freight forwarder of non-household goods to provide service subject to FMCSA jurisdiction *if the Secretary finds that such registration is needed for the protection of shippers* and that the person is fit, willing, and able to provide the service and to comply with applicable regulations of the Secretary and Surface Transportation Board.

Section 4142(c) of SAFETEA–LU made a similar amendment to 49 U.S.C. 13904 by providing that the Secretary *may register* a person to be a broker of non-household goods to provide service subject to FMCSA jurisdiction *if the Secretary finds that such registration is needed for the protection of shippers* and that the person is fit, willing, and able to provide the service and to comply with applicable regulations of the Secretary and Surface Transportation Board.

Significance of Brokers and Freight Forwarders

General commodities brokers and freight forwarders offer valuable services to the business community. They work with motor carriers to find less expensive transportation alternatives for commercial shippers and provide additional services to assist shippers, such as shipment tracing, warehousing and storage (freight forwarders) and filing loss and damage claims with the motor carrier responsible for the transportation. Without these transportation intermediaries, shippers would have to devote additional resources to locating and negotiating with motor carriers and would likely have to pay higher transportation costs. Smaller businesses in particular would be disadvantaged by not being able to rely on the services provided by brokers and freight forwarders. Available statistics also indicate a growing reliance on these entities in the shipment of goods.

Brokers

FMCSA's Motor Carrier Management Information System (MCMIS) indicates that approximately 16,930 active general commodities brokers are registered with the Agency as of April 17, 2006. The number of property broker applications filed annually with FMCSA has increased by 30 percent since 2003.[5] These figures indicate that property brokers represent an expanding segment of the transportation industry and are being utilized to help meet the transportation needs of a large number of commercial shippers.

Freight Forwarders

MCMIS indicates that approximately 1,040 active general commodities freight forwarders are registered with FMCSA. The number of freight forwarder applications filed with FMCSA annually has increased by approximately 80 percent since 2003.[6] As with brokers, these figures indicate that freight forwarders represent a growing segment of the transportation industry whose services are relied upon by many commercial shippers to meet their transportation needs.

U.S. Census Bureau statistics indicate there were 15,782 establishments involved in the business of freight transportation arrangement in 1997. This industry group includes freight forwarders, marine shipping agents, and brokers. These businesses generated revenues of over $16 billion and employed over 140,000 employees with a cumulative annual payroll of approximately $5 billion. While not all these entities provided services subject to FMCSA jurisdiction, the more current MCMIS data indicate that the number of general commodities brokers and freight forwarders registered with FMCSA exceeds the size of the entire freight transportation arrangement industry reported in 1997. Although FMCSA does not have figures on cumulative revenues and employment for regulated general commodities freight forwarders and brokers, the Census data provide a rough estimate of the potential impact on the regulated freight transportation arrangement industry and the national economy if general commodities freight forwarders and brokers are unable to be relied upon by shippers due to lack of confidence in their activities and financial responsibilities.

Registration of Non-Household Goods Brokers and Freight Forwarders Is Needed for the Protection of Shippers

Pursuant to section 4142 of SAFETEA–LU, if the Agency determines that registration of non-household goods brokers and freight forwarders is needed for the protection of shippers, the Agency may require these entities to register.

Under 49 U.S.C. 13906(b), brokers must maintain and file with FMCSA a bond, insurance policy or other type of approved security to ensure that the transportation which the broker arranges is provided. Currently, FMCSA regulations require general commodities brokers to file a surety bond or trust fund in the amount of $10,000 (49 CFR 387.307(a)). This requirement is designed to protect shippers who pay brokers who renege on their obligations to arrange for the transportation or to pay the motor carrier. In the latter case,

[2] S. Rep. 99–120, p. 2 (July 31, 1985).

[3] S. Rep. 104–176, p. 12 (Nov. 21, 1995).

[4] *Id.*

[5] In calendar year 2005, 3,274 applications were filed, compared to 2,518 in 2003 and 2,816 in 2004.

[6] In calendar year 2005, 442 applications were filed, compared to 244 in 2003 and 205 in 2004.

the motor carrier may attempt to bill the shipper, who has already paid the broker for the shipment. It is also designed to protect motor carriers who are not paid for their services but are unwilling or unable to seek payment from the shipper. Section 13906(b) financial responsibility requirements are expressly linked to broker registration by the statute. In other words, without a registration requirement, FMCSA has no statutory authority to impose a bonding requirement to protect shippers and carriers against unscrupulous or financially irresponsible general commodities brokers.

As is the case with brokers, the financial responsibility requirements applicable to freight forwarders are expressly linked to the registration requirement. Under 49 U.S.C. 13906(c)(1), FMCSA may register a person as a freight forwarder only if the person files with the agency evidence of public liability insurance to cover negligent operation, maintenance or use of motor vehicles by or under direction and control of the freight forwarder when providing transfer, collection or delivery services. Section 13906(c)(2) permits FMCSA to also require registered freight forwarders to file freight forwarder insurance to cover loss or damage to cargo for which the freight forwarder provides service. There are no independent financial responsibility requirements for the protection of shippers that would apply if general commodities freight forwarders are no longer being registered.

Based on the foregoing, FMCSA finds that continued registration of non-household goods freight forwarders under 49 U.S.C. 13903 and non-household goods brokers under 49 U.S.C. 13904 is needed for the protection of shippers. We also note that brokers and freight forwarders must register pursuant to 49 U.S.C. 13901 to engage in interstate transportation. Finally, based on FMCSA's determination above regarding the protection of shippers, any registration appropriately filed between August 10, 2005 (the date of enactment of SAFETEA–LU) and the date of this Notice shall be effective on the date the registration was approved by FMCSA.

Issued on: August 16, 2006.

John H. Hill,

Administrator.

[FR Doc. E6–14064 Filed 8–23–06; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

August 18, 2006.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

Dates: Written comments should be received on or before September 25, 2006 to be assured of consideration.

Community Development Financial Institutions Fund

OMB Number: 1559–0016.

Type of Review: Revision.

Form: CDFI 0020.

Title: New Markets Tax Credit (NMTC) Program Allocation Application.

Description: The New Markets Tax Credit (NMTC) Program will provide an incentive to investors in the form of a tax credit, which is expected to stimulate investment in private capital that, and in turn, will facilitate economic and community development in low-income communities. In order to qualify for an allocation of tax credits under the NMTC Program an entity must be certified as a qualified community development entity and submit an allocation application to the CDFI Fund. Upon receipt of such applications, the CDFI Fund will conduct a competitive review process to evaluate applications for the receipt of NMTC allocations.

Respondents: Private and State, Local or Tribal Governments.

Estimated Total Burden Hours: 41,650 hours.

Clearance Officer: Matt Josephs, Community Development Financial Institutions Fund, Department of the Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC 20005, (202) 622–9254.

OMB Reviewer: Alexander T. Hunt, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, (202) 395–7316.

Michael A. Robinson,

Treasury PRA Clearance Officer.

[FR Doc. E6–13997 Filed 8–23–06; 8:45 am]

BILLING CODE 4810–70–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

August 18, 2006.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before September 25, 2006 to be assured of consideration.

Alcohol and Tobacco Tax and Trade Bureau (TTB)

OMB Number: 1513–0009.

Type of Review: Revision.

Title: Application to Establish and Operate Wine Premises Wine Bond.

Description: TTB F 5120.25, Application to Establish and Operate Wine Premises, is the form used to establish the qualifications of an applicant applying to establish and operate wine premises. The applicant certifies the intention to produce and/or store a specified amount of wine and take certain precautions to protect it from unauthorized use. TTB F 5120.36, Wine Bond, is the form used by the proprietor and a surety company as a contract to ensure the payment of the wine excise tax.

Respondents: Private Sector.

Estimated Total Burden Hours: 1013 hours.

Clearance Officer: Frank Foote, Alcohol and Tobacco Tax and Trade Bureau, Room 200 East, 1310 G Street, NW., Washington, DC 20005, (202) 927–9347.

OMB Reviewer: Alexander T. Hunt, Office of Management and Budget, Room 10235, New Executive Office

Building, Washington, DC 20503, (202) 395–7316.

Michael A. Robinson,

Treasury PRA Clearance Officer.

[FR Doc. E6–13998 Filed 8–23–06; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

August 18, 2006.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

Dates: Written comments should be received on or before September 25, 2006 to be assured of consideration.

Alcohol and Tobacco Tax and Trade Bureau (TTB)

OMB Number: 1513–0014.

Type of Review: Revision.

Title: Power of Attorney.

Form: TTB F 5000.8.

Description: TTB F 5000.8 delegates the authority to a specific individual to sign documents on behalf of an applicant or principal. 26 U.S.C. 6061 authorizes that individuals signing returns, statements, or other documents required to be filed by industry members under the provisions of the IRC or the FAA Act, are to have that authority on file with TTB.

Respondents: Private Sector.

Estimated Total Burden Hours: 3300 hours.

Clearance Officer: Frank Foote, (202) 927–9347, Alcohol and Tobacco Tax and Trade Bureau, Room 200 East, 1310 G. Street, NW., Washington, DC 20005.

OMB Reviewer: Alexander T. Hunt, (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Michael A. Robinson,

Treasury PRA Clearance Officer.

[FR Doc. E6–14042 Filed 8–23–06; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the AD Hoc Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the AD Hoc Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, September 14, 2006 at 2 p.m. ET.

FOR FURTHER INFORMATION CONTACT: Inez De Jesus at 1–888–912–1227, or 954–423–7977.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Ad Hoc Committee of the Taxpayer Advocacy Panel will be held Thursday, September 14, 2006 at 2 p.m. ET via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7977, or write Inez De Jesus, TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Inez De Jesus. Ms. De Jesus can be reached at 1–888–912–1227 or 954–423–7977, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include: Various IRS issues.

Dated: August 16, 2006.

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E6–13999 Filed 8–23–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 1 Taxpayer Advocacy Panel (Including the States of New York, Connecticut, Massachusetts, Rhode Island, New Hampshire, Vermont and Maine)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 1 Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, September 19, 2006.

FOR FURTHER INFORMATION CONTACT: Audrey Y. Jenkins at 1–888–912–1227 (toll-free), or 718–488–2085 (non toll-free).

SUPPLEMENTARY INFORMATION: An open meeting of the Area 1 Taxpayer Advocacy Panel will be held Tuesday, September 19, 2006 from 9 a.m. ET to 10 a.m. ET via a telephone conference call. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 718–488–2085, or write Audrey Y. Jenkins, TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Audrey Y. Jenkins. Ms. Jenkins can be reached at 1–888–912–1227 or 718–488–2085, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: August 16, 2006.

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E6–14001 Filed 8–23–06; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 6 Taxpayer Advocacy Panel (Including the States of Arizona, Colorado, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming).

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 6 committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel (TAP) is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. The TAP will use citizen input to make

recommendations to the Internal Revenue Service.

DATES: The meeting will be held Tuesday, September 12, 2006.

FOR FURTHER INFORMATION CONTACT: Dave Coffman at 1–888–912–1227, or 206–220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 6 Taxpayer Advocacy Panel will be held Tuesday, September 12, 2006 from 1 p.m. Pacific Time to 2:30 p.m. Pacific Time via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Dave Coffman, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174 or you can contact us at *www.improveirs.org.* Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Dave Coffman. Mr. Coffman can be reached at 1–888–912–1227 or 206–220–6096.

The agenda will include the following: Various IRS issues.

Dated: August 16, 2006.

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E6–14006 Filed 8–23–06; 8:45 am]

BILLING CODE 4830–01–P



Federal Register

Thursday,
August 24, 2006

Part II

Department of Labor

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, and 1926
Assigned Protection Factors; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, and 1926

[Docket No. H049C]

RIN 1218–AA05

Assigned Protection Factors

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Final rule.

SUMMARY: In this final rule, OSHA is revising its existing Respiratory Protection Standard to add definitions and requirements for Assigned Protection Factors (APFs) and Maximum Use Concentrations (MUCs). The revisions also supersede the respirator selection provisions of existing substance-specific standards with these new APFs (except for the respirator selection provisions of the 1,3-Butadiene Standard).

The Agency developed the final APFs after thoroughly reviewing the available literature, including chamber-simulation studies and workplace protection factor studies, comments submitted to the record, and hearing testimony. The final APFs provide employers with critical information to use when selecting respirators for employees exposed to atmospheric contaminants found in general industry, construction, shipyards, longshoring, and marine terminal workplaces. Proper respirator selection using APFs is an important component of an effective respiratory protection program. Accordingly, OSHA concludes that the final APFs are necessary to protect employees who must use respirators to protect them from airborne contaminants.

DATES: The final rule becomes effective November 22, 2006.

ADDRESSES: In compliance with 28 U.S.C. 2212(a), the Agency designates Joseph M. Woodward, the Associate Solicitor for Occupational Safety and Health, Office of the Solicitor, Room S–4004, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, as the recipient of petitions for review of this rulemaking.

FOR FURTHER INFORMATION CONTACT: For technical inquiries regarding this final rule, contact Mr. John E. Steelnack, Directorate of Standards and Guidance, Room N–3718, OSHA, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210; telephone (202) 693–2289 or fax (202) 693–1678. For general inquiries regarding this final standard contact Kevin Ropp, OSHA Office of Public Affairs, Room N–3647, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210 (telephone (202) 693–1999). Copies of this **Federal Register** notice are available from the OSHA Office of Publications, Room N–3101, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210 (telephone (202) 693–1888). For an electronic copy of this notice, as well as news releases and other relevant documents, go to OSHA's Web site (*http://www.osha.gov*), and select ''**Federal Register**,'' ''Date of Publication,'' and then ''2006''.

SUPPLEMENTARY INFORMATION:

I. General

A. Table of Contents

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B. Glossary

This glossary specifies the terms represented by acronyms, and provides definitions of other terms, used frequently in the preamble to the final rule. This glossary does not change the legal requirements in this final rule, nor is it intended to impose new regulatory requirements on the regulated community.

1. Acronyms

ACGIH: American Conference of Governmental Industrial Hygienists

AIHA: American Industrial Hygiene Association

ANSI: American National Standards Institute

APF: Assigned Protection Factor

APR: Air-purifying respirator

Ci: Concentration measured inside the respirator facepiece

Co: Concentration measured outside the respirator

DOP: Dioctylphthalate (see definition below)

DFM: Dust, fume, and mist filter

EPF: Effective Protection Factor (see definition below under ''Protection factor study'')

HEPA: High efficiency particulate air filter (see definition below)

IDLH: Immediately dangerous to life or health (see definition below)

LANL: Los Alamos National Laboratory

LASL: Los Alamos Scientific Laboratory

LLNL: Lawrence Livermore National Laboratory

MSHA: Mine Safety and Health Administration

MUC: Maximum Use Concentration

NFPA: National Fire Protection Association

NIOSH: National Institute for Occupational Safety and Health

NRC: Nuclear Regulatory Commission

OSHA: Occupational Health and Safety Administration

OSH Act: The Occupational Safety and Health Act of 1970 (29 U.S.C. 655, 657, 665).

PAPR: Powered air-purifying respirator (see definition below)

PEL: Permissible Exposure Limit
PPF: Program Protection Factor (see definition below under ''Protection factor study'')
QLFT: Qualitative fit test (see definition below)
QNFT: Quantitative fit test (see definition below)
RDL: Respirator Decision Logic (see definition below)
REL: Recommended Exposure Limit (see definition below)
SAR: Supplied-air (or airline) respirator (see definition below)
SCBA: Self-contained breathing apparatus (see definition below)
WPF: Workplace Protection Factor (see definition below under ''Protection factor study'')
TLV: Threshold Limit Value (see definition below)
SWPF: Simulated Workplace Protection Factor (see definition below under ''Protection factor study'')

2. Definitions

Terms followed by an asterisk (*) refer to definitions that can be found in paragraph (b) (''Definitions'') of OSHA's Respiratory Protection Standard (29 CFR 1910.134).

Air-purifying respirator:* A respirator with an air-purifying filter, cartridge, or canister that removes specific air contaminants by passing ambient air through the air-purifying element.

Atmosphere-supplying respirator:* A respirator that supplies the respirator user with breathing air from a source independent of the ambient atmosphere, and includes SARs and SCBA units.

Canister or cartridge:* A container with a filter, sorbent, or catalyst, or combination of these items, which removes specific contaminants from the air passed through the container.

Continuous flow respirator: An atmosphere-supplying respirator that provides a continuous flow of breathable air to the respirator facepiece.

Demand respirator:* An atmosphere-supplying respirator that admits breathing air to the facepiece only when a negative pressure is created inside the facepiece by inhalation.

Dioctylphthalate (DOP): An aerosolized agent used for quantitative fit testing.

Elastomeric: A respirator facepiece made of a natural or synthetic elastic material such as natural rubber, silicone, or EPDM rubber.

Filter or air-purifying element:* A component used in respirators to remove solid or liquid aerosols from the inspired air.

Filtering facepiece (or dust mask):* A negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium.

Fit factor:* A quantitative estimate of the fit of a particular respirator to a specific individual and typically estimates the ratio of the concentration of a substance in ambient air to its concentration inside the respirator when worn.

Fit test:* The use of a protocol to qualitatively or quantitatively evaluate the fit of a respirator on an individual.

Helmet:* A rigid respiratory inlet covering that also provides head protection against impact and penetration.

High-efficiency particulate air filter (HEPA):* A filter that is at least 99.97% efficient in removing monodisperse particles of 0.3 micrometers in diameter. The equivalent NIOSH 42 CFR part 84 particulate filters are the N100, R100, and P100 filters.

Hood:* A respiratory inlet covering that completely covers the head and neck and may also cover portions of the shoulders and torso.

Immediately dangerous to life or health (IDLH):* An atmosphere that poses an immediate threat to life, would cause irreversible adverse health effects, or would impair an individual's ability to escape from a dangerous atmosphere.

Loose-fitting facepiece:* A respiratory inlet covering that is designed to form a partial seal with the face.

Negative pressure respirator (tight-fitting):* A respirator in which the air pressure inside the facepiece is negative during inhalation with respect to the ambient air pressure outside the respirator.

Permissible Exposure Limit (PEL): An occupational exposure limit specified by OSHA.

Positive pressure respirator:* A respirator in which the pressure inside the respiratory inlet covering exceeds the ambient air pressure outside the respirator.

Powered air-purifying respirator (PAPR):* An air-purifying respirator that uses a blower to force the ambient air through air-purifying elements to the inlet covering.

Pressure demand respirator:* A positive pressure atmosphere-supplying respirator that admits breathing air to the facepiece when the positive pressure is reduced inside the facepiece by inhalation.

Protection factor study: A study that determines the protection provided by a respirator during use. This determination generally is accomplished by measuring the ratio of the concentration of an airborne contaminant (e.g., hazardous substance) outside the respirator (Co) to the concentration inside the respirator (Ci) (i.e., Co/Ci). Therefore, as the ratio between Co and Ci increases, the protection factor increases, indicating an increase in the level of protection provided to employees by the respirator. Four types of protection factor studies are:

Effective Protection Factor (EPF) study: A study, conducted in the workplace, that measures the protection provided by a properly selected, fit-tested, and functioning respirator when used intermittently for only some fraction of the total workplace exposure time (i.e., sampling is conducted during periods when respirators are worn and not worn). EPFs are not directly comparable to WPF values because the determinations include both the time spent in contaminated atmospheres with and without respiratory protection; therefore, EPFs usually underestimate the protection afforded by a respirator that is used continuously in the workplace.

Program Protection Factor (PPF) study: A study that estimates the protection provided by a respirator within a specific respirator program. Like the EPF, it is focused not only on the respirator's performance, but also the effectiveness of the complete respirator program. PPFs are affected by all factors of the program, including respirator selection and maintenance, user training and motivation, work activities, and program administration.

Workplace Protection Factor (WPF) study: A study, conducted under actual conditions of use in the workplace, that measures the protection provided by a properly selected, fit-tested, and functioning respirator, when the respirator is worn correctly and used as part of a comprehensive respirator program that is in compliance with OSHA's Respiratory Protection Standard at 29 CFR 1910.134. Measurements of Co and Ci are obtained only while the respirator is being worn during performance of normal work tasks (i.e., samples are not collected when the respirator is not being worn). As the degree of protection afforded by the respirator increases, the WPF increases.

Simulated Workplace Protection Factor (SWPF) study: A study, conducted in a controlled laboratory setting and in which Co and Ci sampling is performed while the respirator user performs a series of set exercises. The laboratory setting is used to control many of the variables found in workplace studies, while the exercises simulate the work activities of respirator users. This type of study is designed to determine the optimum

performance of respirators by reducing the impact of sources of variability through maintenance of tightly controlled study conditions.

Qualitative fit test (QLFT):* A pass/fail fit test to assess the adequacy of respirator fit that relies on the individual's response to the test agent.

Quantitative fit test (QNFT):* An assessment of the adequacy of respirator fit by numerically measuring the amount of leakage into the respirator.

Recommended Exposure Limit (REL): An occupational exposure level recommended by NIOSH.

Respirator Decision Logic (RDL): Respirator selection guidance developed by NIOSH that contains a set of respirator protection factors.

Self-contained breathing apparatus (SCBA):* An atmosphere-supplying respirator for which the breathing air source is designed to be carried by the user.

Supplied-air respirator (or airline) respirator (SAR):* An atmosphere-supplying respirator for which the source of breathing air is not designed to be carried by the user.

Threshold Limit Value (TLV): An occupational exposure level recommended by ACGIH.

Tight-fitting facepiece:* A respiratory inlet covering that forms a complete seal with the face.

II. Events Leading to the Final Standard

A. Regulatory History of APFs

Congress established the Occupational Safety and Health Administration (OSHA) in 1970, and gave it the responsibility for promulgating standards to protect the health and safety of American workers. As directed by the OSH Act, the Agency adopted existing Federal standards and national consensus standards developed by various organizations such as the NFPA and ANSI. The ANSI standard Z88.2–1969, ''Practices for Respiratory Protection,'' was the basis of the first six sections (permissible practice, minimal respirator program, selection of respirators, air quality, use, maintenance and care) of OSHA's Respiratory Protection Standard (29 CFR 1910.134) adopted in 1971. The seventh section was a direct, complete incorporation of ANSI Standard K13.1–1969, ''Identification of Gas Mask Canisters.''

The Agency promulgated an initial respiratory protection standard for the construction industry (29 CFR 1926.103) in April 1971. On February 9, 1979, OSHA formally applied 29 CFR 1910.134 to the construction industry (44 FR 8577). Federal agencies that preceded OSHA developed the original maritime respiratory protection standards in the 1960s (e.g., Section 41 of the Longshore and Harbor Worker Compensation Act). The section designations adopted by OSHA for these standards, and their original promulgation dates, are: Shipyards—29 CFR 1915.82, February 20, 1960 (25 FR 1543); Marine Terminals—29 CFR 1917.82, March 27, 1964 (29 FR 4052); and Longshoring—29 CFR 1918.102, February 20, 1960 (25 FR 1565). OSHA incorporated 29 CFR 1910.134 by reference into its Marine Terminal standards (Part 1917) on July 5, 1983 (48 FR 30909). The Agency updated and strengthened its Longshoring and Marine Terminal standards in 1996 and 2000, and these standards now incorporate 29 CFR 1910.134 by reference.

Under the Respiratory Protection Standard that OSHA initially adopted, employers were required to follow the guidance of the Z88.2–1969 ANSI standard to ensure proper selection of respirators. Subsequently, OSHA published an Advance Notice of Proposed Rulemaking (''ANPR'') to revise the Respiratory Protection Standard on May 14, 1982 (47 FR 20803). Part of the impetus for this notice was the Agency's inclusion of new respirator requirements in the comprehensive substance-specific standards promulgated under section (6)(b) of the OSH Act, e.g., fit testing protocols, respirator selection tables with assigned protection factors, use of PAPRs, changing filter elements whenever an employee detected an increase in breathing resistance, and referring employees with breathing difficulties, either at fit testing or during routine respirator use, to a physician trained in pulmonary medicine (see, e.g., 29 CFR 1910.1025 (OSHA's Lead Standard)). The respirator provisions in these substance-specific standards reflected advances in respirator technology and changes in related guidance documents that were state-of-the-art information at the time when OSHA published these substance-specific standards. These standards recognized that effective respirator use depends on a comprehensive respiratory protection program that includes the use of APFs.

In the 1982 ANPR, OSHA sought information on the effectiveness of its current Respiratory Protection Standard, the need to revise the standard, and recommendations regarding what revisions should be made. The 1982 ANPR referenced the ANSI Z88.2–1980 standard on respiratory protection with its table of protection factors, the 1976 report by Ed Hyatt from LASL titled ''Respiratory Protection Factors'' (Ex. 2), and the RDL developed jointly by OSHA and NIOSH, as revised in 1978 (Ex. 9, Docket No. H049). The 1982 ANPR asked for comments on how OSHA should use protection factors. The Agency received 81 responses to this inquiry. The commenters generally supported revising OSHA's Respiratory Protection Standard, and provided recommendations regarding approaches for including a table of protection factors (Ex. 15).

On September 17, 1985, OSHA announced the availability of a preliminary draft of the proposed Respiratory Protection Standard. This preproposal draft standard included a discussion of the public comments received in response to the 1982 ANPR, and OSHA's analysis of revisions needed in the Respiratory Protection Standard to address up-to-date respiratory protection. The Agency received 56 responses from interested parties (Ex. 36), which OSHA carefully reviewed in developing the proposed rule.

On November 15, 1994, OSHA published the proposed rule to revise 29 CFR 1910.134, and provided notice of an informal public hearing on the proposal (59 FR 58884). The Agency convened the informal public hearing on June 6, 1995. In response to the comments OSHA received on the proposal, the Agency proceeded to develop APFs. On June 15, 1995, as part of the public hearing, OSHA held a one-day panel discussion by respirator experts on APFs. The discussion included measuring respirator performance in WPF and SWPF studies, the variability of data from these studies, and setting APFs for various types of respirators that protect employees across a wide variety of workplaces and exposure conditions.

OSHA also reopened the rulemaking record for the revised Respiratory Protection Standard on November 7, 1995 (60 FR 56127), requesting comments on a study performed for OSHA by Dr. Mark Nicas titled ''The Analysis of Workplace Protection Factor Data and Derivation of Assigned Protection Factors'' (Ex. 1–156). This study, which the Agency placed in the rulemaking docket on September 20, 1995, addressed the use of statistical modeling for determining respirator APFs. OSHA received 12 comments on the Nicas report. This report, and the comments received in response to it, convinced OSHA that more information would be necessary before the Agency could resolve the complex issues regarding how to establish APFs,

including what methodology to use in analyzing existing protection factor studies. (See Section IV. Methodology for Developing Assigned Protection Factors in the June 6, 2003 NPRM, 68 FR 34044, for a detailed discussion of the Nicas report and the comments OSHA received.)

OSHA published the final, revised Respiratory Protection Standard, 29 CFR 1910.134, on January 8, 1998 (63 FR 1152). The standard contains worksite-specific requirements for program administration, procedures for respirator selection, employee training, fit testing, medical evaluation, respirator use, and other provisions. However, OSHA reserved the sections of the final standard related to APFs and MUCs pending further rulemaking (see 63 FR 1182 and 1203). The Agency stated that, until a future rulemaking on APFs is completed:

> [Employers must] take the best available information into account in selecting respirators. As it did under the previous [Respiratory Protection] standard, OSHA itself will continue to refer to the [APFs in the 1987 NIOSH RDL] in cases where it has not made a different determination in a substance specific standard. (63 FR 1163)

The Agency subsequently established a separate docket (i.e., H049C) for the APF rulemaking. This docket includes copies of material related to APFs that previously were placed in the docket (H049) for the revised Respiratory Protection Standard. The APF rulemaking docket also contains other APF-related materials, studies, and data that OSHA obtained after it promulgated the final Respiratory Protection Standard in 1998.

On June 6, 2003, the Agency published in the **Federal Register** an NPRM titled ''Assigned Protection Factors; Proposed Rule'' (68 FR 34036) that contained proposed definitions for APFs and MUCs, a proposed Table 1 with APFs for the various respirator classes, and proposed revisions to the APF provisions and tables in OSHA's substance-specific standards. The NPRM announced that OSHA would be holding an informal public hearing in Washington, DC on the proposal. The public hearings were held over three days, from January 28–30, 2004. OSHA received extensive pre-hearing comments (Exs. 9–1 through 9–43 and 10–1 through 10–60), written hearing testimony (Exs. 16–1 through 16–25), post-hearing comments (Exs. 17–1 through 17–12), and post-hearing briefs (Exs. 18–1 through 18–9 and 19–1 through 19–8). Transcripts of the public hearings also were made and added to the APF Docket (Exs. 16–23–1, 16–23–2, and 16–23–3). It is from these public comments, exhibits, hearing transcript, and post-hearing submissions that OSHA has prepared these final APF and MUC provisions and revisions to substance-specific standards.

B. Non-Regulatory History of APFs

In 1965, the Bureau of Mines published ''Respirator Approval Schedule 21B,'' which contained the term ''protection factor'' as part of its approval process for half mask respirators (for protection up to 10 times the TLV) and full facepiece respirators (for protection up to 100 times the TLV). The Bureau of Mines based these protection factors on quantitative fit tests, using DOP, that were conducted on six male test subjects performing simulated work exercises.

The Atomic Energy Commission (AEC) published proposed protection factors for respirators in 1967, but later withdrew them because quantitative fit testing studies, which the AEC used to determine APFs, were available for some, but not all, types of respirators. To address this shortcoming, the AEC sponsored respirator performance studies at LASL, starting in 1969.

ANSI standard Z88.2–1969, which OSHA adopted by reference in 1971, did not contain APFs for respirator selection. Nevertheless, this ANSI standard recommended that ''due consideration be given to potential inward leakage in selecting devices,'' and contained a list of the various respirators grouped according to the expected quantity of leakage into the facepiece during routine use.

In 1972, NIOSH and the Bureau of Mines published new approval schedules for respiratory protection under 30 CFR 11. However, these new approval schedules did not include provisions for determining facepiece leakage as part of the respirator certification process.

NIOSH sponsored additional respirator studies at LASL, beginning in 1971, that used quantitative test systems to measure the overall performance of respirators. In a 1976 report titled ''Respirator Protection Factors'', Edwin C. Hyatt of LASL included a table of protection factors for: single-use dust respirators; quarter mask, half mask, and full facepiece air-purifying respirators; and SCBAs (Ex. 2). Hyatt based these protection factors on data from DOP and sodium chloride quantitative fit test studies performed at LASL on these respirators between 1970 and 1973. The table also contained recommended protection factors for respirators that had no performance test data. Hyatt based these recommended protection factors on the judgment and experience of LASL researchers, as well as extrapolations from available facepiece leakage data for similar respirators. For example, Hyatt assumed that performance data for SCBAs operated in the pressure-demand mode could be used to represent other (non-tested) respirators that maintain positive pressure in the facepiece, hood, helmet, or suit during inhalation. In addition, Hyatt recommended in his report that NIOSH continue testing the performance of respirators that lacked adequate fit test data. To increase the database, Hyatt used a representative 35-person test panel to conduct quantitative fit tests from 1974 to 1978 on all air-purifying particulate respirators approved by the Bureau of Mines and NIOSH.

In August 1975, the Joint NIOSH–OSHA Standards Completion Program published the RDL (Ex. 25–4, Appendix F, Docket No. H049). The RDL contained a table of protection factors that were based on quantitative fit testing performed at LASL and elsewhere, as well as the expert judgment of the RDL authors. In 1978, NIOSH updated the RDL specifying the following protection factors:

5 for single-use respirators;
10 for half mask respirators with DFM or HEPA filters;
50 for full facepiece air-purifying respirators with HEPA filters or chemical cartridges;
1,000 for PAPRs with HEPA filters;
1,000 for half mask SARs operated in the pressure-demand mode;
2,000 for full facepiece SARs operated in the pressure-demand mode; and
10,000 for full facepiece SCBAs operated in the pressure-demand mode.

ANSI's Respiratory Protection Subcommittee (''Subcommittee'') decided to revise Z88.2–1969 in the late 1970s. During its deliberations, the Subcommittee conducted an extensive discussion regarding the role of respirator protection factors in an effective respiratory protection program. As a result, the Subcommittee decided to add an APF table to the revised standard. In May 1980, ANSI published the revision as Z88.2–1980 which contained the first ANSI Z88.2 respirator protection factor table (Ex. 10, Docket H049). The ANSI Subcommittee based the table on Hyatt's protection factors, which it updated using results from fit testing studies performed at LANL and elsewhere since 1973. For example, the protection factor for full facepiece air-purifying particulate respirators was 100 when qualitatively fit tested, or 1,000 when equipped with

HEPA filters and quantitatively fit tested. The table consistently gave higher protection factors to tight-fitting facepiece respirators when employers performed quantitative fit testing rather than qualitative fit testing. The ANSI Subcommittee concluded that PAPRs (with any respiratory inlet covering), atmosphere-supplied respirators (in either a continuous flow or pressure-demand mode), and pressure-demand SCBAs required no fit testing because they operated in a positive-pressure mode. ANSI assigned high protection factors to these respirators, but limited their use to concentrations below the IDLH values. Pressure-demand SCBAs and combination continuous flow or pressure-demand airline respirators with escape provisions for use in IDLH atmospheres were assigned protection factors of 10,000 plus.

In response to a complaint to NIOSH that the PAPRs used in a workplace did not appear to provide the expected protection factor of 1,000, Myers and Peach of NIOSH conducted a WPF study during silica-bagging operations. Myers and Peach tested half mask and full facepiece PAPRs under these conditions, and found protection factors that ranged from 16 to 215. They published the results of their study in 1983 (Ex.1–64–46). The results of this study led NIOSH and other researchers, as well as respirator manufacturers, to perform additional WPF studies on PAPRs and other respirators.

NIOSH revised its RDL in 1987 (Ex. 1–54–437Q) to address advances in respirator technology and testing. The revision retained many of the provisions of the 1978 RDL, but also lowered the APFs for other respirators based on NIOSH's WPF studies. For example, the APFs were lowered for the following respirator classes: PAPRs with a loose-fitting hood or helmet (reduced to 25); PAPRs with a tight-fitting facepiece and a HEPA filter (lowered to 50); supplied-air continuous flow hoods or helmets (decreased to 25); and supplied-air continuous flow tight-fitting facepiece respirators (reduced to 50).

In August 1992, ANSI again revised its Z88.2 Respiratory Protection Standard (Ex. 1–50). The ANSI Z88.2–1992 standard contained a revised APF table, based on the Z88.2 Subcommittee's review of available protection factor studies. In a report describing the revised standard (Ex. 1–64–423), Nelson, Wilmes, and daRoza described the rationale used by the ANSI Subcommittee in setting APFs:

> If WPF studies were available, they formed the basis for the [APF] number assigned. If no such studies were available, then laboratory studies, design analogies, and other information [were] used to decide what value to place in the table. In all cases where the assigned protection factor changed when compared to the 1980 standard, the assigned number is lower in the 1992 standard.

In addition, the 1992 ANSI Z.88.2 standard abandoned ANSI's 1980 practice of giving increased protection factors to some respirators when quantitative fit testing was performed.

Thomas Nelson, the co-chair of the ANSI Z88.2–1992 Subcommittee, published a second report entitled ''The Assigned Protection Factor According to ANSI'' (Ex. 135) four years after the Z88.2 Subcommittee completed the revised 1992 standard. In the report, Nelson reviewed the reasoning used by the ANSI Subcommittee in setting the 1992 ANSI APFs. Nelson noted that the Z88.2 Subcommittee gave an APF of 10 to all half mask air-purifying respirators, including quarter mask, elastomeric, and disposable respirators. The Subcommittee also recommended that full facepiece air-purifying respirators retain an APF of 100 (from the 1980 ANSI standard) because no new data were available to justify another value. Nelson noted that the Z88.2 Subcommittee approved the RDL's reduction to an APF of 25 for loose-fitting facepieces and PAPRs with helmets or hoods based on their performance in WPF studies. For half mask PAPRs, the ANSI Subcommittee set an APF of 50 based on a WPF study by Lenhart (Ex. 1–64–42). The ANSI Subcommittee had no WPF data available for full facepiece PAPRs, so Nelson indicated that the Subcommittee selected an APF of 1,000 to be consistent with the APF for PAPRs with helmets or hoods. The Subcommittee, in turn, based its APF of 1,000 for PAPRs with helmets or hoods on design similarities (i.e., same facepiece designs, operation at the same airflow rates) between these respirators and airline respirators. Nelson noted that the results from a subsequent WPF report by Keys (Ex. 1–64–40) on PAPRs with helmets or hoods were consistent with an APF of 1,000. According to Nelson, the Subcommittee used WPF studies by Myers (Exs. 1–64–47 and 1–64–48), Gosselink (Ex. 1–64–23), and Que Hee and Lawrence (Ex. 1–64–60) to set an APF of 25 for PAPRs with loose-fitting facepieces. Nelson stated that two WPF studies, conducted by Gaboury and Burd (Ex. 1–64–24) and Stokes (Ex. 1–64–66) subsequent to publication of ANSI Z88.2–1992, supported the APF of 25 selected by the Subcommittee for PAPRs with loose-fitting facepieces.

Nelson also stated in his report that the ANSI Subcommittee had no new information on atmosphere-supplying respirators. Therefore, the APFs for these respirators were based on analogies with other similarly designed respirators (Ex. 135). The ANSI Subcommittee based the APF of 50 for half mask continuous flow atmosphere-supplying respirators, and the APF of 25 for loose-fitting continuous flow atmosphere-supplying respirators, on the similarities between these respirators and PAPRs with the same airflow rates. Nelson noted that the ANSI Subcommittee set the APF of 1,000 for full facepiece continuous flow atmosphere-supplying respirators consistent with the APF for SARs with helmets or hoods using the results of two earlier studies: a WPF study by Johnson (Ex. 1–64–36) and a SWPF study by Skaggs (Ex. 1–38–3). The Subcommittee used the design analogy between PAPRs and continuous flow supplied-air respirators to select the APF of 50 for half mask pressure-demand SARs and an APF of 1,000 for full facepiece pressure-demand SARs. Nelson stated, ''The committee believed that setting a higher APF because of the pressure-demand feature was not warranted, but rather that the total airflow was critical'' (Ex. 135).

Nelson noted in the report that the Subcommittee selected no APF for SCBAs. In explaining the committee's decision, he stated that ''the performance of this type of respirator may not be as good as previously measured in quantitative fit test chambers.'' Nelson also observed that the ANSI Z88.2–1992 standard justified this approach in a footnote to the APF table. The footnote states:

> A limited number of recent simulated workplace studies concluded that all users may not achieve protection factors of 10,000. Based on [these] limited data, a definitive assigned protection factor could not be listed for positive pressure SCBAs. For emergency planning purposes where hazardous concentrations can be estimated, an assigned protection factor of no higher than 10,000 should be used.

A new ANSI Z88.2 Subcommittee recently finished revising the ANSI Z88.2–1992 standard, in accordance with the ANSI policy specifying that each standard receive a periodic review. This revised ANSI Z88.2 standard is currently under appeal to the ANSI Board.

C. Need for APFs

When OSHA published the final Respiratory Protection Standard in January 1998, it noted that the revised standard was to ''serve as a 'building block' standard with respect to future standards that may contain respiratory protection requirements'' (63 FR 1265).

OSHA's final Respiratory Protection Standard established the minimum elements of a comprehensive program that are necessary to ensure effective performance of a respirator. The only parts missing from this building block standard are the APF and MUC provisions that are being finalized in this rulemaking. In the standard the Agency recommended that employers in the interim ''take the best information into account in selecting respirators. As it did under the previous standard, OSHA itself will continue to refer to the NIOSH APFs in cases where it has not made specific compliance interpretations'' (63 FR 1203).

In October 2004, NIOSH published its Respirator Selection Logic (RSL), an update of the 1987 RDL. The APF tables in the new RSL have not changed from those in the 1987 RDL. However, NIOSH stated in the forward to the 2004 RSL: ''[w]hen the OSHA standard on APFs is finalized NIOSH intends to consider revisions to this RSL.'' (Ex. 20–4.)

The ANSI Z88.2–1992 APF table also has been a source for interim APFs while OSHA completed its APF rulemaking. However, the ANSI Z88.2–1992 respiratory protection standard was withdrawn by ANSI in 2003. While a revised ANSI Z88.2 standard has been written, the final ANSI standard has yet to be published since it is currently under appeal. Therefore, no ANSI respiratory protection standard with recommended APFs is available at this time. The draft APF table from the ANSI Z88.2 revision was submitted to the OSHA rulemaking docket (Ex.13–7–2), and was the subject of discussion during the public hearings on APFs. OSHA considered the draft ANSI table during its deliberations in this rulemaking.

Throughout the Respiratory Protection Standard rulemaking, OSHA has emphasized that the APF and MUC definitions and the APF table are an integral part of the overall standard. A careful review of the submitted comments and information supports the Agency's conclusion that this final standard is necessary to guide employers in selecting the appropriate class of respirator needed to reduce hazardous exposures to acceptable levels. The final APF for a class of respirators specifies the workplace level of protection that a class of respirator should provide under an effective respiratory protection program. In addition, the APFs can be utilized by employers to determine a respirator's MUC for a particular chemical exposure situation.

The final APFs must be used in conjunction with the existing provisions of the Respiratory Protection Standard. Integration of the final APF and MUC provisions into the reserved provisions of paragraph (d) completes that standard. With the addition of these provisions, appropriate implementation of the Respiratory Protection Standard by employers in their workplaces should afford each affected employee the maximum level of respiratory protection.

III. Methodology for Developing APFs for Respirators

A. Introduction

In the proposed rule for Assigned Protection Factors (APFs), OSHA raised a number of issues or questions about its proposed methodology for deriving APFs (68 FR 34112–34113). OSHA asked for information on: (1) The evidence-based method used by OSHA in developing the proposed APFs; (2) any additional studies that may be useful in determining APFs that were not already identified by OSHA in the proposal; and, (3) statistical analyses, treatments, or approaches, other than those described in the proposal, available for differentiating between, or comparing, the respirator performance data. The vast majority of the comments in response to the NPRM addressed the use of WPF studies for establishing the APF for filtering facepiece half mask respirators. OSHA also received comments on the methodology and data it used for determining the filtering facepiece APF, and was provided with new studies on these respirators for consideration. OSHA's quantitative analyses for establishing the APFs for other classes of higher performing respirators drew little comment, and no new studies on these respirators were submitted. This section, therefore, focuses on methodology and new information relative to the APF for half mask air-purifying respirators.

More specifically, Part C of this section contains a discussion of the comments about OSHA's proposed methodology for determining APFs for filtering facepiece half mask respirators, including comments on data analysis and study selection. In addition, OSHA is providing an overview of Dr. Kenny Crump's statistical analyses (Ex. 20–1) of the updated half mask database (Ex. 20–2). Comments about alternative approaches are discussed in Part D (''Methodology, Data, and Studies on Filtering Facepieces and Elastomerics''). The Agency's overall conclusions on methodology, and summaries of new studies submitted during the public comment process, are presented under Part E. Discussion of the comments and opinions regarding the APF for half mask respirators and the establishment of the APFs for higher performing respirators is included in Section VI, Summary and Explanation of the Final Standard.

B. Background

The Occupational Safety and Health Act of 1970 (''OSH Act''), 29 U.S.C. 651–678, enacted to ensure safe and healthy working conditions for employees, empowers OSHA to promulgate standards and provides overall guidance on how these standards are to be developed. It states:

> (5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, *shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence,* that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. *Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate.* In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be *the latest available scientific data in the field,* the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired. 29 U.S.C. 655(b)(5) [emphasis added].

A reviewing court will uphold standards set under this section when they are supported by substantial evidence in the record considered as a whole (29 U.S.C. 655(f)). In searching for the ''best available evidence'' upon which to base its rulemaking, OSHA is required to ''identify the relevant factual evidence, * * * to state candidly any assumptions on which it relies, and to present its reasons for rejecting any significant contrary evidence or argument.'' *Public Citizen Health Research Group* v. *Tyson*, 796 F.2d 1479, 1495 (D.C. Cir. 1986).

OSHA has retained the multifaceted approach it used in the proposal to determine the APFs for classes of respirators. That is, the Agency reviewed all of the available literature, including the various analyses by respirator authorities, as well as quantitative analyses of data from WPF and SWPF studies. During revision of the overall Respiratory Protection Standard, the Agency used a similar approach when reviewing protection factor studies related to the effectiveness and necessity of a comprehensive respiratory protection program.

The Agency did not use Effective Protection Factor (EPF) and Program Protection Factor (PPF) studies in its APF analyses since these measure deficiencies in respirator program practices. More specifically, EPFs are not directly comparable to WPF values because the determinations include the time spent in contaminated atmospheres both with and without respiratory protection. PPFs are affected by any deficient elements of a respirator program, including inadequate respirator selection and maintenance, poor user training and motivation, work activities, and inadequate program administration. Therefore, OSHA relied on WPF and SWPF studies, since they focus on the performance characteristics of the respirator only.

During the APF rulemaking, OSHA reviewed the extensive literature on APFs and developed selection criteria for including studies and data in its quantitative analysis of respirator performance. This procedure ensured that only carefully designed and executed WPF and SWPF studies were included in the analysis. The Agency then used these studies to compile the NPRM's original database. The database was comprised of 917 data points from 16 WPF studies for half mask respirators (Matrix 1) and 443 data points from 13 studies for PAPRs and SARs (Matrix 2), conducted in a variety of American workplaces. OSHA made the studies, its selection criteria, the data, and its analyses available to the public electronically and through the rulemaking docket. In addition, the Agency encouraged the public to access this information and to reanalyze the data using methods of their choice. The Agency also sought submissions from the public of any additional studies for inclusion in its database. Four additional WPF studies of half masks were submitted during the public comment period following publication of the NPRM. Dr. Kenny Crump updated the Matrix 1 half mask database with these additional studies (Ex. 20–2) and reanalyzed the resulting 1,339 data points for half mask respirators (Ex. 20–1).

Dr. Crump also performed a second quantitative analysis in which the 1,339 accepted data points (original NPRM database updated with data from the four new studies) for half mask respirators were combined with 403 data points from 12 studies that the Agency originally excluded from the analysis. This second analysis corroborated the original findings to the extent practicable. The results of both of these analyses provide compelling support of OSHA's conclusions regarding the appropriate APF for half mask respirators. The Agency believes that the database it constructed represents the best available data on APFs, and that its conclusions are based on substantial evidence. *See Texas Independent Ginners' Association* v. *Marshall*, 630 F.2d 398, 413 n. 48 (5th Cir. 1980), citing *Industrial Union Dept., AFL–CIO–CIC* v. *American petroleum Institute*, 448 U.S. 607, 661 (1980).

In past rulemakings, OSHA's conclusions as to the best available evidence have been upheld as based on substantial evidence when it has relied on a body of reputable scientific evidence. *See ASARCO* v. *Occupational Safety and Health Administration*, 746 F.2d 483, 494 (9th Cir. 1984). OSHA need not accept all data presented to it as long it considers the data and rejects it on reasonable grounds. *See id.* Furthermore, each study relied upon by the Agency need not be a model of textbook scientific inquiry, and OSHA need not find one definitive study supporting its decision. *Public Citizen Health Research Group*, 796 F.2d at 1489, 1495. Rather, the Agency is justified in adopting a conclusion when the cumulative evidence is compelling. *Id.* at 1489, 1491, 1495. OSHA's conclusions are strongest when it has relied on multiple data sources that support each other, as it has in this rulemaking.

C. Methodology, Data, and Studies on Filtering Facepieces and Elastomerics

1. Comments on the Methodology

OSHA developed the proposed APFs through a multi-faceted approach. As it stated in the preamble to the proposal, ''The Agency reviewed the various analyses of respirator authorities, available WPF and SWPF studies, and other APF literature.'' It later concluded that ''the APFs proposed by OSHA in this rulemaking represent the Agency's evaluation of all available data and research literature i.e., a composite evaluation of all relevant quantitative and qualitative information'' (68 FR 34050). OSHA then asked the public if this method was appropriate to determine APFs. The methodology was supported by a number of commenters, including NIOSH (Ex. 9–13), the Department of the Army (Ex. 9–42), ALCOA (Ex. 10–31), and others (e.g., Exs. 9–1, 9–4, 9–14, 9–16, 9–22, 10–2, 10–17, 10–18, and 10–59). NIOSH stated:

> NIOSH agrees that the APF values resulting from this multi-faceted approach are reasonable indications of the level of protection that should be expected for each class of respirators. * * *
>
> The available data are not ideal because there can be considerable model-to-model variation and only a few models in each class have been evaluated. Given that lack of complete data, the approach taken by OSHA is the most appropriate currently possible. (Ex. 9–13.)

The United States Army Center for Health Promotion and Preventive Medicine commented:

> The method of APF development used by OSHA is appropriate. OSHA reviewed available data, both published and unpublished; utilized technical reviews and summaries from subject matter experts outside-OSHA; weighed study findings and conclusions based on study shortfalls, as then state-of-the-art technical bias and procedural omissions; and used a conservative approach to maintain confidence that minimal risk of respirator selection and use errors will exist in worker protection from proposed APF use. (Ex. 9–42–1.)

Nevertheless, some commenters did not agree with OSHA's approach. These participants included several labor organizations (Exs. 9–27, 9–29, 9–34, 9–40, and 10–37), trade associations (Exs. 9–24 and 10–27), and individuals (e.g., Exs. 9–17, 9–25, 9–33, 9–41, 10–33, and 10–42). Criticisms of OSHA's approach focused on the Agency's selection of WPF studies for its determination of the proposed APFs. Reasons given to support these criticisms included: The differences between the studies do not permit comparison of the studies; the study conditions are not representative of typical workplaces; the study data are too old; the data do not cover all configurations of filtering facepieces available; and, the analytical method employed by some studies was too sensitive.

A few commenters (Exs. 10–34 and 10–47) recommended that certain criteria should be met before a WPF study is deemed acceptable for analysis. These criteria include: Exposures to small particle sizes; work time of at least four hours; moderate to heavy work rate; and, high temperature and humidity. Still others believed that OSHA should develop and perform SWPFs on a representative subset of all filtering facepieces or all configurations of filtering facepiece respirators and all respirator models, and establish APFs for all classes of respirators based on the SWPF study results (Exs. 9–41 and 10–27). A more detailed discussion of data issues is presented below.

2. Comments on Data and Study Problems

Selection bias in WPF studies. Several commenters stated that the authors of WPF studies ''cherry-picked'' either the workplaces in which the studies were

conducted or the individual tasks that were performed by workers chosen for monitoring (Pascarella, Tr. at 464; Faulkner, Tr. at 549 and 564–565). ''Cherry-picking'' is a common term for ''selection bias.'' Selection bias is a matter of concern when either workplace study participants or job tasks are selected for inclusion in the study in a manner that skews the results of the study away from the true value.

Selection bias is a matter of concern for all scientific studies, not just WPF studies, and peer reviewers typically evaluate its effects before a study is accepted for publication in a peer-reviewed journal. Most of the studies included in OSHA's analysis of WPF studies were either published in peer-reviewed journals or were presented at the AIHCE, and met the criteria for respirator research studies accepted by the industrial hygiene community. The half mask database consists of 16 studies performed in a variety of workplaces over a range of years (from 1976 to 2004) by many different researchers. Therefore, it is highly improbable that these studies were subject to selection bias. OSHA could find no instance of selection bias either in its review of the scientific studies or its analysis of the data. Finally, OSHA repeatedly asked commenters who raised concerns about ''cherry-picking'' for specific studies in which selection bias occurred. In no case did the commenters provide any details to support their allegations.

Observer effect in WPF studies. Several commenters (Shine, Tr. at 644 and Macaluso, Tr. at 652) stated that data from the WPF studies considered by OSHA were the result of a condition known as the ''observer effect.'' The observer effect occurs when the act of observing or monitoring test subjects causes their responses to differ from their usual (nonobserved) responses. In some of the WPF studies used by OSHA, the researchers stated that during the study, they were present to monitor the test equipment to ensure that the sampling equipment functioned properly, thereby increasing the usefulness of the results. In other WPF studies, the researchers did not indicate their presence during the study.

The mere presence of an observer does not, in and of itself, presume that there will be an observer effect. For example, if the observer is a researcher who is monitoring the test equipment instead of a supervisor who is monitoring the workers' practices, the workers are unlikely to change their practices.

Although the Agency repeatedly asked the commenters who raised this concern to identify specific studies in which the observer effect may have been involved, they could not do so (i.e., in no case did the commenters provide any example to support their allegations). In its own analysis of the WPF studies, the Agency was also unable to find any evidence of an observer bias.

Representativeness of the data. A number of commenters expressed concern that the study data analyzed by OSHA were not representative of conditions found in the construction industry (Ex. 9–29, Building Construction Trades Department), or of workplace conditions in general (e.g., Exs. 9–34, International Union Operating Engineers; 9–35, Melissa Rich; 9–40, United Steel Workers of America; and 10–60, Paul Hewett). The bulk of these concerns are represented in the comments of Melissa Rich, a Department of Energy respirator program manager, who stated:

> The selection of the test sites for the cited APF proposed rulemaking WPF studies are not representative of the worksite for American workers. Many test sites chosen for these studies were selected on availability only. Moreover, key study attributes such as hot humid conditions, long work hours, and heavy workload were the exception, not the norm for most of the cited studies. Most test sites had ambient concentrations less than the OSHA half mask respirator maximum use limit (i.e., ten times the PEL).
>
> * * * * *
>
> The various particle sizes, a critical issue in a WPF, cited in many of the APF proposed rule Workplace Protection Factor studies are so large that they do not penetrate the faceseal. Many respiratory protection studies have indicated that particles larger than two microns are less likely to penetrate the most important attribute of a respirator, the faceseal. Most of the APF proposed rule Workplace Protection Factor studies have a particle size greater than two microns. (Ex. 9–35.)

The studies analyzed by OSHA consisted of a varied cross-section of workplaces and conditions. For example, workplaces included ship breaking, asbestos removal, aluminum and lead smelters, brass foundries, and aircraft painting and manufacturing. Two of the four new studies analyzed by OSHA involved concrete-block manufacturing. The authors of an aluminum smelter study (Ex. 1–64–24) noted that employees were required to rest in a cool area for 50% of each hour due to high heat, and a steel mill study (Ex. 1–64–50) and a primary lead smelter study (Ex. 1–64–42) both were conducted in the sinter plant and blast furnace areas. The asbestos study (Ex. 1–64–54) was conducted under high humidity conditions. Tasks performed by test subjects included welding and grinding, torch cutting, pouring molten metal, handling concrete blocks, and spray painting. Work rates for these studies, when provided, ranged from low to heavy.

The purpose of a WPF study is to evaluate a respirator's effectiveness under actual workplace use conditions. Consequently, the contaminant concentrations and particle sizes contained in the analyzed studies were generated while the workers performed their normal job duties. With regard to concerns about particle size, Myers et al. (Ex.1–64–51) found particles larger than 10 microns inside the respirator facepiece. The Agency believes that accepting only WPF studies that are conducted at exposure levels close to 10 times the PEL, with particulates of two microns in size or less, would not be representative of the conditions found in the workplace. Studies based on such selective criteria would be more akin to a SWPF, rather than a WPF, study. OSHA has concluded that the data used in its analyses are applicable to other American work settings because a range of work rates and environmental conditions were represented, and many of the tasks performed by the test subjects are performed in a variety of workplaces, including construction. Accordingly, the Agency is not persuaded by comments suggesting that the studies were so narrowly focused that the data cannot be applied to other work settings.

Sensitive analytical method. Several commenters questioned the use of sensitive analytical methods for the analyses of workplace exposures, sometimes accompanied by a recommendation to test respirators under controlled laboratory settings, and at sufficiently high concentrations to obtain inside-the-facepiece measurements (Ci) that can be assessed by less sensitive methods (e.g., Exs. 9–32, 9–35, 10–6, 10–37, and 10–49). The commenters believed that sensitive analytical methods (particularly PIXEA, proton-induced x-ray emission analysis) permit the determination of low Ci concentrations, resulting in high protection factors.

In response to these comments, OSHA reviewed the seven half mask studies that used the PIXEA analytical method (Exs. 1–64–19, 1–64–51, 1–64–52, 1–64–15, 1–64–16, and 1–64–34) and found that six of the studies used the method to measure both the Ci and Co concentrations. The seventh study (Ex. 3–12) used PIXEA to measure the Ci concentration but used atomic absorption (AA) to assess Co concentrations because the respirator filters were overloaded. However, the

Agency does not believe that this study provided inaccurate results. Under conditions of high Co concentrations, the AA method must be used because the PIXEA method would exceed its maximum measurement limits. Therefore, the PIXEA method would be unable to provide accurate Co data. Based on its review of these seven studies, the Agency found that the sensitive analytical method (i.e., PIXEA) allowed the investigators to quantify small amounts of contaminant that penetrate a respirator. This method permitted accurate assessment of Ci concentrations under conditions of low ambient concentrations, thereby permitting the use of actual Ci values in determining WPFs. Less sensitive methods would result in penetration values that are nondetectable or less than the limit of detection (LOD) for the analytic method, thereby requiring the study to discard these data or to correct for nondetected values using unvalidated statistical techniques. On the other hand, the sensitive analytical method was able to quantify low Ci concentrations, thereby enhancing the validity of the subsequent analysis by retaining the actual data and avoiding unvalidated statistical corrections.

Craig Colton of 3M provided the following testimony in support of OSHA's conclusions:

> Some commenters also asserted that the use of analytical methods with low detection limits are a reason to invalidate some of the WPF studies. The claim is erroneously made that the analytical sensitivity affects the results from WPF studies. However, the actual amount of contaminant on the Ci sample is not changed by the analytical method.
>
> * * * Because the [Ci levels are] typically very small in a WPF study, the higher sensitivity of [the PIXEA method] is necessary to get the best data.
>
> * * * The WPF protocol from the AIHA Respirator Committee recommended the use of analytical methods with sensitive detection limits. * * * Use of less sensitive analytical methods for * * * [Ci] sample[s] that result in nondetect values are not meaningful for determining true exposure. (Tr. at 413–414.)

In its post-hearing comments, 3M illustrated the value of sensitive analytical methods using the following example:

> [C]onsider three filters ''spiked with 1 μg of silicon each and analyzed by three different methods [gravimetric, atomic absorption (AA), and PIXEA]. In the case of gravimetric and AA analyses, it is certain only that the silicon mass on the filter is between 0 μg and 10 [μg] or 0 μg and 5 μg respectively. However, PIXE[A] has sufficient analytical sensitivity to ''find'' the true value of 1 μg. Because the mass of contaminants on a Ci filter is typically very small in a WPF study, the higher sensitivity of PIXE[A] is necessary to get the best data. (Ex. 19–3–1.)

Tom Nelson commented that ''[t]he analytical method must be sensitive for a WPF study. For a half facepiece respirator[,] the detection limit should be at least 1/100 of the ambient concentration'' (Ex. 18–9). Later in these comments, Nelson stated, ''The [low-concentration Ci] samples are part of the distribution of WPF samples collected during a study. These represent true measures of performance.''

Based on the evidence in the record, OSHA concludes that using sensitive analytic methods for assessing Ci samples is both necessary and appropriate. Specifically, the Agency sees no scientific basis for excluding WPF studies that used PIXEA, particularly when using the method to determine both Ci and Co. The Agency's review of the record evidence shows that a leading national organization representing industrial hygienists (i.e., the AIHA) recommends using sensitive analytic methods for assessing Ci samples. Furthermore, using sensitive analytic methods improves significantly the validity of data analyses by allowing studies to retain low Ci values, and by reducing substantially the need to use unvalidated techniques to correct low Ci values. Therefore, OSHA concludes that the data from the WPF studies used in its analyses are accurate, and that the availability of data with low Ci values improved the validity of the APFs derived from these analyses.

Large particles. Several commenters (e.g., Exs. 9–33, 9–35, 10–6, 10–37, and 10–41) postulated that larger particles (greater than one or two microns) do not penetrate a respirator's faceseal. They believed that WPF studies having large particles in the Co concentration should be excluded from OSHA's analyses. They reasoned that these large particles were being measured as part of the Co but had no chance of being measured in the Ci, and consequently were inflating the WPF values.

These commenters appear to be ignoring the possibility that half masks (both elastomerics and filtering facepieces) with faceseals that selectively filter large particles still are capable of providing an adequate level of protection. Nevertheless, OSHA notes that in one of the WPF studies used in OSHA's data analyses, Myers et al. found large particles (i.e., 10 microns in diameter) inside the facepiece, indicating that large particles are capable of penetrating a respirator faceseal (Ex. 1–64–51). Consistent with these results, Tom Nelson stated in his comments that ''[t]he particle size of contaminants in the various WPF studies in the docket range from [about] 0.5 [microns] to 14 [microns] MMAD,'' and that ''particles much larger than those that would be predicted from laboratory studies have been found inside the facepiece in WPF studies'' (Ex. 18–9). At the hearing, Nelson presented data showing that large particles enter half mask respirators, probably through breaks in the faceseal; moreover, these data demonstrate that no relationship exists between particle size and the WPF obtained for the respirator (Tr. at 146–148). The 3M Company addressed this point further, stating in its comments:

> Laboratory studies have shown that particle losses occur through fixed leaks. A faceseal leak is not accurately represented by a fixed leak, however. To perform these studies[,] assumptions were made regarding leak size, shape, and the particle size penetrating those leaks. These assumptions have been shown to be wrong. Myers has shown that large particles can be found inside the facepiece[,] much larger than could have occurred with the fixed leaks used by several researchers.[] As shown in Figure 1 [of the Myers et al. study], an analysis of particle size and the geometric mean WPF from a number of studies does not show any relationship between particle size and WPF. If the size of the particle played a role in faceseal leaks, a relationship would be evident. (Ex. 9–16.)

Based on the evidence in the record, OSHA concludes that the data in its APF analyses for half masks were the same as particle sizes found in the workplaces represented in the WPF studies. Therefore, eliminating the study data from the Agency's analyses would be unnecessary and inappropriate.

Probe bias. Probe bias refers to the misplacement of the sampling probe when taking measurements inside the respirator facepiece. Some commenters expressed concern that probe bias may have underestimated Ci in the half mask WPF studies analyzed by Dr. Brown (e.g., Exs. 9–17, 9–30, 9–35, and 10–42). These commenters suggested that OSHA reanalyze its database after applying a correction factor to account for probe bias. Tim Roberts provided a specific description of this concern when he testified:

> Respirator probe error is an issue. It's been better characterized for elastomeric type respirators than it has for filtering facepiece respirators, and we think that this needs some additional work as well, to characterize what that means when we put probes in different locations in elastomeric facepieces (Tr. at 208).

Later in the hearings, Ching-tsen Bien questioned Craig Colton of 3M on Colton's experiences with probe location while conducting filtering

facepiece WPF studies. Colton responded:

[S]treamlining that you see is similar to that in the elastomeric half-facepieces. You see it streamlining from the leak up to the mouth and nose. And so what Dr. Myers indicated in his sampling bias—not really probe bias, but the sampling bias—was that location becomes important because if your probe is flushed with the facepiece, you can miss the streamlines. So his recommendation was that the probe needs to be ideally on the midline, between the mouth and the nose, and as close to the face as possible. And so that's what we attempt to do as best as you can with the products you end up testing to meet his recommendations. (Tr. at 455–456.)

Colton also noted that, although some of his studies may show probes entering the side of the filtering facepiece, a probe extension was used to place the sampling inlet in the nose-mouth area (Tr. at 455–456). Tom Nelson explained the purpose of the probe location when he commented, ''The sampling probe is placed so that it is close to the nose and mouth. This minimizes sampling bias'' (Ex. 18–9). Warren Myers testified that, in unusual circumstances, the configuration of a half mask (including some elastomerics) requires placing the sampling probe on the side of the mask instead of the centerline between the nose and the mouth; in these cases, a study can control for sampling bias by randomly alternating the location of the probe on the right and left side of the mask (Tr. at 77).

OSHA also reviewed the 13 half mask studies analyzed by Dr. Brown. The authors of nine of these studies specifically state that the probe was located in the area of the nose and mouth. While the remaining four studies do not specify the probe's location, no evidence from this rulemaking indicates that the sampling probes were inappropriately placed. Therefore, the majority of the WPF studies, along with the new studies included in the updated database, located the sampling probe in the nose-mouth area. Of the 1,339 data points in the updated database, approximately 220 of these points (about 16%) are from the four studies in which no information on probe placement was available. OSHA believes the sampling methodology that was used in these studies was consistent with comments indicating that the optimum location for a probe is at the centerline between the nose and the mouth. At this location, the probe will sample any streamlining that occurs between a faceseal leak and the nose-mouth area, thereby detecting the maximum Ci exposure level. In addition, no analysis was submitted indicating that the data from these studies, whether corrected for probe bias or excluded altogether, would have resulted in APFs that differed from the final APFs derived from this rulemaking.

3. Summary and Conclusion

OSHA considered the comments addressing the data and study problems identified by commenters, but does not find that these comments merit rejection of the data or analyses. The studies OSHA analyzed were conducted on employees in actual workplaces who were performing their normal job duties. Consequently, the particle sizes, work rates, work times, and environmental conditions varied among these studies. The Agency has concluded that using data collected under these various conditions presents a more accurate picture of workplace use of these respirators and is a better measure of the protection provided by half mask respirators than data collected only from SWPF or other highly controlled studies.

D. Alternative Approaches

1. Alternatives Based on Non-Compliant Respirator Programs

Several commenters suggested alternative means for ascertaining APFs. While not completely disagreeing with OSHA's approach, Paul Hewett of Exposure Assessment Solutions Incorporated (Ex. 10–60) stated that OSHA should include EPF studies in its APF deliberations. He commented that EPF studies account for actual use conditions in that they factor in the time that the employee does not wear the respirator but is still exposed to atmospheric contaminants. He also believed that determination of an appropriate APF should represent respirator use in hot, strenuous jobs. Therefore, he recommended that ''OSHA should factor in real world conditions and not rely exclusively on WPF and particularly SWPF studies'' (Ex. 10–60.)

OSHA noted in the proposal that the Agency would analyze only WPF and SWPF studies since they address respirator performance exclusively (68 FR 34045). This alternative approach already has been addressed above by the Agency in its discussion of the usefulness of WPF data. The Agency has no data in the record showing that EPF studies would improve, or even complement, its analyses. Therefore, OSHA is not convinced that EPF data would increase the validity of the APFs derived in this final rule. The discussion of an EPF study by Harris et al. (Ex. 27–11; 63 FR 1167) substantiates these conclusions.

Ching-tsen Bien of LAO Consulting, Inc. (Ex. 18–5) wanted OSHA to enter into the record any available independent assessment reports (and applicable check lists) for the year prior to, and for the year of, each WPF study. Bien noted that the reports would have covered applicable program elements, and ensure that OSHA selected studies for its analyses that were in compliance with appropriate respiratory protection standards. He also requested that OSHA enter the ''selection criteria, decision matrix for each study, and the review report for these studies to the H–049C Docket'' (Ex. 18–5.)

As stated in the NPRM at 68 FR 34046, the Agency evaluated all studies used in its analyses for compliance with the requirements of OSHA's Respiratory Protection Standard (29 CFR 1910.134), as well as for completeness of the data. The Agency also compiled a list of criteria (Ex. 5–5) for evaluating each study. Accordingly, OSHA evaluated each published article or each written study report to determine whether the test subjects were trained properly, fit tested, medically evaluated, and in compliance with the requirements of the OSHA Respiratory Protection Standard. The researchers performing these WPF studies ensured that fit testing was performed on the test subjects, trained them on doffing and donning the respirator, as well as the performance of user seal checks, on the selection of proper-sized respirators, and on the other elements of a complete OSHA-compliant respirator program. These researchers did not rely on the existing workplace respirator program, but instead performed the necessary actions to ensure that the test subjects in their WPF studies met the respirator program requirements.

The WPF studies the Agency evaluated were either WPF studies that had been published previously, or were newly performed studies that were submitted during the rulemaking for inclusion in the OSHA database. OSHA did not perform these studies, and was not involved in the selection of the worksites being tested. Therefore, the Agency could not gather additional information on a worksite's respirator program that was in effect when a WPF study was performed, as Bien requested. Additionally, such information is irrelevant to the results of a WPF study since the researchers had to demonstrate compliance with the required respirator program before OSHA included the study in its database.

2. Alternatives Based on SWPF Studies

The American Chemistry Council (Ex. 10–25) stated that OSHA's APFs should be based on SWPF studies, and that the APFs derived from this rulemaking should be used only as interim values until SWPF studies could be performed. OSHA notes that basing APFs on SWPF studies, rather than on WPF studies, was recommended by a number of commenters including Organizational Resource Counselors Worldwide (ORC) (Ex. 10–27), Paper, Allied-Industrial, Chemical & Energy Workers International Union (PACE) (Ex. 10–37), and others (e.g., Exs. 9–32, 9–41, 10–6, 10–49, 9–33, 9–35, and 18–5). These commenters expressed various concerns about the WPF studies, and stated that SWPF studies permit investigators to control a number of variables (e.g., particle size, contaminant concentration, environmental conditions) that cannot be controlled in WPF studies.

SWPF studies use sensitive analytical methods, such as PIXEA, to obtain measurable Ci information. SWPF studies safely test a respirator in a high-concentration atmosphere (i.e., at the respirator's limit of protection) to generate enough penetration for the analytical method to quantify Ci results. OSHA agrees that SWPF testing permits an investigator to control factors such as particle size, contaminant concentration, temperature, and humidity. Accordingly, the Agency used data generated from all available SWPF studies in determining APFs. However, OSHA concluded that controlled SWPF studies alone are not representative of, nor can they be extrapolated readily to, typical workplaces. Standardized protocols for conducting such testing, or a methodology for extrapolating SWPF results to protection levels expected in the workplace, are not available. ORC stated, ''We advocate development of a protocol based on a combination of laboratory testing and field trials for determining expected respirator performance'' (Ex. 10–27). NIOSH also supported the use of both SWPF and WPF studies, noting, ''NIOSH agrees that the APF values resulting from OSHA's multifaceted approach to analysis of existing data provide reasonable values for the level of protection that should be expected for each class of respirators'' (Tr. at 102). NIOSH continued, ''Given this lack of complete data, the noted model-to-model variation and the imperfection in protection level measurements, the approach taken by OSHA is the best currently possible based upon available data'' (Tr. at 103). The Agency has concluded that its approach in using both WPF and SWPF studies is well supported by the rulemaking record and is appropriate for determining APFs specified in this final rule.

3. Model-Specific APFs

The Organization Resources Counselors Worldwide (Ex. 10–27), the American Chemistry Council (Ex. 10–25), and the Pharmaceutical Research and Manufacturers of America (Ex. 9–24) urged OSHA to develop model-specific APFs. Under this recommendation, each respirator model would undergo testing and be assigned a unique APF. NIOSH did not support this approach. In response to questioning by OSHA, NIOSH stated:

> This morning's expert witnesses and the questions I think clearly identified that there is variability, and because of this variability, we believe that class APFs are more appropriate and consistent with the state of the art today. In order to achieve more precise data, much, much larger data sets, including the numbers of test subjects that would have to be involved to eliminate this variability, seems impractical based upon the state of the art today. So we are for these reasons supporting class APFs, not model-specific APFs. (Tr. at 120.)

OSHA considered the use of SWPF studies in developing model-specific APFs. The Agency's review of the ORC SWPF study of PAPRs and SARs in the proposal (68 FR 34069) stated that ORC had recommended that ''the [ORC SWPF] study methodology should be the basis for determining APFs for all respiratory protective equipment regulated by OSHA'' (68 FR 34070). However, only a few SWPF studies are available that measured the performance of a few PAPRs and SARs. Model-specific SWPF studies for the remaining respirator classes have not been performed. In addition, the respirator protection community has not agreed on a standard protocol for conducting SWPF studies, or how the results relate to APFs. These issues would have to be addressed before it would be possible to use model-specific APFs. Also, insufficient data are available to set model-specific APFs, and developing the methodology and conducting the testing could take years. OSHA believes that completing the APF rulemaking with the information available now is necessary. Delaying this rulemaking to develop model-specific APFs will result in employers not knowing what respirators to select and, consequently, employees will not receive adequate protection. Based on the rulemaking record, the Agency has concluded it will determine an APF for each respirator class using information from existing WPF and SWPF studies.

4. Nicas-Neuhaus Model

Several commenters (Paul Hewett, Ex. 10–60; Bill Kojola, AFL–CIO, Ex. 17–2; and NIOSH, Ex. 17–7–1) asked OSHA to consider a February 2004 article by Nicas and Neuhaus (Ex. 17–7–2) that applies a model for analyzing WPF data to establish APFs. The Nicas-Neuhaus article is based on the variability of WPFs (i.e., the variability between different test subjects, as well as the variability within a test subject resulting from repeated donnings of the respirator). APFs based on this Nicas-Neuhaus model require that WPFs for 95% of all workers be above the APF 95% of the time. However, the established method for deriving APFs used by OSHA, NIOSH, and ANSI sets the APFs at the 95% percentile of the between-subject WPFs. By controlling for within-subject variability, APFs based on the Nicas-Neuhaus model will always be smaller than APFs derived using the established method.

To account for within-subject variability, the Nicas-Neuhaus model requires repeated measurements on each test subject which is not required by the established method. Consequently, most available WPF studies did not include multiple measures on individual test subjects, resulting in an extremely limited database for applying the Nicas-Neuhaus model. Nicas and Neuhaus were able to analyze only seven half mask respirator studies, comprising a total of 310 data pairs. In comparison, the database established and analyzed by OSHA for determining the final APFs contains 1,339 data pairs from 16 half mask respirator studies. Also, OSHA had rejected for its analyses several of the WPF studies used by Nicas and Neuhaus in developing their model because these studies did not meet the Agency's selection criteria.

The Nicas-Neuhaus model is a significant departure from established and accepted practices used by the respirator research community, The Agency has concluded that there are insufficient data to fully evaluate the proposed model, and to incorporate it in setting APFs.

5. Other Alternative Approaches

Sheldon Coleman recommended that OSHA select a panel from AIHA members to review the APF data and OSHA's APF determinations (Ex.10–40). OSHA believes this rulemaking has provided ample opportunity for comment from the public and professional associations. Further analysis would delay the development

of the final APFs, and is unnecessary as the rulemaking record is sufficient to determine APFs.

6. Summary and Conclusion

OSHA is relying on science, data, and established quantitative analyses to establish the final APFs for filtering facepiece and elastomeric half mask respirators, and is limiting its statistical analyses to those procedures that use the selected data to the fullest extent possible. Reliance on alternative approaches is not supported by the evidence in the record. The data to use such approaches are not currently available, and require either a different set of data or a standardized testing protocol that requires testing every respirator model. OSHA concludes that the available data and analytic methods used in determining the final APFs are appropriate.

E. Updated Analyses

1. Review of the Original WPF and SWPF Databases

In developing its proposed rule regarding APFs for respirators, OSHA contracted with Dr. Kenneth Brown to investigate possible approaches for evaluating respirator performance data from WPF and SWPF studies. To assist Dr. Brown in this evaluation, the Agency reviewed the available studies and created a database from these studies. In deciding which WPF studies to include in this database, OSHA evaluated studies with respect to compliance with the requirements of its Respiratory Protection Standard (29 CFR 1910.134) and the completeness of the data. In doing so, the Agency excluded WPF studies of gas or vapor contaminants due to the limited number of these studies and the difficulties in conducting and interpreting data from such studies (68 FR 34046). During the rulemaking, OSHA received new WPF data on half mask respirators. No new SWPF data were submitted for half masks, and no new WPF data were submitted for higher-performing respirators.

In the NPRM, Dr. Brown initially divided negative pressure half mask air-purifying respirators (APRs) into five classes. Four classes of filtering facepiece half masks were derived based on whether a respirator had adjustable head straps, an exhalation valve, a double-shell construction, or a foam-ring faceseal. Elastomeric half masks were grouped together in a single fifth class. (See Ex. 5–1 for details on respirator class definitions.) In his analyses, Dr. Brown found no clear evidence of a difference in WPFs across these different classes. In particular, he found that elastomeric half masks performed substantially the same as filtering facepieces. From the original database of 917 WPF measurements for negative pressure half mask APRs, 36 WPF measurements (3.9%) were found to have an APF less than 10, and 96.1% at 10 and above.

2. Updated OSHA Database on APRs

In the NPRM, OSHA asked if any more WPF or SWPF studies should be considered in setting APFs. Data from four additional studies were submitted for OSHA's evaluation during the comment period, and an updated half mask database was compiled using these studies (Ex. 20–2). During the post-hearing comment period, the 3M Company provided OSHA with data from two additional WPF studies of filtering facepiece respirators. One study (Colton and Bidwell, Ex. 9–16–1–1) measured the performance of three different types of filtering facepiece respirators used by 21 workers at a lead-battery manufacturing plant. One respirator (3M 8710) was approved under 30 CFR part 11, and two respirators were N95 particulate respirators (3M 8210 and 3M 8510) approved under 42 CFR part 84. Up to three WPF measurements were made with each worker on each respirator type, for a total of 143 WPF measurements. The data submitted to OSHA from this study are provided in Appendix A of Dr. Crump's report on the reanalysis of the half mask database (Ex. 20–1).

The second set of WPF data provided by 3M Company was from a study by Bidwell and Janssen (Ex. 9–16) on the performance of a ''flat-fold'' filtering facepiece respirator conducted at a concrete-block manufacturing facility. Repeated measurements of WPFs were made on 19 workers, and each sample was analyzed for both silicon and calcium. A total of 73 Co and 73 Ci air samples were collected, for a total of 146 WPF measurements. Eleven of the 146 Ci measurements were non-detectable (all coming from silicon exposures).

The third study added to the database was a WPF study by Colton (Ex. 4–10–4) on the performance of an elastomeric half mask respirator. This study had been submitted earlier to OSHA, but was not included in the NPRM database since it was received too late for inclusion in Dr. Brown's original analysis. The data from this study, conducted in the battery-pasting and assembly areas of a battery manufacturing plant, have now been added to OSHA's updated database. Also, three additional data points from a study by Myers and Zhuang (Exs. 1–64–50 and 3–14) were added to the updated database. These data were collected in a concrete-block facility while elastomeric half mask respirators were worn as protection against calcium and silicon particulates.

The updated OSHA half mask database (Ex. 20–2), summarized in Table III–1, contains 1,339 WPF measurements—760 collected from filtering facepiece respirators, and 579 from elastomeric respirators. The database originally analyzed by Dr. Brown contained 917 WPF measurements—471 from filtering facepieces, and 446 from elastomerics.

TABLE III–1.—SUMMARY OF OSHA WPF DATABASE FOR APRS

Respirator class	Figure 1 No.	Constituent sampled	Author	Exhibit No.	Number samples per study	Number samples per class
Filtering Facepiece Respirators						
1	1	Asbestos	Dixon	1–64–54	26	474
1	2	Fe	Myers	1–64–50, 3–14	21	.....
1	3	Mn	Wallis	1–64–70	69	.....
1	4	Al	Colton	1–64–15	23	.....
1	5	Al	Johnston	1–64–34	13	.....
1	6	Si	Johnston	1–64–34	15	.....
1	7	Ti	Johnston	1–64–34	18	.....
1	8	Pb	Colton & Bidwell	9–16–1–1	143	.....
1	9	Si	Bidwell & Janssen	9–16	73	.....

TABLE III–1.—SUMMARY OF OSHA WPF DATABASE FOR APRS—Continued

Respirator class	Figure 1 No.	Constituent sampled	Author	Exhibit No.	Number samples per study	Number samples per class
1	10	Ca	Bidwell & Janssen	9–16	73	
3	11	Pb	Myers	1–64–51, 3–12	19	162
3	12	Zn	Myers	1–64–51, 3–12	20	
3	13	Fe	Colton	1–146	31	
3	14	Mn	Colton	1–146	32	
3	15	Ti	Colton	1–146	28	
3	16	Zn	Colton	1–146	32	
4	17	Pb	Colton	1–64–16	62	124
4	18	Zn	Colton	1–64–16	62	
Elastomeric Respirators						
5	19	Asbestos	Dixon	1–64–54	46	579
5	20	B(a)Pyrene	Gaboury	1–64–24	18	
5	21	Pb	Lenhart	1–64–42	25	
5	22	Pb	Myers	1–64–51, 3–12	46	
5	23	Zn	Myers	1–64–51, 3–12	46	
5	24	Fe	Myers	1–64–50, 3–14	30	
5	25	Cr	Myers	1–64–52, 4–5	35	
5	26	Ti	Myers	1–64–52, 4–5	33	
5	27	Cd	Colton	1–64–13	68	
5	28	Pb	Colton	1–64–13	57	
5	29	Pb	Dixon & Nelson	1–64–19	42	
5	30	Pb	Colton	4–10–4	130	
5	31	Calcium	Myers	1–64–50, 3–14	3	
Grand Total						1339

3. Variability of the APF Data

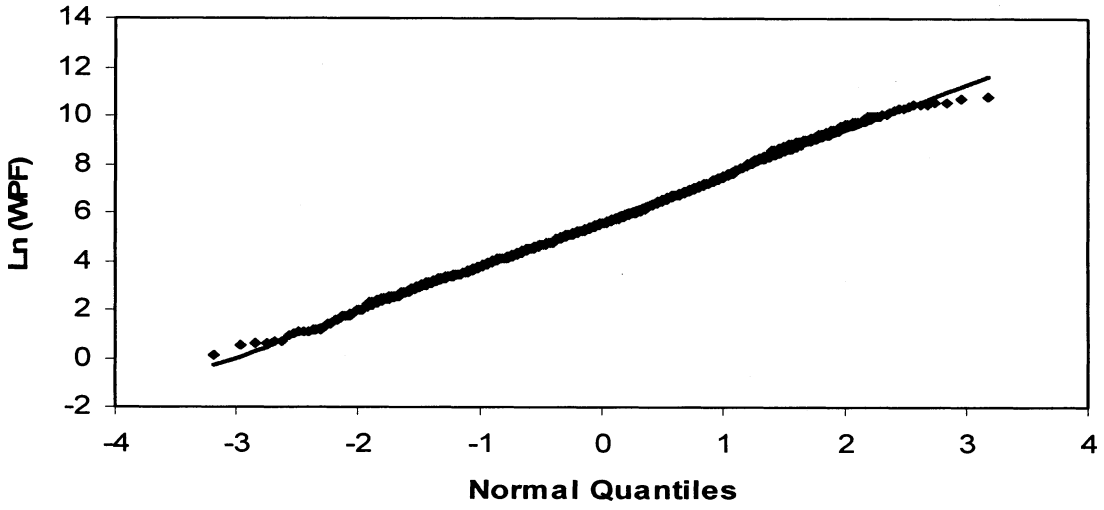
Several commenters (Faulkner, Ex. 9–40 and Kojola, Ex. 9–27) criticized WPF studies because the studies demonstrated what they considered to be a high degree of variability of the data. However, it is inappropriate to describe the variability of the data with terms such as ''high'' or ''low'' because no recognized standard exists by which to characterize variability. The variability of the data should reflect the true variability in respirator fit and performance experienced by workers who wear respirators. It is reasonable to expect variability because respirator performance is determined by many factors, including: Respirator type, the workers' face shapes, work practices and effort levels, and workplace conditions such as temperature and humidity. Thus, the key issue is not whether the data have too much or too little variability, but whether the variability in the data reflects the true variability in respirator performance under actual workplace conditions.

A logarithmic transformation was applied to the WPF data set to adjust for a skewed distribution and extreme outliers, both of which are common with ratio-based data. As Figure III–1 shows, when a logarithmic transformation is applied to OSHA's WPF database, the data closely follow a standard normal distribution. Therefore, OSHA's analysis of the data, which assumes that WPFs are log-normally distributed with a geometric mean of 307 and a geometric standard deviation of 7.1, appropriately accounts for the variability in the WPF data.

Figure III-1

Logarithm of WPFs for Updated Data Base

Versus Quantiles of the Standard Normal Distribution



4. Analysis of Updated Database on APRs

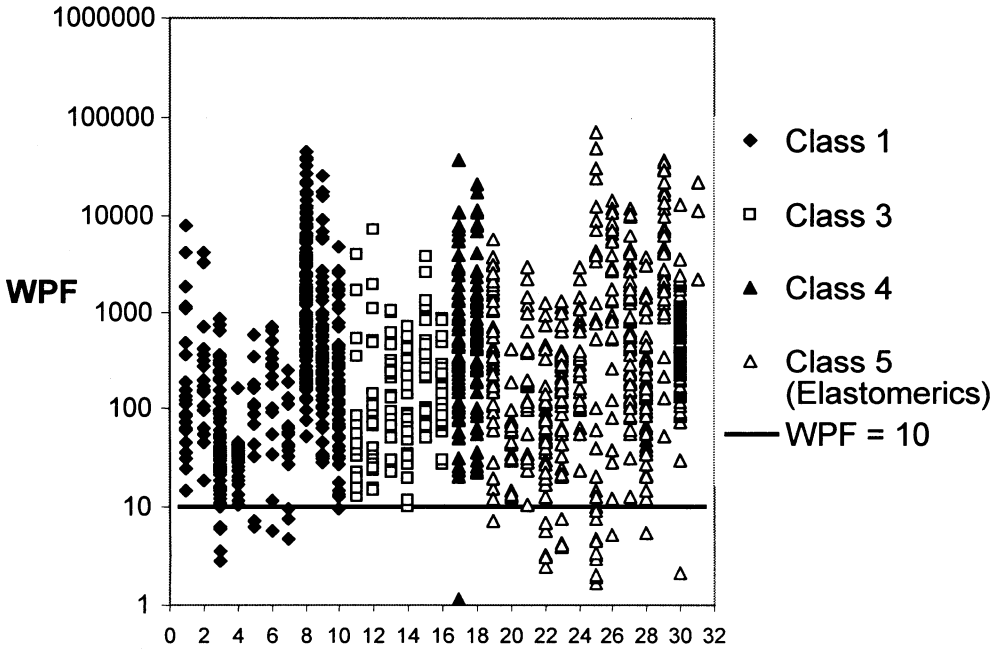
OSHA proposed an APF of 10 for negative pressure half mask APRs, including both filtering facepieces and elastomerics (68 FR 34096). Accordingly, the present analysis focuses on estimating this APF, particularly the percent of WPFs that are less than 10.

Figure III–2 displays the 1,339 WPF values, grouped by respirator class,[1] study, and contaminant. Each column of data points in the figure corresponds to a row number listed in column 2 of Table III–1. This figure shows that more WPFs for elastomerics are less than 10 than was the case for filtering facepieces, even though a much larger proportion of these WPFs are from filtering facepieces.

[1] Includes four of the five classes originally determined in the analysis conducted for OSHA by Dr. Ken Brown; no data were available for Class 2. Dr. Brown characterized disposable half marks according to combinations of the following four design characteristics: (1) Adjustable head straps, (2) presence of an exhalation valve, (3) double shell construction, and (4) foam ring liner. Class 1 has none of the four design characteristics. Class 2 has design characteristics (1) and (3). Class 3 has design characteristics (1) through (3). Class 4 has all four of the design characteristics. Class 5 consists of all elastomeric half masks.

Figure III-2

Graph of WPFs by Study



''Figure 1 Number'' from Table III-1

Figure III–2 also shows that differences exist between WPFs measured in different studies, even among respirators of the same type. For example, both the Colton (Ex. 1–64–15, #4 in Figure 2) and the Colton and Bidwell (Ex. 9–16–1–1, #8 in Figure 2) studies were conducted by some of the same investigators, and both studies used Class 1 filtering facepieces. Nevertheless, all but one of the 23 WPFs in the Colton study (Ex. 1–64–15) are less than 40, while all 143 of the WPFs from the Colton and Bidwell study (Ex. 9–16–1–1) are at least 58 or higher. However, the Colton study evaluated respirators approved under 30 CFR part 11, whereas the Colton and Bidwell study evaluated respirators approved under 42 CFR part 84.

Table III–2 shows the percentages of WPFs less than 10 by respirator class, along with the 90% statistical confidence intervals on these percentages. The exact confidence intervals are based on a binomial distribution for counts. The percentage of WPFs less than 10 is less than 5% for all four classes, and the 90% statistical confidence interval on this percentage excludes 5% for every class except elastomerics. Also, elastomerics had the highest percentage of WPFs less than 10 (4.5%). Over all classes, 38/1339, or 2.8%, of WPFs were less than 10 (90% confidence interval: 2.1%, 3.7%). The upper bound of this two-sided 90% confidence interval, 3.7%, is equivalent to a one-sided 95% upper statistical confidence bound on the true proportion of WPFs less than 10. This bound may be interpreted as follows: assuming the database is representative of workplace WPFs in general (more specifically, that the data approximate a random sample of WPFs from all workers who use respirators), when the true proportion of WPFs less than 10 is 3.7%, the probability of observing 2.8% or less (the observed percentage) would be $1 - 0.95 = 0.05$. Thus, under these assumptions, it is unlikely that the true proportion of WPFs less than 10 is as high as 3.7% (and extremely unlikely to be as high as 5%).

TABLE III–2.—PERCENT OF WPFS LESS THAN 10 BY RESPIRATOR CLASS

	Total n	n < 10	Percent	(90% CI)
Class 1	474	11	2.3	(1.3%, 3.8%)
Class 3	162	0	0.0	(0.0%, 1.8%)
Class 4	124	1	0.8	(0.0%, 3.8%)
Class 1–4 (Filtering Facepieces)	760	12	1.6	(0.9%, 2.5%)
Class 5 (Elastomerics)	579	26	4.5	(3.2%, 6.2%)
Total	1339	38	2.8	(2.1%, 3.7%)

In the earlier database analyzed by Dr. Brown, 3.9% of the WPFs were less than 10. By comparison, among the 422 WPFs added to the database, only 2/422 (0.5%) were less than 10. Thus, the new data indicate a higher level of protection by APRs.

In addition to the 1,339 WPFs in the updated OSHA database, an additional 403 WPFs from 12 studies were coded by OSHA but were not included in either the present database or the one analyzed by Dr. Brown. These data were omitted for various reasons, including too few WPF measurements in a study and problems with the quality of the studies (i.e., study did not meet requirements of OSHA's Respiratory Protection Standard). In addition, as noted earlier, OSHA did not include data from studies in which exposures were predominantly to a gas or vapor. To determine the effect that excluding these data had on the results in Table III–2, the 403 WPFs were added to the updated data base of 1,339 WPFs (for a total of 1,742 WPFs), and the overall fraction of WPFs less than 10 was computed (Table III–3). The percent of WPFs less than 10 was 4.0% (90% confidence interval: 3.2%, 4.8%). Thus, even with no data exclusions, the overall percent of WPFs smaller than 10 is less than 5%, and the 95% statistical upper confidence bound is also less than 5% (i.e., 4.8%).

TABLE III–3.—COMPARISON OF PERCENT OF WPFS LESS THAN 10 IN STUDIES USED AND NOT USED BY OSHA

	Total n	n < 10	Percent	(90% CI)
Used	1339	38	2.8	(2.1%, 3.7%)
Unused	403	31	7.7	(5.6%, 10.2%)
Both Used and Unused	1742	69	4.0	(3.2%, 4.8%)

Consistent with the WPF studies used in its analysis, OSHA adopted the point estimate of the lower 5th percentile of WPF or SWPF data to establish APFs. Table III–4 shows the point estimate of the 5th percentiles of WPFs for different categories of respirators using the updated database. The 5th percentile of WPFs for filtering facepieces as a whole was 18.1, and for elastomerics it was 12.0. In both cases, the point estimate was above the APF of 10 proposed by OSHA. Since several commenters expressed concern about whether sufficient evidence is available to support an APF of 10 for filtering facepieces, OSHA also calculated 90% confidence intervals for each point estimate. (As noted earlier, the lower limit estimate of a two-sided 90% confidence interval is equivalent to a one-sided 95% lower confidence bound.) The lower 95% confidence bounds for the 5th percentile of WPFs exceeded 10 for all classes combined, and, with the exception of elastomerics, for each individual class. The confidence limits for the 5th percentiles were computed using the method for distribution-free confidence intervals of Hahn and Meeker (1991), as implemented in SAS (2001). Therefore, OSHA concludes that sufficient statistical evidence is available to justify an APF of at least 10 for filtering facepieces.

TABLE III–4.—FIFTH PERCENTILES OF WPFS BY RESPIRATOR CLASS

	5th percentile	(90% CI)
Class 1	14.8	(12, 18)
Class 3	19.7	(15, 24)
Class 4	27.0	(22, 49)
Class 1–4 (Filtering Facepieces)	18.1	(15, 22)
Class 5 (Elastomerics)	12.0	(7, 14)
Total	14.7	(13, 18)

5. Comparison of Respirators Approved Under 30 CFR Part 11 Versus 42 CFR Part 84

Several commenters expressed concern that the majority of WPF and SWPF studies were conducted on respirators certified by NIOSH under requirements in 30 CFR 11, instead of the newer NIOSH certification procedure described in 42 CFR 84. While these commenters did not explain the basis of their concern, two major studies were submitted that examined the performance of 42 CFR 84-approved respirators. The 3M study by Colton and Bidwell (Ex. 9–16–1–1) evaluated one respirator approved under 30 CFR 11, and two respirators approved under 42 CFR 84. In this study, WPFs were measured on up to nine different occasions for 21 workers (143 total measurements), 17 of whom used each type of respirator on at least one occasion, with none of them using the same type respirator on more than three occasions. Thus, this study provides an opportunity for comparing the performance of respirators approved under the two standards. Table III–5 shows the performance of these three respirators using three methods: the proportion of samples with Ci non-detects, the distribution of the 30 smallest WPF values among the three respirators, and the geometric mean of WPFs. The two 42 CFR 84-approved respirators performed similarly with each of these methods, and they both performed better than the 30 CFR 11-approved respirator (see Table III–5).

TABLE III–5.—PERFORMANCE OF THE 30 CFR PART 11 RESPIRATOR (3M 8710) AND THE 42 CFR PART 84 RESPIRATORS (3M 8511 AND 3M 8210)

	Inside-the-mask non-detects	Dist. of 30 smallest WPF	WPF geometric means [1]
3M 8710	5/49	15	792
3M 8511	23/47	7	2506
3M 8210	19/47	8	2405

[1] Modeled assuming log-normal distribution with non-detects set at detectin limit.

The geometric means of WPFs of the 42 CFR 84 respirators were similar (2506 and 2405), and were significantly ($p < 0.0001$) higher than the geometric mean of the 30 CFR 11 respirator (792). This comparison was made using a repeated measures analysis that accounted for dependence among different samples collected from the same worker, assumed log-normally distributed WPFs, and set non-detects at the detection limit (which should minimize differences between the two respirator types). All three respirators performed well in this study, with the smallest of the 143 WPFs being 52, well above the APF of 10 proposed by OSHA.

When the 146 WPF measurements from the Bidwell and Janssen study (Ex. 9–16) (that assessed the 3M 9211 respirator approved under 42 CFR 84) are added to the 94 WPFs from the Colton and Bidwell study (Ex. 9–16–1–1), 240 WPFs in the OSHA database are from 42 CFR 84 respirators. None of these WPFs was less than 10 (0/240). This finding, along with the evidence that 42 CFR 84 respirators performed better than 30 CFR 11 respirators in the same study, suggests that the new filtering facepiece respirators certified under 42 CFR 84 may perform better than the respirators relied on by OSHA for its analyses, which consisted mainly of respirators approved under 30 CFR 11. Because the respirators approved under 42 CFR 84 outperformed those respirators approved under 30 CFR 11, which were adequately protective, OSHA is confident current workers will be well protected by the respirators approved under 42 CFR 84.

6. Methodology of Evaluating Overexposure

Another method to assess the appropriateness of an APF is to determine whether an overexposure occurs (Ex. 10–17). The Agency reviewed relevant studies on this subject cited by several commenters (Exs. 9–16, 9–22, and 10–17–1) to determine if such an analysis would provide useful information on filtering facepiece and elastomeric half mask respirators.

Two major studies (Exs. 9–16–1–9 and 4–21) address the likelihood that half mask respirators will not sufficiently reduce occupational exposures to airborne contaminants. In the first of these two studies (Nelson *et al.*, Ex. 9–16–1–9), the authors evaluated the risk of overexposure for selected APFs using Monte Carlo simulation modeling. For a half mask respirator with an APF of 10, the calculations indicated a low risk of being exposed above an occupational exposure limit (OEL), with mean exposures being controlled well below an OEL. In the second article by Drs. Myers and Zhuang (Ex. 4–21), ambient (Co) and in-facepiece exposure monitoring data (Ci) from studies of worker exposures in foundry, aircraft-painting, and steel-manufacturing industries were compared with the OSHA PEL for single-substance exposures. The 5th percentiles of the protection factor (Co/Ci) data from each study were calculated. The authors used a new binomial analysis of likelihood of successes (no overexposure) and failures (overexposures). Their calculations indicate, for both half mask elastomeric and filtering facepiece respirators, that the <5% of workers who fail to achieve an APF of 10 are still being protected.

OSHA considered Nelson's analysis along with the findings of Myers and Zhuang when it conducted its own analysis. Accordingly, the Agency was persuaded to quantify the probability of overexposure by applying the Myers and Zhuang binomial analysis to OSHA's updated database. OSHA's expert, Dr. Gerry Wood, performed the analysis and presented his results in a report (Ex. 20–3) described below. The updated OSHA half mask database (Ex. 20–2) used in this analysis contains 1,339 WPFs from studies with both filtering facepiece half mask respirators (760 WPFs) and elastomeric half mask respirators with cartridge filters (579 WPFs). This database also contains Co and Ci measurements (expressed in $\mu g/m^3$), with asbestos fiber counts converted as follows: 1 fiber/cm^3 = 30 $\mu g/m^3$); these measurements permit binomial analysis of overexposure through calculation of hazard ratios (HR).

The following 8-hour TWA PELs were used to calculate HR = Co/PEL for this study (see Table III–6).

TABLE III–6.—8-HOUR TWA PELS USED TO CALCULATE THE HAZARD RATIOS

Analyte	PEL (mg/m^3)
Benzo(a)pyrene	0.2
Lead	0.05
Zinc	15
Iron	10
Chromium	0.5
Titanium	15
Manganese	5
Aluminum	15
Asbestos	0.003 (0.1 fiber/cm^3)
Silica	10
Cadmium	0.005
Calcium	15

Values for individual WPFs then were plotted against HR as illustrated in the figures of the Myers and Zhuang reference (Ex. 4–21, Figure 1, page 798, and Figure 2, page 799). The same reference lines and labels were used, but the scales were expanded to include all data in the OSHA database.

Figure 1 below shows the plot of all data for both filtering facepieces and elastomerics. The line labeled CD represents WPF = 10; 38 (2.8%) of the 1,339 data points fell below this line and five data points (0.37%) fell within the triangle defined by the letters ABK; Myers and Zhuang (Ex. 4–21) label this triangle as ''Inadequate Protection, Overexposure,'' which corresponds to the region in which Ci exceeds the PEL.

Figure 1. All Half Mask Respirators

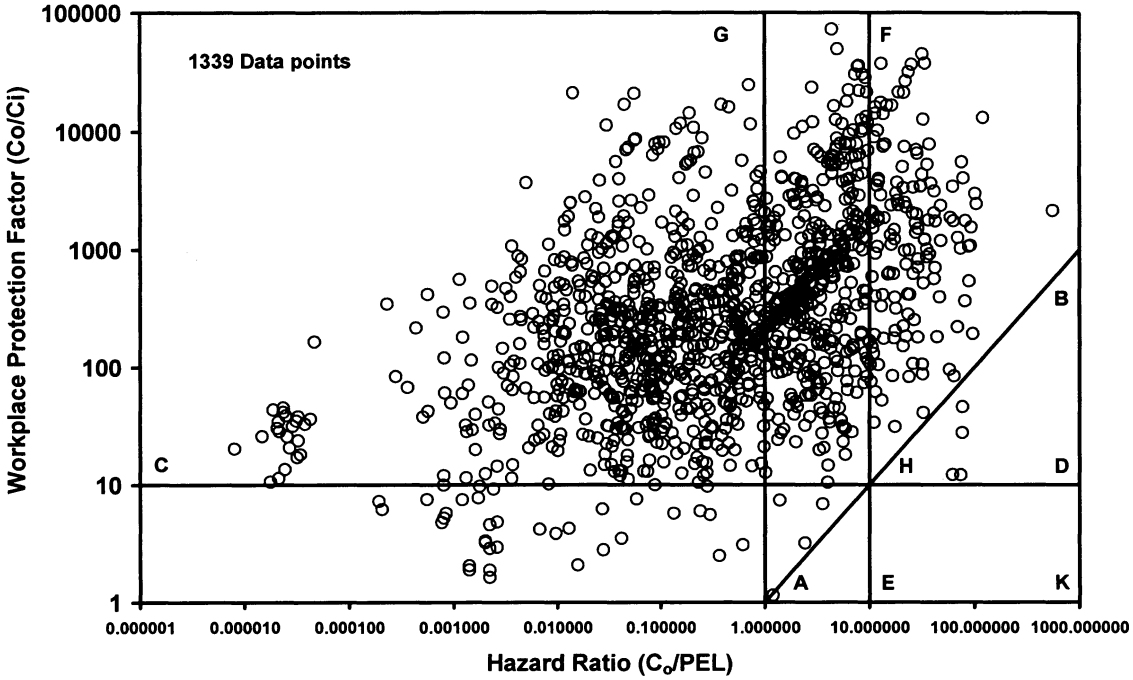
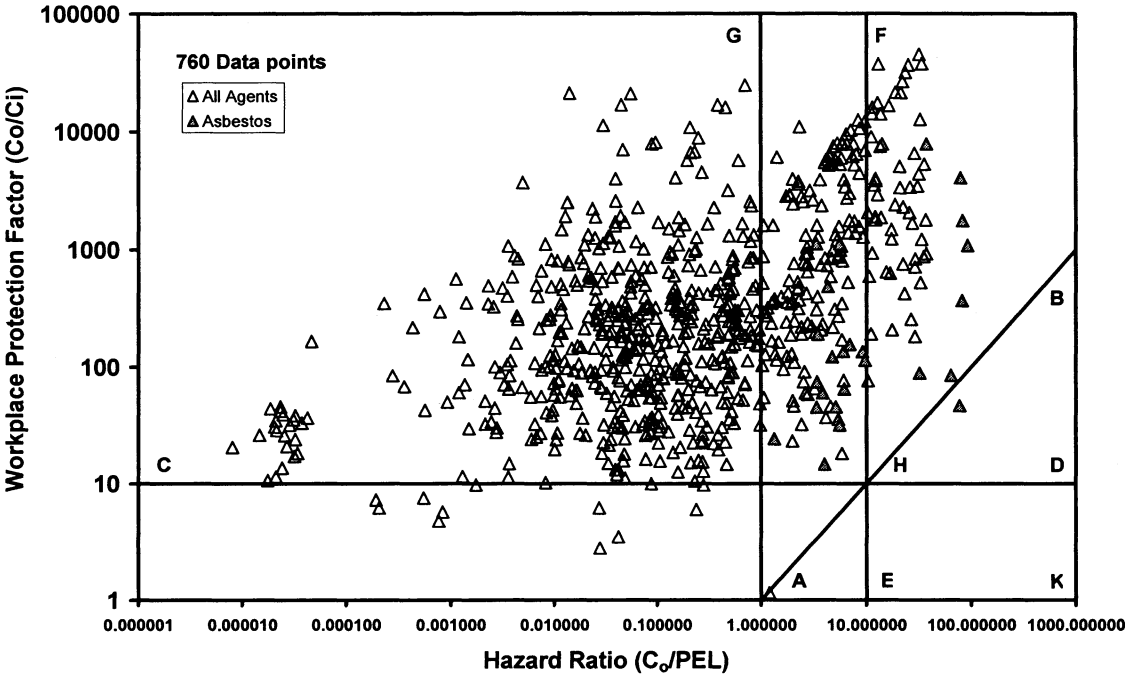


Figure 2 shows the same plot for studies using filtering facepieces only. Twelve data points (1.6%) are below the WPF = 10 line. Two of these twelve data points equal WPF = 10 when rounded off to the nearest whole number. Only 2 (0.26%) of the points are within the ABK overexposure region. The data point in the A corner (from a study by Colton (Ex. 1–64–16, CL4.15.Pb)) represents a Co just above the lead PEL (HR = 1.20) that, with a WPF = 1.15 (almost no protection), gave a Ci = 1.04 * PEL; this value represents an inside-the-mask exposure just barely higher than the PEL. The only other data point in the over-exposure region is from the asbestos (PEL–0.1 fiber/cm^3) study by Dixon (Ex. 1–64–54, CL1.2.Asb) which corresponds to HR = 77, WPF = 47, and a Ci = 1.6 * PEL, (or 0.16 fiber/cm^3).

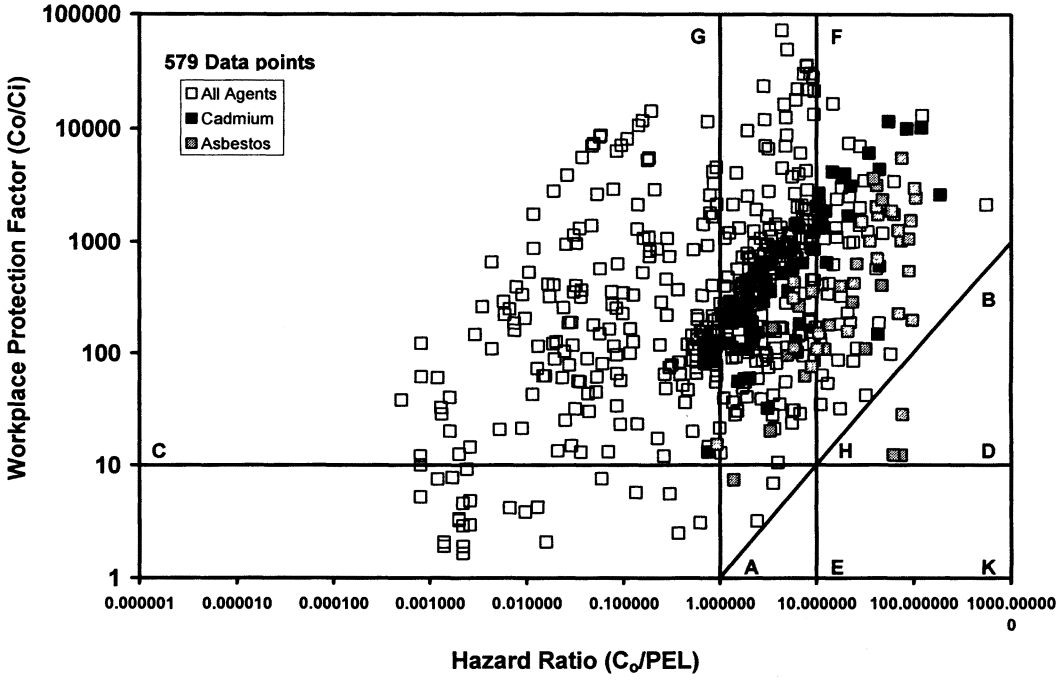
Figure 2. Filtering Facepiece Respirators (PELs since August 1994)



If the MUC is defined as MUC = APF × PEL, and an APF = 10 is assumed, then data points in the triangle labeled AHE represent overexposures. With one data point in this triangle, filtering facepieces are 99.4% effective in protecting employees at an APF = 10 and an MUC = 10 × PEL (i.e., 160 of 161 data points in the AGFE area, with an HR ranging from 1 to 10, are outside the triangle (AHE) that represents diminished protection).

Figure 3 shows the same plot for the elastomerics. Of these 579 data points, 26 (4.5%) fall below WPF = 10. Three data points (0.5%) in the ABK overexposure triangle are from an asbestos study by Dixon (Ex. 1–64–54, CL5.2.Abs). However, no data points of 265 in the AGFE area fall within the AHE triangle, indicating that all of these respirators provided protection at APF = 10 × PEL.

Figure 3. Elastomeric Respirators (PELs since August 1994)



Figures 4 and 5 demonstrate that both filtering facepiece and elastomeric respirators maintain the level of employee protection found in Figures 2 and 3, even when the data are plotted using the higher PELs specified by the older OSHA asbestos standard (pre-August 1994) and cadmium standard (pre-April 1993). The combined data for both Figures 4 and 5 show that filtering facepieces had only one data point of 160 (with an HR ratio of 1 to 10) in the overexposure area (i.e., the AHE triangle), while none of the 241 data points for elastomeric respirators fell into this area. Therefore, Figures 4 and 5 and Figures 2 and 3 demonstrate that both filtering facepiece and elastomeric respirators afford employees effective protection against two different exposure levels of asbestos and cadmium.

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Figure 4. Filtering Facepiece Respirators (PELs before August 1994)

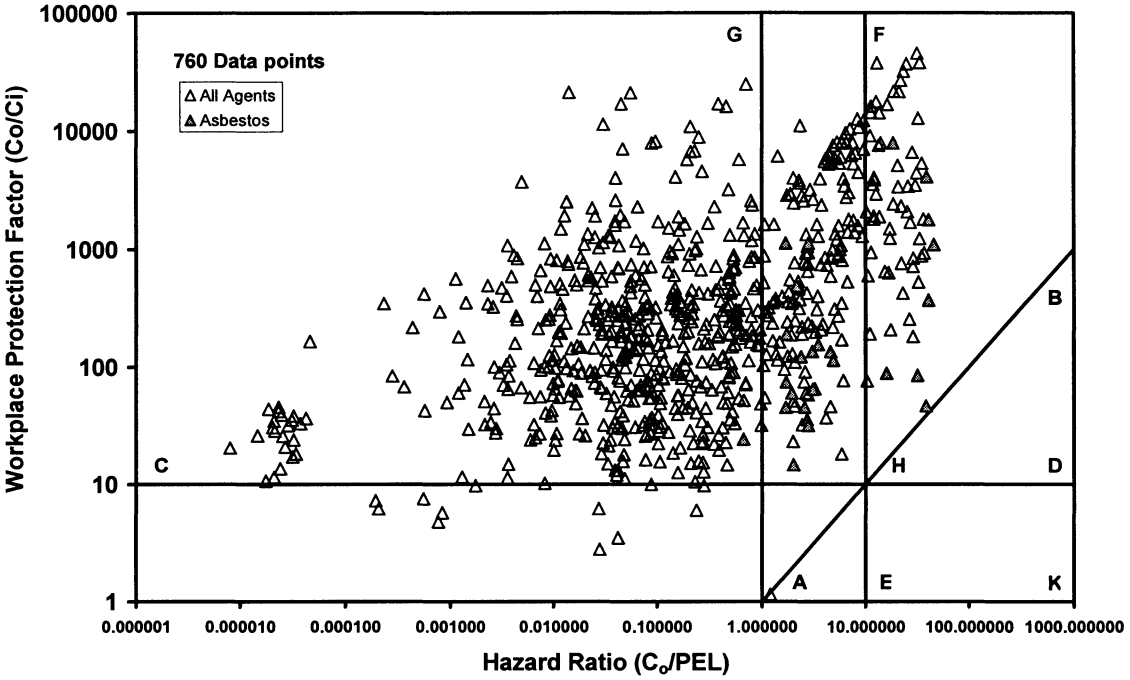
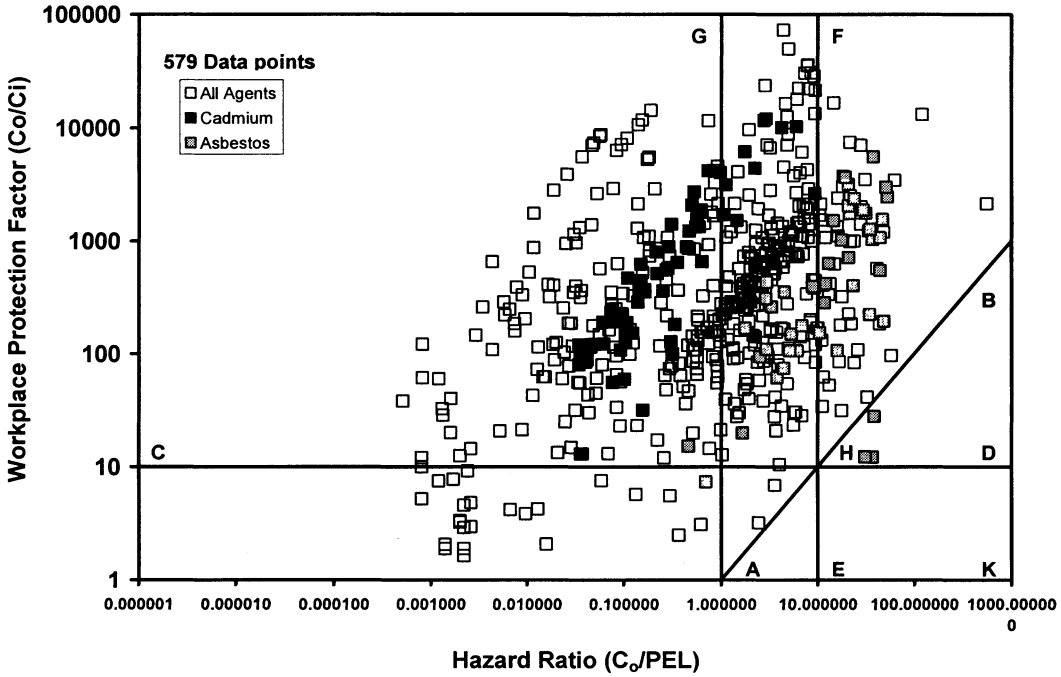


Figure 5. Elastomeric Respirators (PELs before April 1993)



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7. Summary of Quantitative Analyses of the Updated Database

First, OSHA's database includes the best available data. As part of the APF rulemaking process, the Agency conducted a metaanalysis of data collected from numerous scientific studies related to APFs. OSHA established criteria that were used to evaluate each study's design and data quality to assure that the database included only the most valid data. The Agency, at each step in the rulemaking process, called on participants to identify additional studies to augment the dataset or to discuss alternative methods of analysis. In response, a number of commenters expressed these concerns about the data analysis: The statistical treatment minimized the true

differences between elastomeric and filtering facepieces, and there was too much variability in the data. In all cases, concerns raised by commenters about the composition of the dataset used in the metaanalysis, or the statistical methods used to conduct the analyses, were unsubstantiated by evidence submitted to the record despite repeated requests by OSHA for either specific examples or additional evidence.

Second, the best available data support an APF of 10 for half mask elastomerics and filtering facepieces. The final APF half mask database consists of 1,339 data points from 16 different studies, which represents a data increase of 46% over the 917 data points initially available for analysis in the proposal. The full data set indicates: (a) The precise APF for filtering facepieces is 18.1, with a 90% confidence interval between 15 and 22; (b) the precise APF for elastomerics is 12.0, with a 90% confidence interval between 7 and 14; and (c) that a greater percentage of elastomerics failed to achieve an APF of 10 (4.5%) than filtering facepieces (1.6%). In both cases, fewer than 5% of the respirators failed to achieve an APF of 10, which is the maximum failure rate historically allowed by both OSHA and other standards-setting bodies.

Third, OSHA substantiated its previous analysis by adding to its updated database 403 data points that were excluded originally because they did not meet OSHA's selection criteria and reanalyzing the database. This additional analysis also supports an APF of 10 for both types of respirators, with the results being highly similar to the analysis based on the best-available data.

Fourth, new studies submitted during the rulemaking allowed OSHA to compare the performance of similar respirators that were certified under both NIOSH's old (30 CFR 11) and new (42 CFR 84) certification standards. The 42 CFR 84 respirators achieved a WPF that was better than the 30 CFR 11 respirators. This finding is significant because the majority of the WPF studies, and the only studies in OSHA's original data set, were conducted on respirators certified under 30 CFR 11. Thus, the improved performance of 42 CFR 84 respirators indicates that these respirators are likely to be even more protective of worker health than an APF of 10 as provided for in the final rule.

OSHA also addressed the issue of overexposure among workers. In doing so, it reviewed the respirator literature and performed an analysis of overexposure risk using filtering facepiece or elastomeric respirators. Based on this risk analysis, OSHA concluded that workers participating in effective respirator programs had an extremely low risk of overexposure.

In conclusion, the extensive quantitative analyses of the databases clearly indicate that both filtering facepieces and elastomeric respirators are capable of achieving an APF of 10. The results demonstrate that no statistical justification exists for assigning an APF of less than 10 to either of these two types of respirators. Finally, the results show that an APF of 10 is an underestimate of the true protection provided by both types of respirators. Therefore, the final APF of 10 determined by this rulemaking provides employees who use respirators with an extra margin of safety against airborne contaminants.

F. Summary of Studies Submitted During the Rulemaking

1. Additional Studies Used in the Updated Analyses

OSHA found the studies discussed in this section to be of sufficient quality for inclusion in its APF analyses.

Bidwell and Janssen study (Exs. 9–16–1–1 and 9–16). J. O. Bidwell and L. Janssen of 3M gave a presentation at the May 2003 American Industrial Hygiene Conference and Exposition (AIHCE) on a workplace protection factor study they performed in a concrete-block manufacturing plant with workers using a NIOSH-approved N95 flatfold filtering facepiece respirator. The filtering facepiece respirator tested was the 3M Particulate Respirator 9211, approved by NIOSH under the 42 CFR 84 respirator certification standards. The authors measured silicon and calcium exposures to 19 workers in the bagging and block-handling areas of the plant. In the bagging area, workers placed bags over cement-dust chutes for filling, and then transferred the bags to pallets. In the other areas of the plant sampled by the authors, workers handled concrete blocks, swept and shoveled dust and block pieces into containers, and cleaned out mullers with chipping tools. The workers were informed of the purpose and procedures of, and their role in, the study, and were provided with instructions on proper donning, fitting, and user seal check procedures, as well as respirator operation. In addition, the workers had to pass a Bitrex® qualitative fit test that followed the fit test protocol described in OSHA's Respiratory Protection Standard prior to study participation. They also had to be clean shaven. They were observed by the authors in the workplace on a one-on-one basis throughout the sampling periods.

The inside-the-facepiece sampling train consisted of a 25-mm three-piece cassette with a 0.8-micron pore-size polycarbonate filter with porous plastic back-up pads for collecting the inside samples. For sampling purposes, a Liu probe was inserted opposite the mouth near the midline of the respirator. It projected one centimeter into the facepiece. The sampling cassette was attached directly to the probe, and a cassette heater was used to prevent condensation of moisture from exhaled breath. Outside-the-facepiece samples used a 25-mm three-piece cassette with a 0.8-micron pore-size mixed cellulose-ester filter. The outside sample cassette also was connected to a Liu probe, and this combination was attached in the worker's breathing zone. Inside samples and outside samples were collected at a flow rate of two liters per minute. Respirators were donned and doffed, and sampling trains started and stopped, in a clean area. Field blanks were used to evaluate for sample-handling contamination, and manufacturer blanks were collected to determine background contamination on the filters.

The inside samples were analyzed using proton-induced X-ray emission analysis (PIXEA), and the outside samples were analyzed by inductively coupled plasma (ICP) spectroscopy. For both calcium and silicon, the authors presented the range of Co, Ci, and the associated geometric means and standard deviations. Three sets of WPF results were determined: One for calcium, a second for silicon, and a harmonic mean for the combined calcium and silicon samples. Silicon was not detected on eleven of the Ci samples. However, by using 70% of the limit of detection as the inside mass, the authors were able to include these samples in the statistical analysis. No field-blank adjustments were made (i.e., no calcium or silicon detected), and no mention is made of adjusting the data for pulmonary retention of particles. In addition, three sample sets were invalidated as a result of equipment and procedural problems. The authors reported a mean WPF of 152, with a 5th percentile of 13, for the calcium samples; a mean WPF of 394, with a 5th percentile of 34, for the silicon samples; and a harmonic mean of the calcium and silicon samples of 206, with a 5th percentile of 20. The authors noted a difference in the WPFs measured for calcium and silicon (using the same respirator), and discussed a number of possible reasons for the difference (e.g., random sampling and analytical errors,

possible non-uniformity of the challenge aerosol over time). The authors concluded, ''The estimated WPF for this respirator model based on this study exceeds the APF of 10 assigned to this respirator class by ANSI Z88.2–1992 and proposed by OSHA.'' They also stated, ''The respirator provided an adequate level of protection and reliably provided workplace protection factors of at least 10 when properly fitted, worn, and used'' (Ex. 9–16, page 40).

Colton and Bidwell study (Ex. 4–10–4). C. Colton and J. Bidwell of 3M made a presentation on May 25, 1995 at the AIHCE comparing the workplace performance of two different types of HEPA filters on an elastomeric half mask respirator in a battery manufacturing plant. The HEPA filters and the respirator model tested were approved under the 30 CFR 11 respirator certification standards. The half facepiece respirator tested was the 3M 7000, available in three sizes. The HEPA filters tested were the 3M 7255 high-efficiency (mechanical) filter and the 3M 2040 high efficiency (electret) filter. The authors measured lead exposures for 19 workers in the battery-pasting and assembly areas of the plant because these areas had the highest lead exposures. The workers were informed of the purpose and procedures of, and their role in, the study, and were provided with instructions on proper donning and fitting procedures, as well as respirator operation. In addition, the workers had to pass a saccharin qualitative fit test performed using the fit test protocol described in OSHA's Lead Standard. Workers had to be clean shaven. They were observed in the workplace by the authors on a one-on-one basis throughout the sampling periods.

For sampling purposes, a Liu probe was inserted opposite the mouth near the midline of the respirator. It projected one centimeter into the facepiece. The sampling cassette was attached directly to the probe, and a cassette heater was used to prevent condensation of moisture from exhaled breath. A Liu probe was also attached to the outside sample to ensure that particle loss for the outside samples would be similar to that with the inside samples. Inside samples and outside samples were collected at a flow rate of two liters per minute, and sampling times ranged from 56 to 200 minutes. Up to four samples were collected per day on each worker, each worker was sampled for two days, field blanks were used, and care was taken to avoid handling contamination. The filter for the first day was assigned randomly, with a worker using one filter type on the first day and the second filter type on the second day.

The inside- and outside-the-facepiece samples were analyzed for lead by ICP spectroscopy. The authors presented the range of outside and inside lead concentrations, and the associated geometric means and standard deviations. Two sets of WPF results were determined: One for the 3M 2040 filter and a second for the 3M 7255. A total of 140 samples were collected—one sample was eliminated due to low mass loading, 10 samples were lost due to equipment problems, and 85 samples had inside-sample mass values that were non-detectable. Of the remaining 44 samples, one outlier was identified in the electret filter data set, leaving 22 sets for the 3M 2040 filter and 21 sets for the 3M 7255 filter. No field blank adjustments were reported (i.e., no lead was detected on the field blanks). The authors reported a mean WPF of 562 and a 5th percentile of 71 for the 3M 2040 filter-respirator combination, and a mean WPF of 1006 and a 5th percentile of 80 for the 3M 7255 filter-respirator combination.

When no lead was detected for the inside samples, the WPF results were recalculated using the detection limit to represent the mass for these samples. From these recalculations, the authors identified one outlier in the electret filter data set and two outliers in the mechanical filter data set. They then calculated geometric means, geometric standard deviations, and 5th percentile WPFs for the 67 samples for the 3M 2040 filter and for the 59 samples for the 3M 7255 filter. The authors reported a mean WPF of 420 and a 5th percentile of 101 for the 3M 2040 filter-respirator combination, and a mean WPF of 549 and a 5th percentile of 138 for the 3M 7255 filter-respirator combination.

The authors concluded that the performance differences between the two filter types were not statistically significant. Both filters provided 5th percentile protection factors above 10. No WPFs were less than 30. Under these workplace conditions, no difference was found in the level of protection provided by the electrostatic HEPA filter compared to a mechanical HEPA filter.

Colton and Bidwell study (Ex. 9–16). C. Colton and J. Bidwell of 3M presented a research paper at the May 1999 AIHCE on a WPF study they performed in a battery manufacturing plant with workers using three NIOSH-approved filtering facepiece respirators. The filtering facepiece respirators tested were the 3M 8210 and 3M 8511, approved by NIOSH under the 42 CFR 84 respirator certification standards, and the 3M 8710 filtering facepiece, approved by NIOSH under the 30 CFR 11 respirator certification standards. The authors measured lead exposures for 21 workers in the battery-manufacturing and assembly areas of the plant. The worker job classifications tested were stackers, heat sealers, burners, and assemblers. The workers were informed of the purpose and procedures of, and their role in, the study, and were provided with instructions on proper donning, fitting, and user seal check procedures, as well as respirator operation. In addition, the workers had to pass a Bitrex® qualitative fit test with all three respirators, and they had to be clean shaven. They were observed in the workplace by the authors on a one-on-one basis throughout the sampling periods.

The sampling probe was a Liu probe that was inserted opposite the mouth near the midline of the respirator. It projected one centimeter into the facepiece. The sampling cassette was attached directly to the probe, and a cassette heater was used to prevent condensation of moisture from exhaled breath. Inside and outside samples were collected at a flow rate of two liters per minute for 79 to 159 minutes. Three samples were collected per day for each worker. Field blanks were used, and care was taken to avoid handling contamination.

The inside samples were analyzed for lead using PIXEA. Outside samples were analyzed by ICP spectroscopy. The authors presented the range of outside and inside sample lead concentrations, and the associated geometric means and standard deviations for each respirator model tested. Three sets of WPF results were determined: One for the 3M 8710, a second for the 3M 8210, and a third for the 3M 8511. Lead was not detected on five of the inside samples for the 3M 8710, 19 for the 3M 8210, and 23 for the 3M 8511. No field blank adjustments were reported (i.e., no lead was detected on the field blanks). The authors reported a mean WPF of 730, with a 5th percentile of 105, for the 3M 8710 respirator; a mean WPF of 955, with a 5th percentile of 73, for the 3M 8210; and a mean WPF of 673, with a 5th percentile WPF of 169, for the 3M 8511 using test samples with detectable lead levels. When no lead was detected on the inside samples, the WPF results were calculated by using 70% of the limit of detection as the mass for inside samples. The authors reported a mean WPF of 804, with a 5th percentile of 111, for the 3M 8710 respirator; a mean WPF of 2210, with a 5th percentile of 133, for the 3M 8210; and a mean WPF

of 1970, with a 5th percentile WPF of 223, for the 3M 8511.

The authors stated, ''All respirator models provided an equivalent level of protection,'' and that ''[a]ll the respirators tested reliably provided workplace protection factors of 10 when properly fitted, worn, and used.'' No reported WPFs were less than 51, and no difference in workplace protection was found between workers using 30 CFR part 11-approved respirators and workers using 42 CFR 84-approved respirators. The authors concluded that, using the 5th percentile WPFs as an indicator of performance, the APFs should not differ between these respirators.

2. Additional Studies Not Used in the Updated Analyses

The Agency received a number of comments on the relationship between fit testing and APFs. OSHA regulations require that when a respirator user cannot pass a fit test with a particular respirator model, it cannot be used. OSHA does not believe that it is appropriate to assign a lower protection factor to a respirator (e.g., half the APF) when the respirator doesn't fit. However, a number of fit test studies, and one study on farm worker exposures to bioaerosols, were submitted to the record for the Agency to evaluate in terms of APFs. OSHA has evaluated these studies and determined that they do not meet the criteria that data must meet to be included in the database. These criteria have been described above.

NIOSH agreed (Tr. at 102) that the APF values resulting from OSHA's multifaceted approach provide reasonable values for the level of protection expected for each respirator class. Proposed Table 1 (''Assigned Protection Factors'') represents the state of the art for each class or respirator. However, NIOSH stated that designating a specific APF for a respirator class will not ensure that a respirator will perform as expected. The protection afforded by a respirator is contingent on: The respirator user adhering to the respirator program requirements of OSHA's Respiratory Protection Standard; the use of NIOSH-certified respirators in their approved configuration; and fit testing for each employee that ensures selection of a properly fitting respirator. The following studies, which OSHA did not include in its updated analyses, typically violated one or more of these three conditions.

Don-Hee Han study (Ex. 9–13–2). NIOSH (Ex. 9–13) submitted a study by Don-Hee Han (Ex. 9–13–2) of the 3M 8511 cup-shaped filtering facepiece, the MSA Affinity foldable FR 200, and the Willson N95 10FL produced by Dalloz Safety in response to OSHA's request in the NPRM for additional studies that may be useful in determining APFs. The author of the study permitted workers who did not pass a fit test with a minimum fit factor of 100, as required by OSHA's Respiratory Protection Standard, to participate in the study. OSHA reviewed this study and did not add the data set to its quantitative analyses because it was a PPF study that is not directly comparable with WFP studies used by OSHA in its APF determinations. However, the study results confirmed that when a worker's filtering facepiece respirator is fit tested properly, it is capable of achieving a protection factor of at least 10.

Peacock study (Ex. 9–13–4). This fit test research report was submitted to the record by NIOSH. In this study, a liquid-aerosol QNFT (Large Particle QNFT (LPQNFT)) was developed and used to evaluate filter penetration of a regular N95 respirator. Protection factors determined by the LPQNFT were compared to fit factors obtained using the saccharin QLFT. The sensitivity and specificity of the saccharin QLFT were evaluated. The results for the specifity of the LPQNFT indicated that workers who failed the saccharin QLFT also failed the LPQNFT when using a protection factor ≥ 100. The sensitivity was low. Twelve (12) subjects passed both the LPQNFT and the saccharin QLFT (out of 28 subjects), but another 16 subjects failed the saccharin test while passing the LPQNFT. Peacock concluded that the LPQNFT may be subject to particle deposition at leakage sites, as well as conditions inside the facepiece that would lead to sampling bias. OSHA did not rely on these fit test data for setting APFs because, as Peacock noted, further studies should be conducted to identify the cause of these problems.

Lee and Nicas study (Ex. 17–7–3). NIOSH submitted this study of N95 respirators used against *Mycobacterium tuberculosis* (TB). In this study, Lee and Nicas (Ex. 17–7–3) computed risks of TB infection using five medium- or regular-size N95 filtering facepiece respirators. Five NIOSH-approved respirators were selected for evaluation after reviewing manufacturer-provided fit test, comfort, and cost data. After extensive evaluation, the original five brands were rank ordered from highest to lowest fit test pass rates, and the authors calculated the risk of TB transmission. The authors concluded that fit testing is necessary to ensure that respirators perform as expected. However, OSHA did not accept this study for its APF analyses because it is not a WPF or SWPF study, and addresses only fit testing issues.

Coffey, et al. study (Ex. 17–7–4). NIOSH submitted to the record a publication by Coffey et al. (Ex. 17–7–4). In this study, 18 N95 filtering facepiece respirators were evaluated. The authors determined the following measurements from the results: 5th percentile SWPF value; the average SWPF per shift; the h-value; and the assignment error. A SWPF test was used to determine respirator performance, which was assessed using a Portacount Plus with test subjects performing six standard fit test exercises. However, the generally accepted format for a SWPF study involves test subjects performing simulated workplace exercises (e.g., shoveling pebbles, moving blocks, pounding nails).

Using this procedure, the authors found that when properly fit tested, over 80% of the poorly performing respirators achieved a protection factor of more than 10. However, OSHA did not use this study in its APF determinations since this was not a WPF or SWPF study. Nevertheless, the study supports the requirement that APFs apply only when used within the context of a comprehensive respirator program.

Reponen et al. study (Exs. 19–8–3 and 19–8–4). The purpose of this study was to further develop a prototype personal-sampling system for use with N95 filtering facepiece respirators. The study results were calculated from 30–60 minute Co and Ci measurements taken across multiple agricultural settings, tasks, and simulated exposures. The data were combined to calculate dust, microorganism, and cultured microorganism exposures. Descriptions of tasks in several workplaces were provided.

The N95 respirators in this study performed at or above a WPF of 10 when evaluated using dust measurements. However, the dust-exposure measurements counted both dust particles and microorganisms because the optical-particle counter used for this purpose does not differentiate between organic and nonorganic particles. When they calculated WPFs for the microorganism samples alone, the WPFs decreased somewhat. The authors concluded that the geometric mean WPF increased with increasing particle size, and that the WPFs were smaller for biological particles than for dust. The authors speculated that differences in WPFs may result from the measurement effects of particle size or density. They also said that even a small variation in the

density of particles can have a pronounced effect on the loss of dust particles through faceseal leaks due to impaction. The authors concluded that their findings deserve further research.

OSHA agrees with the authors that further research is needed to substantiate and explore these findings. Also, the Agency has significant concern regarding the measurement methodology used in this prototype study. For example, it is not clear whether the WPF differences are valid or are simply the result of using different measurement methods. Therefore, the Agency decided not to use this study for developing APFs.

Summary and conclusions for studies not used in the updated database. OSHA reviewed the studies submitted to the APF rulemaking docket and determined that five of them were unsuitable for the database used to develop APFs. OSHA established a set of criteria in the proposal for evaluating new studies for inclusion in the APF database. The studies by Han (Ex. 9–13–4), Peacock (Ex. 9–13–4), Lee and Nicas (Ex. 17–7–3), Coffey *et al.* (Ex 17–7–4), and Reponen *et al.* (Exs. 19–8–3 and 19–8–4) were not used by OSHA in setting the final APFs because these studies did not follow established WPF or SWPF protocols, or required further research to substantiate or explore the results.

IV. Health Effects

American workers use respirators as a means of protection against a multitude of respiratory hazards that include chemical, biological, and radiological agents. Respirators provide protection from hazards that are immediately life-threatening, as well as hazards associated with routine operations for which engineering controls and work practices do not protect employees sufficiently. When respirators fail, or do not provide the degree of protection expected by the user, the user is placed at an increased risk of adverse health effects that result from exposure to the respiratory hazards present. Therefore, it is critical that respirators perform properly to ensure that users are not at an increased risk of experiencing adverse effects caused by exposure to respiratory hazards.

In this final rulemaking, OSHA defined the minimal level of protection a respirator is expected to achieve (i.e., the APFs in Table 1), as well as the MUCs for the respirators. The Agency also is superseding most of the existing APF table requirements in its substance-specific standards. By superceding the APF tables, the Agency estimates that the benefits for the final APFs under the Respiratory Protection Standard will be available as well to employers who must select respirators for employee use under the substance-specific standards. In addition, the Agency believes that harmonizing the APFs of the substance-specific standards with the APFs in the Respiratory Protection Standard will reduce confusion among the regulated community and aids in uniform application of APFs, while maintaining employee protection at levels at least as protective as the existing APF requirements.

V. Summary of the Final Economic Analysis and Regulatory Flexibility Analysis

A. Introduction

OSHA's Final Economic and Regulatory Flexibility Screening Analysis (FEA) addresses issues related to the costs, benefits, technological and economic feasibility, and economic impacts (including small business impacts) of the Agency's Assigned Protection Factors (APF) rule. The Agency has determined that this rule is not an economically significant rule under Executive Order 12866. The economic analysis meets the requirements of both Executive Order 12866 and the Regulatory Flexibility Act (RFA; as amended in 1996). The FEA presents OSHA's full economic analysis and methodology. The Agency entered the complete FEA into the docket as Exhibit 11. The remainder of this section summarizes the results of that analysis.

The purpose of this FEA is to:

- Evaluate the costs employers would incur to meet the requirements of the APF rule;
- Estimate the benefits of the rule;
- Assess the economic feasibility of the rule for affected industries; and
- Determine the impacts of the rule on small entities and the need for a Regulatory Flexibility Analysis.

B. The Rule and Affected Respirator Users

OSHA's APF rule would amend 29 CFR 1910.134(d)(3)(i)(A) of the Respiratory Protection Standard by specifying a set of APFs for each class of respirators. These APFs specify the highest multiple of a contaminant's permissible exposure limit (PEL) at which an employee can use a respirator safely. The APFs would apply to respirator use for protection against overexposure to any substance regulated under 29 CFR 1910.1000. In addition, OSHA rules for specific substances under subpart Z (regulated under the authority of section 6(b)(5) of the OSH Act of 1970, 29 U.S.C. 655) specify APFs for respirators used for protection against these chemicals (hereafter referred to as § 6(b)(5) substances). The rule would supercede most of these protection factors, and harmonize APFs for these substances with those for general respirator use.

OSHA based estimates of the number of employees using respirators and the corresponding number of respirator-using establishments on the NIOSH-BLS survey of respirator use and practices [2] (Ex. 6–3). The NIOSH-BLS survey provides up-to-date use estimates by two-digit industry sector and respirator type for establishments in which employees used respirators during the previous 12 months.[3] As shown in Table V–1, an estimated 291,085 establishments reported respirator use in industries covered by OSHA's regulation. Most of these establishments (208,528 or 71.6 percent) reported use of filtering facepieces. Substantial percentages of establishments also reported the use of half-mask and full facepiece non-powered air-purifying respirators (49.0 and 21.4 percent, respectively). A smaller number of establishments reported use of powered air-purifying respirators (PAPRs) and supplied-air respirators (SARs). Fifteen percent of establishments with respirators (43,154) reported using PAPRs and 19 percent (56,022) reported using SARs. Table V–2 presents estimates of the number of respirator users by two-digit industry sector. An estimated 2.3 million employees used filtering facepiece respirators in the last 12 months, while 1.5 million used half masks, and 0.7 million used full facepiece non-powered air-purifying respirators. Fewer employees reported using PAPRs (0.3 million) and SARs (0.4 million). The industry-specific estimates show substantial respirator use in several industries, including the construction sector, several manufacturing industries (SICs 28, 33, 34, and 37), and Health services (SIC 80).

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[2] Preliminary results from the 2001 NIOSH–BLS ''Survey of Respirator Use and Practices'' in press. NIOSH commissioned the survey to be conducted by BLS, who also tabulated the data after completing the survey.

[3] The survey was conducted between August 2001 and January 2002. It asked: ''During the past 12 months, how many of your current employees used respirators at your establishment?'' It excluded voluntary use of respirators from detailed followup respirator use questions (Ex. 6–3).

Table V-1

Estimated Number of Establishments With Respirator Users, by Type

SIC	Title	All Respirator Types	Non-powered Air-Purifying			PAPR	Supplied-Air	
			Filtering Facepiece	Half-mask	Full-face		Total	SCBA
07	Agricultural services	7,566	6,466	1,142	33 *	105 *	240 *	164 *
08	Forestry	261	261	208	1 *	4 *	8 *	6 *
09	Fishing, hunting, and trapping	0	0	0	0	0	0	0
13	Oil and gas extraction	1,097	490	1,097	499	220	412	250
15	General building contractors	19,071	15,069	6,729	1,859	1,520	1,213	674
16	Heavy construction, except building	4,718	3,816	2,432	915	757	1,213	355
17	Special trade contractors	40,823	31,380	17,025	10,161	7,136	8,198	2,693
20	Food and kindred products	3,608	1,926	1,433	1,901	428	1,010	720
21	Tobacco products	30	17	13 *	0	20	20	20
22	Textile mill products	720	627	272	201	139	9	0
23	Apparel and other textile products	1,111	943 *	925	14 *	0	0	0
24	Lumber and wood products	1,995	1,326	1,273	353	197	168	106
25	Furniture and fixtures	2,053	1,745	1,469	317	80	83	28
26	Paper and allied products	649	448	329	293	122	193	153
27	Printing and publishing	124	105 *	45	2 *	0	3	0
28	Chemicals and allied products	5,052	3,047	2,896	2,698	910	2,077	1,632
29	Petroleum and coal products	432	64	189	200	99	249	151
30	Rubber and misc. plastics products	3,140	2,094	1,707	1,117	695	938	121
31	Leather and leather products	14 *	12 *	6 *	0	0	340	0
32	Stone, clay, and glass products	3,109	2,089	1,765	495	589	530	119
33	Primary metal industries	1,974	1,533	861	385	491	550	183
34	Fabricated metal products	7,374	4,601	4,988	1,103	1,510	2,456	361
35	Industrial machinery and equipment	7,458	4,425	4,151	1,700	1,093	2,131	441
36	Electronic and other electric equipment	2,731	1,676	1,412	656	341	525	252
37	Transportation equipment	3,788	1,957	2,158	1,656	738	1,225	337
38	Instruments and related products	1,282	711	1,033	736	468	568	155
39	Miscellaneous manufacturing industries	3,140	2,389	2,295	1,442	1,276	439	133
40	Railroad transportation	846	417	803	380	375	503	134
41	Local and interurban passenger transit	809	405	522	87 *	73	86	86
42	Trucking and warehousing	4,090	3,240	793	850	463	751	617
43	United States Postal Service	1,012 **	801 **	196 **	210 **	115 **	186 **	153 **
44	Water transportation	50 *	7 *	50 *	5 *	14 *	55	0
45	Transportation by air	48 *	7 *	48 *	5 *	13	10 *	0
46	Pipelines, except natural gas	252	35 *	180	74	69 *	96 *	91
47	Transportation services	8 *	1 *	7 *	0	2	7	0
48	Communications	100 *	14 *	99 *	11 *	27	18 *	0
49	Electric, gas, and sanitary services	5,085	1,856	2,975	1,486	821	2,737 *	1,956
50	Wholesale trade–durable goods	18,854	10,795	9,641	3,259	2,776	2,926	1,278
51	Wholesale trade–nondurable goods	8,573	4,660	3,619	4,303	2,192	3,045	2,533
52	Building materials and garden supplies	2,386	2,386	1,433	688 *	496	89	66
53	General merchandise stores	687 *	211 *	471 *	190 *	143 *	19 *	19 *
54	Food stores	2,394 *	736 *	1,642 *	662 *	498	67 *	67 *
55	Automotive dealers and service stations	10,243	7,139	6,127	2,271	2,403	3,211 *	1,048 *
56	Apparel and accessory stores	308 *	95 *	211 *	85 *	64	1,442	9
57	Furniture and homefurnishings stores	2,769	2,586	1,710	799 *	576 *	77 *	77 *
58	Eating and drinking places	0	0	0	0	0	0	0
59	Miscellaneous retail	978	679	700 *	282 *	203	27	27
60	Depository institutions	1,372 *	1,349 *	36 *	59 *	6 *	0	0
61	Nondepository institutions	299 *	294 *	8 *	13 *	1	0	0
62	Security and commodity brokers	278 *	274 *	7 *	12 *	1	0	0
63	Insurance carriers	442 *	435 *	62	19 *	2	0	0
64	Insurance agents, brokers, and services	744 *	732 *	19 *	32 *	3	0	0
65	Real estate	1,541	1,031	1,115	67 *	7	0	0
67	Holding and other investment offices	157 *	155 *	4 *	7 *	0	0	0
70	Hotels and other lodging places	1,326	1,326	621	531	7 *	0	0
72	Personal services	9,743	4,779	9,115	1,192	52 *	0	0
73	Business services	13,517	11,574	4,952	4,578	72 *	925	925
75	Auto repair, services, and parking	32,113	26,523	19,568	5,793	5,655	8,778 *	3,263 *
76	Miscellaneous repair services	3,375	3,375	1,199 *	313 *	18 *	4,259	0
78	Motion pictures	17 *	8 *	6 *	2 *	0	2	0
79	Amusement and recreation services	1,612	1,348	1,184	150 *	9 *	0	0
80	Health services	16,486	14,625	1,991	1,307	879	303	260
81	Legal services	61 *	29 *	22 *	6 *	0	3	0
82	Educational services	564	267 *	431	52 *	3 *	0	0
83	Social services	6,668	5,812	2,217 *	579 *	36 *	0	0
84	Museums, botanical, zoological gardens	235	112 *	235	22 *	1 *	16	16
86	Membership organizations	533	252 *	383	49 *	3 *	0	0
87	Engineering and management services	10,292	4,004	7,297	1,800	5,117	254	254
89	Services, n.e.c.	6 *	3 *	2 *	0	0	3	0
	State and local governments	6,893 ***	4,936 ***	3,392 ***	1,479 ***	1,023 ***	1,327 ***	530 ***
	Totals	291,085	208,528	142,947	62,448	43,154	56,022	22,461

Source: Preliminary results from the 2001 NIOSH/BLS Survey of Respirator Use and Practices, in press. Benchmarked to 1997 establishment counts from U.S. Bureau of the Census, Statistics of U.S. Businesses, 1997.

* Suppressed industry-level estimates extrapolated from sector totals.

** Estimated based on respirator use patterns in SIC 42.

*** Estimated based on private-sector respirator use patterns.

Table V-2

Estimated Number of Respirator Users, by Respirator Type

SIC	Title	Non-powered Air-Purifying				Supplied-Air	
		Filtering Facepiece	Half Mask	Full Facepiece	PAPR	Total[1]	With SCBA
07	Agricultural services	52,919	6,030 *	1,713 *	139 *	942 *	567 *
08	Forestry	765 *	208 *	23 *	3 *	32 *	20 *
09	Fishing, hunting, and trapping	0	0	0	0	0	0
13	Oil and gas extraction	12,086 *	14,108	1,587 *	6,242	3,071	2,405
15	General building contractors	77,827	36,770	7,752	2,750	6,047	4,744
16	Heavy construction, except building	31,518	30,503	8,747	4,929	8,652	1,933
17	Special trade contractors	259,240	247,483	156,559	49,285	81,803	17,005
20	Food and kindred products	31,317	15,454	13,559	2,465	9,693	7,093
21	Tobacco products	4,232 *	390 *	0	173	412	412
22	Textile mill products	31,996 *	3,198	3,510	3,243	41	0
23	Apparel and other textile products	3,326 *	2,444	213 *	0	0	0
24	Lumber and wood products	17,615 *	8,855	2,869	3,083	1,761	1,096
25	Furniture and fixtures	15,196	7,544	1,916 *	843	530	180
26	Paper and allied products	13,435	16,139	6,313	1,808	6,724	6,222
27	Printing and publishing	1,060 *	341 *	57 *	0	0	0
28	Chemicals and allied products	62,742	88,807	71,534	14,156	46,708	28,306
29	Petroleum and coal products	3,021 *	20,737	20,737	3,448	19,007	12,675
30	Rubber and misc. plastics products	20,523	15,285	5,902	1,729	5,803	1,383
31	Leather and leather products	101 *	8 *	0	0	0	0
32	Stone, clay, and glass products	34,520 *	17,862	5,433	2,595	2,025	705
33	Primary metal industries	42,014	50,150	8,770	6,316	12,168	5,827
34	Fabricated metal products	41,546	38,192	6,824	6,135	11,960	2,335
35	Industrial machinery and equipment	29,381	23,080	9,998	4,313	9,605	2,448
36	Electronic and other electric equipment	20,550	28,259	10,688	2,339	11,422	7,882
37	Transportation equipment	42,965	86,796	18,958	6,520	16,930	3,493
38	Instruments and related products	11,414	13,602	9,192	1,342	4,470	1,296
39	Miscellaneous manufacturing industries	18,431	15,452	2,401	6,554	2,337	555
40	Railroad transportation	NA	NA	NA	NA	NA	NA
41	Local and interurban passenger transit	5,589 *	2,536	203 *	467	587 *	419 *
42	Trucking and warehousing	26,422 *	9,486 *	7,702	4,299	4,879	2,446
44	Water transportation	973 *	20,591 *	143 *	20,591	64 *	0
45	Transportation by air	3,443 *	3,443 *	3,443 *	13	11,282	0
46	Pipelines, except natural gas	40 *	471 *	237 *	160	295	215
47	Transportation services	25 *	214 *	0	2	8 *	0
48	Communications	336 *	2,844 *	49 *	27	18 *	0
49	Electric, gas, and sanitary services	22,784	62,648	35,279	7,147	27,403	13,905
50	Wholesale trade--durable goods	35,783	22,876	16,548 *	4,734	6,936	5,072
51	Wholesale trade--nondurable goods	75,813 *	50,120	13,576	16,524	19,157	4,244
52	Building materials and garden supplies	34,024 *	8,296 *	4,061 *	496	89 *	66 *
53	General merchandise stores	1,008 *	1,008 *	190 *	1,008	19 *	19 *
54	Food stores	2,786 *	2,110 *	802 *	498	921	921
55	Automotive dealers and service stations	66,440	52,361	22,888	16,426	19,415	7,139
56	Apparel and accessory stores	867 *	345 *	85 *	64	1,442 *	9 *
57	Furniture and homefurnishings stores	4,556 *	2,723 *	799 *	1,494	77 *	77 *
58	Eating and drinking places	0	0	0	0	0	0
59	Miscellaneous retail	7,034 *	1,577 *	767 *	203	27 *	27 *
60	Depository institutions	1,933 *	1,790 *	59 *	57	0	0
61	Nondepository institutions	294 *	238 *	13 *	1	0	0
62	Security and commodity brokers	274 *	222 *	12 *	1	0	0
63	Insurance carriers	1,055 *	761 *	19 *	2	0	0
64	Insurance agents, brokers, and services	732 *	593 *	32 *	3	0	0
65	Real estate	5,760 *	10,161	218 *	7	0	0
67	Holding and other investment offices	595 *	165 *	7 *	0	0	0
70	Hotels and other lodging places	72,978 *	4,959	16,012 *	21 *	0	0
72	Personal services	10,771 *	19,239 *	12,074 *	188 *	0	0
73	Business services	78,724	45,461 *	24,576 *	261 *	30,116	29,997
75	Auto repair, services, and parking	115,969	56,952	15,320	12,868	23,583	6,787
76	Miscellaneous repair services	26,018	15,868 *	6,066 *	72 *	4,730	0
78	Motion pictures	859 *	650 *	243 *	0	0	0
79	Amusement and recreation services	14,915	7,217	3,650 *	26 *	0	0
80	Health services	637,932	123,157	64,125	69,893	4,230	3,829
81	Legal services	3,145 *	2,379 *	890 *	0 *	0	0
82	Educational services	29,197 *	2,891	8,259 *	226	0	0
83	Social services	7,868 *	5,128 *	1,813 *	129 *	0	0
84	Museums, botanical, zoological gardens	2,212 *	2,652 *	586 *	4 *	625	624
86	Membership organizations	1,035 *	1,276 *	326 *	9 *	0	0
87	Engineering and management services	69,687 *	42,515 *	19,530 *	6,350	3,354	3,354
89	Services, n.e.c.	715 *	928 *	0	0	0	0
	Totals	2,250,327	1,376,547	655,857	294,682	421,402	187,728

Source: Preliminary results from the 2001 NIOSH-BLS "Survey of Respirator Use and Practices", in press. Benchmarked to 1997 establishment counts from U.S. Bureau of the Census, Statistics of U.S. Businesses, 1997.
* Suppressed industry-level estimates extrapolated from sector totals.
[1] Includes both SCBA and respirators with air supplied by hose.

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The standard would have different impacts on employers using respirators to comply with OSHA substance-specific standards than for employers using respirators for other purposes. Therefore, OSHA used findings from the NIOSH–BLS survey of establishments that reported respirator use, by general respirator class, for protection against specific substances (see Table V–3). OSHA applied these numbers to all respirator users and establishments within the industries that make up each sector to derive substance-specific estimates of respirator use. For those § 6(b)(5) substances not reported by NIOSH, OSHA used expert judgments of a consultant with experience in the respirator industry to estimate the percentage of establishments and employees that use respirators for protection against these chemicals (Ex. 6–2) (see Table V–3).

C. Compliance Costs

The standard does not raise issues of technological feasibility because it requires only that employers use respirators already on the market. Further, these respirators are already in use and have proven feasible in a wide variety of industrial settings. However, costs for the APF standard result from requiring some users to switch to more protective respirators than they currently use. When the APF is lower than the baseline (current) APF, respirator users must upgrade to a more protective model. Both the 1992 ANSI Z88.2 Respiratory Protection Standard and the 1987 NIOSH RDL specify APFs for certain classes of respirators. The Agency assumed that employers currently use the ANSI or NIOSH APFs, or the APFs in the OSHA substance-specific standards, as applicable, to select respirators. While the Agency currently refers to the NIOSH RDL as its primary reference for APFs, in the absence of an applicable OSHA standard, this analysis assumes that, in most cases, adhering to the existing ANSI APFs fulfills employers' legal obligation for proper respirator selection under the existing Respiratory Protection Standard. However, in the case of full facepiece negative pressure respirators, the Agency has established that an APF of 50, as opposed to ANSI's APF of 100, is currently acceptable. In this regard, all but one of the substance-specific standards with APFs for full facepiece negative pressure respirators set an APF of 50. In addition, the existing respirator rule and its supporting preamble require that quantitative fit testing of full facepiece negative pressure respirators must achieve a fit factor of 500 when employees use them in atmospheres in excess of 10 times the PEL; this requirement assumes a safety factor of 10. Therefore, based on a fit factor of 500, such respirators are safe to wear in atmospheres up to 50 times the PEL, consistent with similar requirements regarding respirator use found in existing standards for § 6(b)(5) chemicals.

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Table V-3A

Establishments Using Respirators to Protect Against Selected Substances

Sector/Respirator Class	Establishments With Respirators	Arsenic		Asbestos		Cadmium		Lead		Cotton Dust [1]		Coke Oven Emissions	
Air-Purifying Respirators													
Agriculture	13,200	1,200	9.1%	1,200	9.1%	1,200	9.1%	1,100	8.3%	2,500	18.9%	1,000	7.6%
Mining	3,500	200	5.7%	400	11.4%	200	5.7%	300	8.6%	100	2.9%	100	2.9%
Construction	60,000	2,900	4.8%	6,000	10.0%	2,600	4.3%	7,900	13.2%	800	1.3%	900	1.5%
Manufacturing	46,200	2,500	5.4%	4,000	8.7%	2,700	5.8%	5,500	11.9%	1,400	3.0%	2,000	4.3%
Transportation and utilities	9,700	900	9.3%	2,200	22.7%	600	6.2%	1,400	14.4%	200	2.1%	200	2.1%
Wholesale trade	28,000	800	2.9%	2,600	9.3%	1,800	6.4%	3,700	13.2%	1,100	3.9%	700	2.5%
Retail trade	16,100	100	0.6%	300	1.9%	200	1.2%	600	3.7%	100	0.6%	0	0.0%
Finance, insurance, and real estate	4,200	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Services	86,600	1,600	1.8%	8,700	10.0%	1,500	1.7%	10,800	12.5%	1,000	1.2%	800	0.9%
Total	267,500	10,200	3.8%	25,400	9.5%	10,800	4.0%	31,300	11.7%	7,200	2.7%	5,700	2.1%
Supplied-Air Respirators													
Agriculture	500	0	0.0%	0	0.0%	0	0.0%	0	0.0%	1	0.05%	0	0.0%
Mining	600	0	0.0%	0	0.0%	0	0.0%	0	0.0%	0	0.00%	0	0.0%
Construction	10,500	1,700	16.2%	1,000	9.5%	1,600	15.2%	2,400	22.9%	0	0.00%	0	0.0%
Manufacturing	12,700	400	3.1%	600	4.7%	600	4.7%	1,100	8.7%	3	0.02%	200	1.6%
Transportation and utilities	3,800	100	2.6%	1,000	26.3%	100	2.6%	300	7.9%	1	0.02%	0	0.0%
Wholesale trade	6,800	0	0.0%	0	0.0%	0	0.0%	700	10.3%	1	0.01%	0	0.0%
Retail trade	2,900	0	0.0%	0	0.0%	0	0.0%	200	6.9%	0	0.00%	0	0.0%
Finance, insurance, and real estate	0	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Services	9,500	0	0.0%	0	0.0%	0	0.0%	400	4.2%	0	0.00%	0	0.0%
Total	47,300	2,200	4.7%	2,600	5.5%	2,300	4.9%	5,100	10.8%	6	NA	200	0.4%

Source: The 2001 NIOSH-BLS "Survey of Respirator Use and Practices", Bureau of Labor Statistics Press Release, March 20, 2002.

[1] Estimates for supplied-air respirators provided by ERG consultant Jeffrey Stull of International Personal Protection, Inc.

Table V-3B

Establishments Using Respirators to Protect Against Selected Substances

Sector/Respirator Class	Establishments With Respirators [1]	Acrylonitrile		Formaldehyde		DBCP		Ethylene oxide		Vinyl chloride		Butadiene	
Air-Purifying Respirators													
Agriculture	13,200	0	0.00%	66	0.50%	1	0.01%	0	0.00%	0	0.00%	0	0.00%
Mining	3,500	0	0.00%	4	0.10%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Construction	60,000	0	0.00%	480	0.80%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Manufacturing	46,200	92	0.20%	554	1.20%	5	0.01%	231	0.50%	462	1.00%	370	0.80%
Transportation and utilities	9,700	5	0.05%	1	0.01%	0	0.00%	1	0.01%	1	0.01%	0	0.00%
Wholesale trade	28,000	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Retail trade	16,100	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Finance, insurance, and real estate	4,200	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Services	86,600	0	0.00%	0	0.00%	0	0.00%	43	0.05%	0	0.00%	0	0.00%
Total	267,500	97	0.04%	1,105	0.4%	6	0.00%	275	0.1%	463	0.17%	370	0.14%
Supplied-Air Respirators													
Agriculture	500	0	0.00%	0	0.00%	0	0.01%	0	0.01%	0	0.00%	0	0.00%
Mining	600	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Construction	10,500	0	0.00%	5	0.05%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Manufacturing	12,700	64	0.50%	102	0.80%	1	0.01%	114	0.90%	152	1.20%	76	0.60%
Transportation and utilities	3,800	1	0.02%	1	0.02%	0	0.00%	1	0.02%	1	0.03%	0	0.01%
Wholesale trade	6,800	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Retail trade	2,900	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
Finance, insurance, and real estate	0	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
Services	9,500	0	0.00%	0	0.00%	0	0.00%	1	0.01%	0	0.00%	0	0.00%
Total	47,300	64	0.14%	108	0.2%	1	0.0%	116	0.2%	NA	NA	77	0.16%

Source: Estimates provided by ERG consultant Jeffery Stull of International Personal Protection, Inc.
[1] The 2001 NIOSH-BLS "Survey of Respirator Use and Practices", Bureau of Labor Statistics Press Release, March 20, 2002.

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For each respirator type, OSHA compared the new and existing standards and, where these new APFs were lower, identified an incrementally more protective respirator model. To be adequate, the more protective respirator must have an APF greater than the current APF.

1. Number of Users Required To Upgrade Respirator Models

For a given respirator type, the number of users required to shift to a more protective respirator depends on two factors: the total number of users of that type, and the percentage of those users for whom the ambient exposure level is greater than the APF. While survey data are available to estimate the number of users, virtually no information is available in the literature that provides a basis for estimating the percentage of users required to upgrade respirators. The percentage of workers switching respirators would depend on the profile or frequency distribution of users' exposure to contaminants relative to the PEL. For example, the Agency is lowering the APFs for full facepiece respirators used to protect against cotton dust from 100 to 50; accordingly, when workers have ambient exposures that are greater than 50 times the PEL, employers must upgrade the respirator from a full facepiece negative pressure respirator to a more protective respirator (e.g., a PAPR).

Because of the absence of data on this issue, OSHA made several assumptions regarding the requirement to upgrade respirators. First, OSHA assumed that employers use respirators only when their employees have exposures above the PEL. Second, OSHA assumed employers use the most inexpensive respirator permitted, taking into consideration the employees' safety and compliance with regulatory requirements. These assumptions most likely overestimate the cost of compliance because many employers require their employees to use respirators when OSHA does not require such use, or they require respirators with higher APFs than OSHA currently requires. As a result, this analysis assumes shifts in respirators that employers may have implemented already. Two commenters on this issue agreed that these assumptions overestimate the number of employers that would need to change respirators as a result of this rule (see Exs. 9–16 and 13–8). One commenter (Ex. 9–16) noted that ''For about twenty years, 3M has looked for worksites where employers were using respirators at concentrations at the upper end of the APF range. We have not been able to find these worksites.'' This commenter went on to note, as a result ''we believe that the overall compliance costs associated with the proposal, as currently written, will likely be even lower than OSHA has estimated.''

The Agency estimated distributions of exposures above the PELs based on reports from its Integrated Management Information System describing workplace monitoring of § 6(b)(5) toxic substances performed during OSHA health inspections. Of the 9,095 samples reported above the PELs, 68.0 percent reported exposures between one and five times the PEL, 13.1 percent found exposures between five and 10 times the PEL, and 9.5 percent documented exposures between 10 and 25 times the PEL. Exposures for the remaining 9.4 percent of the samples were greater than 25 times the PEL. Based on these data, OSHA modeled the current exposure distribution for each respirator type.

2. Incremental Costs of Upgrading Respirator Models

OSHA also analyzed the costs of upgrading from the current respirator to a more protective alternative. In doing so, OSHA estimated the annualized unit costs for each respirator type, including equipment and accessory costs, and the costs for training and fit testing. One commenter (Ex. 17–9) noted the importance of not just considering the initial costs of a respirator, but all associated costs. OSHA has considered

all of these costs, including training, fit testing, program development, and medical evaluation, as this commenter suggested. OSHA then calculated the incremental cost for each combination of upgrades from an existing model to a more protective one, taking into account the effect of replacement before the end of the respirator's useful life. These annualized costs range from $49.98 (for upgrading from a supplied-air, demand mode, full facepiece respirator to a supplied-air, continuous flow, half-mask respirator) to $963.73 (for upgrading from a non-powered, air-purifying full facepiece respirator to a full facepiece PAPR).

In certain instances, workers who use respirators under the substance-specific standards may have to upgrade to a SAR with an auxiliary escape SCBA. Several substance-specific standards currently specify SARs for exposures that exceed 1,000 times the PEL.[4] OSHA believes that workers are unlikely to regularly use respirators at such extreme exposure levels, i.e., they are most likely to use them only in exceptional, possibly emergency-related situations. Furthermore, exposures at levels more than 1,000 times the PEL would generally be at or above levels deemed immediately dangerous to life or health (IDLH), so employers already are required by the Respiratory Protection Standard to provide each worker with a respirator that has SCBA capability. For these reasons, this PERFSA estimated no impacts for these situations.[5]

3. Aggregate Compliance Costs

For each respirator type affected by the regulation, OSHA combined the incremental costs of upgrading to a more protective respirator, the estimated share of users forecast to upgrade, and the number of users involved to estimate the compliance costs associated with each respirator type. Table V–4 shows estimated compliance costs for OSHA's APF rule. The rule would require 1,918 users of non-powered air-purifying respirators to upgrade to some respirator more expensive than they are now using at a cost of $1.8 million. The Agency estimates that 22,848 PAPR users would upgrade their respirators at a cost of $2.3 million. A relatively small number of SAR users (5,110) would upgrade to more expensive respirators at a cost of $0.4 million. Industry-specific compliance costs vary according to the number of respirator users and the proportion of these users affected by the rule. Industries with relatively large compliance costs include SIC 17, Special trade contractors ($0.8 million), and SIC 80, Health services ($0.8 million).

As discussed previously, the Agency believes the actual costs of the standard almost certainly are overestimated. The cost analysis assumes all respirator wearers have levels of exposures that require the particular respirator they are using. Under this assumption, 15,000 employees would be allowed to safely shift to a less expensive respirator, which could lead to cost savings for the employer. Such potential cost savings are not accounted for in this cost analysis.

In many cases, employers use respirators when respirators are not required by OSHA, or use respirators more protective than required by OSHA. As a result, OSHA's cost analysis overestimates the number of employees who are affected by the standard, and therefore overestimates costs associated with the standard.

D. Benefits

The benefits that would accrue to respirator users and their employers take several forms. The standard would benefit workers by reducing their exposures to respiratory hazards. Improved respirator selection would augment previous improvements to the Respiratory Protection Standard, such as better fit-test procedures and improved training, contributing substantially to greater worker protection. Estimates of benefits are difficult to calculate because of uncertainties regarding the existing state of employer respirator-selection practices and the number of covered work-related illnesses. At the time of the 1998 revisions to the Respiratory Protection Standard, the Agency estimated that the standard would avert between 843 and 9,282 work-related injuries and illnesses annually, with a best estimate (expected value) of 4,046 averted illnesses and injuries annually (63 FR 1173). In addition, OSHA estimated that the standard would prevent between 351 and 1,626 deaths annually from cancer and many other chronic diseases, including cardiovascular disease, with a best estimate (expected value) of 932 averted deaths from these causes. The APFs in this rulemaking will help ensure that these benefits are achieved, as well as provide an additional degree of protection. These APFs also will reduce employee exposures to several § 6(b)(5) chemicals covered by standards with outdated APF criteria, thereby reducing exposures to chemicals such as asbestos, lead, cotton dust, and arsenic.[6] While the Agency did not quantify these benefits, it estimates that 29,655 employees would have a higher degree of respiratory protection under this APF standard. Of these employees, an estimated 8,384 have exposure to lead, 7,287 to asbestos, and 3,747 to cotton dust, all substances with substantial health risks.

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[4] These standards regulate cotton dust, coke oven emissions, acrylonitrile, arsenic, DBCP, ethylene oxide, and lead.

[5] Paragraph (d)(2) of the Respiratory Protection Standard requires employers to provide either a pressure demand SCBA or a pressure demand SAR with auxiliary SCBA to any employee who works in IDLH atmospheres.

[6] In the 1998 rulemaking revising the Respiratory Protection Standard, the Final Economic Analysis noted that the standard would not directly affect the benefits for the estimated 5% of employees who use respirators under OSHA's substance-specific health standards (except to the extent that uniformity of provisions improve compliance). Therefore, the Agency likely over-estimated the benefits of that rulemaking since the standard did not affect directly the type of respirator used by those employees (63 FR 1173). Conversely, this rule directly addresses the APF provisions of the substance-specific standards; therefore, this rule would affect directly the respirators used by employees covered by these standards.

Table V-4

Summary of Costs by Respirator Class

SIC	Industry	Non-powered Air-Purifying Respirators			Powered Air-Purifying Respirators			Supplied-Air Respirators			Total Cost
		Users [1]	No. Upgrading	Cost	Users [1]	No. Upgrading	Cost	Users [1,2]	No. Upgrading	Cost	
07	Agricultural services	60,662	46	$43,030	139	7	$657	467	2	$81	$43,768
08	Forestry	996	0	$0	3	0	$0	16	0	$0	$0
09	Fishing, hunting, and trapping	0	0	$0	0	0	$0	0	0	$0	$0
13	Oil and gas extraction	27,781	6	$6,016	6,848	415	$50,887	666	12	$1,399	$58,302
15	General building contractors	122,350	15	$13,713	4,355	288	$30,519	5,846	80	$9,067	$53,300
16	Heavy construction, except building	70,768	17	$15,472	7,342	380	$38,426	6,719	90	$9,445	$63,344
17	Special trade contractors	663,282	296	$276,942	102,625	3,933	$428,165	86,591	1,007	$87,432	$792,539
20	Food and kindred products	60,330	58	$54,509	4,105	107	$12,643	2,600	60	$6,620	$73,772
21	Tobacco products	4,621	0	$0	271	0	$0	121	3	$125	$125
22	Textile mill products	38,704	15	$14,112	5,071	36	$4,153	164	4	$190	$18,455
23	Apparel and other textile products	5,984	0	$0	0	0	$0	0	0	$0	$0
24	Lumber and wood products	29,339	12	$11,535	3,178	102	$12,283	792	11	$535	$24,353
25	Furniture and fixtures	24,657	8	$7,703	844	15	$1,847	521	5	$387	$9,937
26	Paper and allied products	35,888	27	$25,382	2,086	73	$7,507	2,662	57	$2,853	$35,742
27	Printing and publishing	1,458	0	$0	0	0	$0	3	0	$0	$0
28	Chemicals and allied products	223,083	307	$287,588	18,791	238	$25,243	27,066	443	$22,139	$334,970
29	Petroleum and coal products	44,494	89	$83,367	5,207	35	$4,099	6,333	147	$8,052	$95,518
30	Rubber and misc. plastics products	41,711	25	$23,728	4,437	43	$5,152	6,253	84	$8,583	$37,463
31	Leather and leather products	108	0	$0	0	0	$0	340	11	$1,651	$1,651
32	Stone, clay, and glass products	57,815	23	$21,844	4,123	131	$13,691	1,648	5	$248	$35,783
33	Primary metal industries	100,933	38	$35,257	7,163	270	$27,951	7,061	80	$6,326	$69,534
34	Fabricated metal products	86,562	29	$27,435	8,885	152	$15,766	12,536	93	$8,955	$52,156
35	Industrial machinery and equipment	62,459	43	$40,196	5,501	38	$4,362	8,549	51	$4,156	$48,714
36	Electronic and other electric equipment	59,497	46	$42,968	2,967	99	$11,927	5,419	109	$6,441	$61,337
37	Transportation equipment	148,719	81	$76,217	9,511	125	$14,084	18,614	241	$24,308	$114,609
38	Instruments and related products	34,208	39	$36,953	2,412	17	$2,073	4,737	50	$3,320	$42,345
39	Miscellaneous manufacturing industries	36,285	10	$9,653	10,640	539	$64,860	2,161	22	$1,915	$76,427
40	Railroad transportation	NA	NA	$0	NA	NA	$1,064	NA	NA	$518	$1,581
41	Local and interurban passenger transit	8,327	0	$0	1,086	86	$8,330	168	2	$124	$8,453
42	Trucking and warehousing	43,611	22	$21,069	6,492	326	$39,424	5,832	104	$9,349	$69,843
44	Water transportation	21,707	0	$0	21,490	2,368	$290,046	64	1	$197	$290,243
45	Transportation by air	10,328	10	$9,417	17	0	$0	12,008	225	$11,267	$20,684
46	Pipelines, except natural gas	747	0	$0	237	3	$312	80	1	$58	$369
47	Transportation services	240	0	$0	2	0	$0	8	0	$0	$0
48	Communications	3,229	0	$0	37	0	$0	18	0	$0	$0
49	Electric, gas, and sanitary services	120,711	103	$96,504	7,545	65	$7,532	14,630	249	$15,425	$119,461
50	Wholesale trade--durable goods	75,206	92	$86,246	5,430	52	$6,040	5,217	107	$8,545	$100,831
51	Wholesale trade--nondurable goods	139,508	76	$70,757	16,524	1,788	$164,785	15,428	38	$4,140	$239,682
52	Building materials and garden supplies	46,382	4	$3,347	852	19	$1,842	89	3	$494	$5,683
53	General merchandise stores	2,206	0	$0	1,111	32	$2,935	0	0	$0	$2,935
54	Food stores	5,698	0	$0	854	19	$1,848	0	0	$0	$1,848
55	Automotive dealers and service stations	141,690	20	$18,860	21,635	177	$19,874	17,645	435	$21,720	$60,454
56	Apparel and accessory stores	1,297	0	$0	110	1	$105	1,442	56	$8,561	$8,667
57	Furniture and homefurnishings stores	8,078	0	$0	2,989	71	$7,253	0	0	$0	$7,253
58	Eating and drinking places	0	0	$0	0	0	$0	0	0	$0	$0
59	Miscellaneous retail	9,378	0	$0	349	7	$699	0	0	$0	$699
60	Depository institutions	3,782	0	$0	57	0	$0	0	0	$0	$0
61	Nondepository institutions	545	0	$0	1	0	$0	0	0	$0	$0
62	Security and commodity brokers	508	0	$0	1	0	$0	0	0	$0	$0
63	Insurance carriers	1,835	0	$0	2	0	$0	0	0	$0	$0
64	Insurance agents, brokers, and service	1,357	0	$0	3	0	$0	0	0	$0	$0
65	Real estate	16,139	0	$0	7	0	$0	0	0	$0	$0
67	Holding and other investment offices	766	0	$0	0	0	$0	0	0	$0	$0
70	Hotels and other lodging places	93,949	26	$24,531	21	0	$0	0	0	$0	$24,531
72	Personal services	42,084	20	$18,497	188	0	$0	0	0	$0	$18,497
73	Business services	148,761	40	$37,651	261	0	$0	119	3	$132	$37,783
75	Auto repair, services, and parking	188,241	25	$23,471	28,435	1,308	$141,436	27,832	815	$91,407	$256,314
76	Miscellaneous repair services	47,952	10	$9,293	464	0	$0	4,730	179	$25,988	$35,281
78	Motion pictures	1,752	0	$0	0	0	$0	2	0	$0	$0
79	Amusement and recreation services	25,782	6	$5,592	26	0	$0	0	0	$0	$5,592
80	Health services	825,213	105	$98,238	78,349	8,094	$740,937	1,355	14	$691	$839,865
81	Legal services	6,414	1	$1,363	0	0	$0	3	0	$0	$1,363
82	Educational services	40,347	14	$12,652	226	0	$0	0	0	$0	$12,652
83	Social services	14,809	3	$2,778	129	0	$0	0	0	$0	$2,778
84	Museums, botanical, zoological gardens	5,450	0	$0	4	0	$0	2	0	$0	$0
86	Membership organizations	2,638	0	$0	9	0	$0	0	0	$0	$0
87	Engineering and management services	131,731	32	$29,919	12,085	734	$67,171	1,114	28	$1,399	$98,488
89	Services, n.e.c.	1,643	0	$0	0	0	$0	3	0	$0	$0
	Totals	4,282,731	1,840	$1,723,804	423,531	22,191	$2,277,927	315,672	4,925	$414,245	$4,415,976

Source: OSHA estimates based preliminary results from the 2001 NIOSH-BLS "Survey of Respirator Use and Practices," in press.
[1] Includes employees who use more than one type of respirator. Total may exceed total number of users for respirator class.
[2] Excludes employees using SCBAs exclusively.

In addition to health benefits, OSHA believes other benefits result from the harmonization of APF specifications, thereby making compliance with the respirator rule easier for employers. Employers also benefit from greater administrative ease in proper respirator selection. Employers would no longer have to consult several sources and several OSHA standards to determine the best choice of respirator, but could make their choices based on a single, easily found regulation. Some employers who now hire consultants to aid in choosing the proper respirator should be able to make this choice on their own with the aid of this rule. In addition to having only one set of numbers (i.e., APFs) to assist them with respirator selection for nearly all substances, some employers may be able to streamline their respirator stock by using one respirator class to meet their respirator needs instead of several respirator classes. The increased ease of compliance would also yield additional health benefits to employees using respirators.

Alternatively, these APFs would clarify when employers can safely place employees in respirators that impose less stress on the cardiovascular system (e.g., filtering facepiece respirators). Many of these alternative respirators may have the additional benefit of being less expensive to purchase and operate. As previously discussed, OSHA estimates that over 15,000 employees currently use respirators that fall in this group (i.e., shift to a less expensive respirator).

One commenter (Ex. 9–16) agreed that the standard would have significant benefits, saying:

> 3M concurs with OSHA's conclusion that significant health benefits will accrue to workers as a result of this rulemaking. 3M believes that the majority of these benefits will be the result of simplification of the respirator selection process for employers. This will in turn lead to greater compliance with OSHA's various standards regarding exposure to toxic and harmful substances. * * *
>
> In addition to these benefits from increased compliance, 3M also concurs with OSHA's determination that the simplification and clarification of the APF tables will result in lessening of cardiovascular stress, as well as other potential stresses, because of the ability to select a filtering facepiece respirator.

E. Economic Feasibility

OSHA is required to set standards that are feasible. To demonstrate that a standard is feasible, the courts have held that OSHA must ''construct a reasonable estimate of compliance costs and demonstrate a reasonable likelihood that these costs will not threaten the existence or competitive structure of an industry'' (*United Steelworkers of America, AFL–CIO–CLC* v. *Marshall* (the ''Lead'' decision), 647 F.2d 1189 (DC Cir. 1980)).

OSHA conducted its analysis of economic feasibility on an establishment basis. Accordingly, for each affected industry, the Agency compared estimates of per-establishment annualized compliance costs with per-establishment estimates of revenues and per-establishment estimates of profits. It used two worst-case assumptions regarding the ability of employers to pass the costs of compliance through to their customers: The no-cost-pass-through assumption, and the full-cost-pass-through assumption. Based on the results of these comparisons, which define the universe of potential impacts of the APFs, OSHA then assessed the economic feasibility for all affected establishments, i.e., those covered by this rule.

The Agency assumed that establishments falling within the scope of the standard would have the same average sales and profits as other establishments in their industries. OSHA believes this assumption is reasonable because no evidence is available showing that the financial characteristics of those firms with employees who use respirators are different from firms that do not use respirators. In the absence of such evidence, OSHA relied on the best available financial data (those from the Bureau of the Census (Ex. 6–4) and Robert Morris Associates (Ex. 6–5)), used a commonly accepted methodology to calculate industry averages, and based its analysis of the significance of the projected economic impacts and the feasibility of compliance on these data.

The analysis of the potential impacts of this standard on before-tax profits and sales shown in Table V–5 is a ''screening analysis,'' so called because it simply measures costs as a percentage of pre-tax profits and sales under the worst-case assumptions discussed above, but does not predict impacts on these before-tax profits or sales. OSHA used the screening analysis to determine whether the compliance costs potentially associated with the standard could lead to significant impacts on all affected establishments. The actual impact of the standard on the profit and sales of establishments in a specific industry would depend on the price elasticity of demand for the products or services of these establishments.

Table V–5 shows the economic impacts of these costs. For each industry, OSHA constructed the average compliance cost per affected establishment and compared it to average revenues and average profits.[7] These costs are quite small, i.e., less than 0.005 percent of revenues; the one major exception is SIC 44 (Water transportation), for which OSHA estimated the costs impacts to be 0.16 percent of revenues. When the Agency compared average compliance costs with profits, the costs also are small, i.e., less than 0.17 percent; again, the major exception was SIC 44, which had an estimated impact of 2.12 percent of profits.[8] Based on the very small impacts for establishments in all industries shown in Table V–5, OSHA concludes that the APF standard is economically feasible, in the sense of being unlikely to close or alter the competitive structure of the affected industries, for the affected establishments.

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[7] OSHA defines ''affected establishment'' as any facility that uses respirators, as represented in the NIOSH–BLS survey data.

[8] For some industries, such as SIC 44, data from the NIOSH–BLS survey were suppressed due to low response rates. In these cases, the Agency, for the purposes of assessing economic feasibility, imputed broader sector-level data from the survey to form an estimate of respirator use. This procedure may result in overestimating the impact of the standard (proposal) in some industries. See the full FEA (Ex. 11) for further details.

Table V-5

Costs as a Percentage of Affected Establishment Revenues and Profits
(Based on Average Compliance Costs)

SIC	Industry	Revenues ($1,000)	Establish-ments	Average Revenues ($1,000)	Profit Rate	Average Profits	Affected Establishments		Average Compliance Costs to Affected Establishments	Compliance Costs as a % of Revenues	Compliance Costs as a % of Profits
07	Agricultural services	$46,797,618	111,841	$418.4	6.02%	$25,183	7,566	6.8%	$5.78	0.001%	0.02%
08	Forestry	$2,533,391	2,689	$942.1	10.30%	$97,040	261	9.7%	$0.00	0.000%	0.00%
09	Fishing, hunting, and trapping	$2,066,630	2,443	$845.9	5.80%	$49,099	0	0.0%	NA	NA	NA
13	Oil and gas extraction	$118,956,993	17,957	$6,624.5	8.65%	$573,023	1,097	6.1%	$53.14	0.001%	0.01%
15	General building contractors	$354,383,931	197,940	$1,790.4	4.00%	$71,614	19,071	9.6%	$2.79	0.000%	0.00%
16	Heavy construction, except building	$129,200,925	37,918	$3,407.4	4.00%	$136,295	4,718	12.4%	$13.43	0.000%	0.01%
17	Special trade contractors	$351,559,520	433,522	$810.9	4.00%	$32,438	40,823	9.4%	$19.41	0.002%	0.06%
20	Food and kindred products	$488,381,169	22,317	$21,883.8	3.46%	$757,938	3,608	16.2%	$20.45	0.000%	0.00%
21	Tobacco products	$36,626,849	185	$197,983.0	4.02%	$7,953,335	30	16.2%	$4.18	0.000%	0.00%
22	Textile mill products	$81,180,135	6,464	$12,558.8	2.77%	$347,644	720	11.1%	$25.63	0.000%	0.01%
23	Apparel and other textile products	$81,000,847	24,460	$3,311.6	2.56%	$84,716	1,111	4.5%	$0.00	0.000%	0.00%
24	Lumber and wood products	$111,381,076	37,716	$2,953.2	3.90%	$115,143	1,995	5.3%	$12.21	0.000%	0.01%
25	Furniture and fixtures	$61,269,677	12,388	$4,945.9	3.51%	$173,603	2,053	16.6%	$4.84	0.000%	0.00%
26	Paper and allied products	$163,517,039	6,863	$23,825.9	4.50%	$1,072,385	649	9.5%	$55.10	0.000%	0.01%
27	Printing and publishing	$209,740,895	63,986	$3,277.9	3.80%	$124,545	124	0.2%	$0.00	0.000%	0.00%
28	Chemicals and allied products	$406,616,253	13,691	$29,699.5	4.49%	$1,332,353	5,052	36.9%	$66.30	0.000%	0.00%
29	Petroleum and coal products	$178,393,963	2,459	$72,547.4	2.99%	$2,168,714	432	17.6%	$221.09	0.000%	0.01%
30	Rubber and misc. plastics products	$160,224,448	17,343	$9,238.6	4.02%	$371,834	3,140	18.1%	$11.93	0.000%	0.00%
31	Leather and leather products	$10,125,106	1,922	$5,268.0	2.20%	$115,725	14	0.7%	$119.63	0.002%	0.10%
32	Stone, clay, and glass products	$87,857,611	17,167	$5,117.8	4.93%	$252,139	3,109	18.1%	$11.51	0.000%	0.00%
33	Primary metal industries	$189,655,505	6,992	$27,124.6	4.52%	$1,225,408	1,974	28.2%	$35.23	0.000%	0.00%
34	Fabricated metal products	$231,787,815	39,399	$5,883.1	4.55%	$267,453	7,374	18.7%	$7.07	0.000%	0.00%
35	Industrial machinery and equipment	$410,878,326	57,563	$7,137.9	4.05%	$288,782	7,458	13.0%	$6.53	0.000%	0.00%
36	Electronic and other electric equipment	$349,240,947	18,619	$18,757.2	5.59%	$1,048,780	2,731	14.7%	$22.46	0.000%	0.00%
37	Transportation equipment	$522,250,748	13,210	$39,534.5	3.74%	$1,479,823	3,788	28.7%	$30.26	0.000%	0.00%
38	Instruments and related products	$158,693,978	12,385	$12,813.4	5.06%	$648,479	1,282	10.4%	$33.03	0.000%	0.01%
39	Miscellaneous manufacturing industries	$52,171,899	18,711	$2,788.3	3.80%	$106,073	3,140	16.8%	$24.34	0.001%	0.02%
40	Railroad transportation	NA	NA	NA	11.08%	NA	NA	NA	NA	NA	NA
41	Local and interurban passenger transit	$18,741,822	20,067	$934.0	4.51%	$42,101	809	4.0%	$10.45	0.001%	0.02%
42	Trucking and warehousing	$197,132,918	135,874	$1,450.9	3.91%	$56,783	4,090	3.0%	$17.08	0.001%	0.03%
44	Water transportation	$34,059,390	9,392	$3,626.4	7.48%	$271,426	50	0.5%	$5,755.39	0.159%	2.12%
45	Transportation by air	$175,932,797	13,694	$12,847.4	3.62%	$465,132	48	0.4%	$427.74	0.003%	0.09%
46	Pipelines, except natural gas	$7,830,792	971	$8,064.7	6.55%	$528,055	252	25.9%	$1.47	0.000%	0.00%
47	Transportation services	$39,490,484	52,884	$746.7	3.39%	$25,322	8	0.0%	$0.00	0.000%	0.00%
48	Communications	$343,904,510	46,030	$7,471.3	5.58%	$416,833	100	0.2%	$0.00	0.000%	0.00%
49	Electric, gas, and sanitary services	$446,859,099	22,716	$19,671.6	10.37%	$2,040,874	5,085	22.4%	$23.49	0.000%	0.00%
50	Wholesale trade–durable goods	$2,290,609,326	341,942	$6,698.8	2.54%	$170,449	18,854	5.5%	$5.35	0.000%	0.00%
51	Wholesale trade–nondurable goods	$1,931,943,829	189,025	$10,220.6	4.46%	$456,162	8,573	4.5%	$27.96	0.000%	0.01%
52	Building materials and garden supplies	$152,492,069	70,064	$2,176.5	2.37%	$51,621	2,386	3.4%	$2.38	0.000%	0.00%
53	General merchandise stores	$334,801,710	36,481	$9,177.4	2.70%	$248,028	687	1.9%	$4.27	0.000%	0.00%
54	Food stores	$424,619,077	179,120	$2,370.6	1.41%	$33,443	2,394	1.3%	$0.77	0.000%	0.00%
55	Automotive dealers and service stations	$787,955,460	202,525	$3,890.7	1.45%	$56,246	10,243	5.1%	$5.90	0.000%	0.01%
56	Apparel and accessory stores	$117,838,184	126,658	$930.4	1.85%	$17,181	308	0.2%	$28.16	0.003%	0.16%
57	Furniture and homefurnishings stores	$138,532,297	117,939	$1,174.6	2.28%	$26,812	2,769	2.3%	$2.62	0.000%	0.01%
58	Eating and drinking places	$249,718,654	484,719	$515.2	3.00%	$15,447	0	0.0%	NA	NA	NA
59	Miscellaneous retail	$372,192,817	374,786	$993.1	2.49%	$24,711	978	0.3%	$0.71	0.000%	0.00%
60	Depository institutions	$626,235,388	115,268	$5,432.9	10.80%	$586,749	1,372	1.2%	$0.00	0.000%	0.00%
61	Nondepository institutions	$208,902,233	53,365	$3,914.6	15.05%	$589,102	299	0.6%	$0.00	0.000%	0.00%
62	Security and commodity brokers	$267,894,402	50,032	$5,354.5	13.32%	$712,970	278	0.6%	$0.00	0.000%	0.00%
63	Insurance carriers	$977,328,464	41,776	$23,394.5	6.82%	$1,596,288	442	1.1%	$0.00	0.000%	0.00%
64	Insurance agents, brokers, and service	$76,085,799	132,265	$575.3	6.83%	$39,261	744	0.6%	$0.00	0.000%	0.00%
65	Real estate	$191,986,451	257,248	$746.3	13.31%	$99,329	1,541	0.6%	$0.00	0.000%	0.00%
67	Holding and other investment offices	$119,637,007	28,175	$4,246.2	24.01%	$1,019,487	157	0.6%	$0.00	0.000%	0.00%
70	Hotels and other lodging places	$103,075,607	59,897	$1,720.9	6.96%	$119,782	1,326	2.2%	$18.50	0.001%	0.02%
72	Personal services	$53,965,771	208,546	$258.8	5.86%	$15,151	9,743	4.7%	$1.90	0.001%	0.01%
73	Business services	$538,701,000	410,246	$1,313.1	4.79%	$62,857	13,517	3.3%	$2.80	0.000%	0.00%
75	Auto repair, services, and parking	$102,979,805	194,877	$528.4	4.39%	$23,214	32,113	16.5%	$7.98	0.002%	0.03%
76	Miscellaneous repair services	$39,030,526	68,439	$570.3	5.44%	$31,000	3,375	4.9%	$10.45	0.002%	0.03%
78	Motion pictures	$72,351,766	46,844	$1,544.5	5.14%	$79,355	17	0.0%	$0.00	0.000%	0.00%
79	Amusement and recreation services	$94,816,288	99,642	$951.6	4.28%	$40,728	1,612	1.6%	$3.47	0.000%	0.01%
80	Health services	$824,840,187	505,878	$1,630.5	6.17%	$100,610	16,486	3.3%	$50.94	0.003%	0.05%
81	Legal services	$124,335,948	170,271	$730.2	17.50%	$127,789	61	0.0%	$22.44	0.003%	0.02%
82	Educational services	$136,669,596	50,146	$2,725.4	8.14%	$221,895	564	1.1%	$22.44	0.001%	0.01%
83	Social services	$95,229,314	165,519	$575.3	4.44%	$25,535	6,668	4.0%	$0.42	0.000%	0.00%
84	Museums, botanical, zoological gardens	$6,636,189	5,466	$1,214.1	21.45%	$260,421	235	4.3%	$0.00	0.000%	0.00%
86	Membership organizations	$111,881,925	249,022	$449.3	7.21%	$32,400	533	0.2%	$0.00	0.000%	0.00%
87	Engineering and management services	$332,197,903	301,160	$1,103.1	6.39%	$70,494	10,292	3.4%	$9.57	0.001%	0.01%
89	Services, n.e.c.	$20,335,429	17,650	$1,152.1	6.80%	$78,346	6	0.0%	$0.00	0.000%	0.00%
	Totals	$18,186,265,527	6,854,769	$2,653.1	NA	NA	282,334	4.1%	$15.64	0.001%	0.01%

Source: OSHA Office of Regulatory Analysis. See full FEA (Ex. 11).

BILLING CODE 4510–26–C

F. Economic Impacts to Small Entities

OSHA also estimated the economic impacts of the rule on affected entities with fewer than 20 employees, and for affected small entities as defined by the Small Business Administration (SBA). Table V–6 shows the estimated economic impacts for small entities with fewer than 20 employees: average compliance costs by industry are less than 0.005 percent of average revenues, and less than 0.19 percent of profits, in all industries. Table V–7 presents the economic impacts for small entities as a whole, as defined by SBA. For these firms, average compliance costs are less than 0.005 percent of average revenues and less than 0.03 percent of average profits. Thus, the Agency projects no significant impacts from the rule on small entities.

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Table V-6

Costs as a Percentage of Revenues and Profits for Affected Small Entities with Fewer than 20 Employees
(Based on Average Compliance Costs)

SIC	Industry	Revenues ($1,000)	Entities	Average Revenues ($1,000)	Profit Rate	Average Profits	Affected Entities		Average Compliance Costs to Affected Entities	Compliance Costs as a % of Revenues	Compliance Costs as a % of Profits
07	Agricultural services	$28,456,904	105,590	$269.5	6.02%	$16,220	6,562	6.2%	$0.09	0.000%	0.00%
08	Forestry	$1,005,916	2,431	$413.8	10.30%	$42,627	231	9.5%	$0.00	0.000%	0.00%
09	Fishing, hunting, and trapping	$934,691	2,325	$402.0	5.80%	$23,333	0	0.0%	NA	NA	NA
13	Oil and gas extraction	$9,568,821	14,566	$656.9	8.65%	$56,826	680	4.7%	$0.86	0.000%	0.00%
15	General building contractors	$140,742,413	185,921	$757.0	4.00%	$30,280	17,671	9.5%	$1.06	0.000%	0.00%
16	Heavy construction, except building	$25,680,517	29,472	$871.4	4.00%	$34,854	2,561	8.7%	$0.19	0.000%	0.00%
17	Special trade contractors	$156,222,049	395,675	$394.8	4.00%	$15,793	35,056	8.9%	$4.08	0.001%	0.03%
20	Food and kindred products	$13,034,058	11,890	$1,096.2	3.46%	$37,968	552	4.6%	$7.84	0.001%	0.02%
21	Tobacco products	$36,982	60	$616.4	4.02%	$24,761	6	10.6%	$0.00	0.000%	0.00%
22	Textile mill products	$2,804,537	3,128	$896.6	2.77%	$24,820	99	3.2%	$0.00	0.000%	0.00%
23	Apparel and other textile products	$7,444,651	16,288	$457.1	2.56%	$11,693	260	1.6%	$0.00	0.000%	0.00%
24	Lumber and wood products	$15,544,934	29,861	$520.6	3.90%	$20,297	437	1.5%	$2.19	0.000%	0.01%
25	Furniture and fixtures	$4,131,575	8,262	$500.1	3.51%	$17,553	410	5.0%	$2.40	0.000%	0.01%
26	Paper and allied products	$2,406,977	2,152	$1,118.7	4.50%	$50,350	48	2.2%	$0.00	0.000%	0.00%
27	Printing and publishing	$22,196,893	49,512	$448.3	3.80%	$17,034	27	0.1%	$0.00	0.000%	0.00%
28	Chemicals and allied products	$8,762,403	7,118	$1,231.0	4.49%	$55,226	2,040	28.7%	$5.44	0.000%	0.01%
29	Petroleum and coal products	$2,213,850	1,455	$1,521.1	2.99%	$45,472	206	14.2%	$4.80	0.000%	0.01%
30	Rubber and misc. plastics products	$7,183,667	8,170	$879.2	4.02%	$35,388	417	5.1%	$6.22	0.001%	0.02%
31	Leather and leather products	$570,806	1,252	$456.0	2.20%	$10,016	3	0.2%	$0.00	0.000%	0.00%
32	Stone, clay, and glass products	$6,351,359	11,248	$564.7	4.93%	$27,819	718	6.4%	$0.00	0.000%	0.00%
33	Primary metal industries	$2,848,236	2,792	$1,020.3	4.52%	$46,094	301	10.8%	$0.00	0.000%	0.00%
34	Fabricated metal products	$17,077,020	23,326	$732.1	4.55%	$33,282	3,541	15.2%	$0.90	0.000%	0.00%
35	Industrial machinery and equipment	$24,064,335	41,000	$586.9	4.05%	$23,746	4,295	10.5%	$1.38	0.000%	0.01%
36	Electronic and other electric equipment	$8,356,375	9,477	$881.7	5.59%	$49,300	1,185	12.5%	$1.45	0.000%	0.00%
37	Transportation equipment	$5,835,684	7,977	$731.6	3.74%	$27,384	2,087	26.2%	$3.44	0.000%	0.01%
38	Instruments and related products	$5,684,460	7,528	$755.1	5.06%	$38,215	644	8.6%	$3.48	0.000%	0.01%
39	Miscellaneous manufacturing industries	$6,908,160	14,733	$468.9	3.80%	$17,838	1,995	13.5%	$2.77	0.001%	0.02%
40	Railroad transportation	NA	NA	NA	11.08%	NA	NA	NA	NA	NA	NA
41	Local and interurban passenger transit	$3,052,031	14,602	$209.0	4.51%	$9,422	620	4.2%	$0.45	0.000%	0.00%
42	Trucking and warehousing	$42,301,497	115,943	$364.8	3.91%	$14,279	3,662	3.2%	$1.54	0.000%	0.01%
44	Water transportation	$4,501,041	7,826	$575.1	7.48%	$43,045	45	0.6%	$3.61	0.001%	0.01%
45	Transportation by air	$3,397,447	9,026	$376.4	3.62%	$13,628	35	0.4%	$0.00	0.000%	0.00%
46	Pipelines, except natural gas	$64,316	719	$89.4	6.55%	$5,853	123	17.2%	$0.47	0.001%	0.01%
47	Transportation services	$12,815,924	47,586	$269.3	3.39%	$9,133	7	0.0%	$0.00	0.000%	0.00%
48	Communications	$9,283,329	32,887	$282.3	5.58%	$15,749	60	0.2%	$0.00	0.000%	0.00%
49	Electric, gas, and sanitary services	$10,824,146	15,676	$690.5	10.37%	$71,638	2,341	14.9%	$2.01	0.000%	0.00%
50	Wholesale trade–durable goods	$467,174,837	288,051	$1,621.8	2.54%	$41,267	10,893	3.8%	$0.74	0.000%	0.00%
51	Wholesale trade–nondurable goods	$321,562,895	154,839	$2,076.8	4.46%	$92,689	4,841	3.1%	$2.09	0.000%	0.00%
52	Building materials and garden supplies	$37,776,200	59,221	$637.9	2.37%	$15,129	1,927	3.3%	$0.00	0.000%	0.00%
53	General merchandise stores	$3,346,901	20,202	$165.7	2.70%	$4,477	114	0.6%	$0.00	0.000%	0.00%
54	Food stores	$57,468,235	141,437	$406.3	1.41%	$5,732	559	0.4%	$0.00	0.000%	0.00%
55	Automotive dealers and service stations	$149,337,410	171,823	$869.1	1.45%	$12,565	7,528	4.4%	$0.56	0.000%	0.00%
56	Apparel and accessory stores	$18,706,435	110,314	$169.6	1.85%	$3,132	79	0.1%	$0.00	0.000%	0.00%
57	Furniture and homefurnishings stores	$45,392,798	105,329	$431.0	2.28%	$9,837	2,218	2.1%	$0.00	0.000%	0.00%
58	Eating and drinking places	$61,841,796	345,818	$178.8	3.00%	$5,362	0	0.0%	NA	NA	NA
59	Miscellaneous retail	$119,265,615	333,875	$357.2	2.49%	$8,889	578	0.2%	$0.00	0.000%	0.00%
60	Depository institutions	$15,538,559	87,085	$178.4	10.80%	$19,270	988	1.1%	$0.00	0.000%	0.00%
61	Nondepository institutions	$13,454,697	46,988	$286.3	15.05%	$43,092	229	0.5%	$0.00	0.000%	0.00%
62	Security and commodity brokers	$19,644,662	42,577	$461.4	13.32%	$61,437	218	0.5%	$0.00	0.000%	0.00%
63	Insurance carriers	$9,416,333	31,420	$299.7	6.82%	$20,449	347	1.1%	$0.00	0.000%	0.00%
64	Insurance agents, brokers, and service	$33,660,359	123,996	$271.5	6.83%	$18,527	580	0.5%	$0.00	0.000%	0.00%
65	Real estate	$108,609,341	241,034	$450.6	13.31%	$59,972	1,139	0.5%	$0.00	0.000%	0.00%
67	Holding and other investment offices	$35,174,755	25,563	$1,376.0	24.01%	$330,365	125	0.5%	$0.00	0.000%	0.00%
70	Hotels and other lodging places	$12,241,793	44,739	$273.6	6.96%	$19,046	872	1.9%	$0.68	0.000%	0.00%
72	Personal services	$27,470,741	193,520	$142.0	5.86%	$8,311	8,203	4.2%	$0.20	0.000%	0.00%
73	Business services	$108,448,938	341,046	$318.0	4.79%	$15,222	8,479	2.5%	$0.67	0.000%	0.00%
75	Auto repair, services, and parking	$52,027,411	183,534	$283.5	4.39%	$12,453	26,179	14.3%	$0.88	0.000%	0.01%
76	Miscellaneous repair services	$18,035,716	63,732	$283.0	5.44%	$15,383	2,762	4.3%	$6.96	0.002%	0.05%
78	Motion pictures	$13,026,870	41,250	$315.8	5.14%	$16,226	10	0.0%	$0.00	0.000%	0.00%
79	Amusement and recreation services	$26,704,545	82,535	$323.6	4.28%	$13,848	1,206	1.5%	$0.00	0.000%	0.00%
80	Health services	$167,087,490	433,861	$385.1	6.17%	$23,764	12,768	2.9%	$0.19	0.000%	0.00%
81	Legal services	$54,265,197	160,755	$337.6	17.50%	$59,074	42	0.0%	$0.00	0.000%	0.00%
82	Educational services	$8,902,333	35,222	$252.7	8.14%	$20,578	421	1.2%	$0.00	0.000%	0.00%
83	Social services	$22,228,579	133,954	$165.9	4.44%	$7,365	4,955	3.7%	$0.10	0.000%	0.00%
84	Museums, botanical, zoological gardens	$1,283,445	4,594	$279.4	21.45%	$59,921	175	3.8%	$0.00	0.000%	0.00%
86	Membership organizations	$43,669,772	224,283	$194.7	7.21%	$14,041	400	0.2%	$0.00	0.000%	0.00%
87	Engineering and management services	$90,405,763	271,244	$333.3	6.39%	$21,300	6,602	2.4%	$0.17	0.000%	0.00%
89	Services, n.e.c.	$5,728,501	16,488	$347.4	6.80%	$23,625	3	0.0%	$0.00	0.000%	0.00%
	Totals	$2,781,206,926	5,797,803	$479.7	NA	NA	194,364	3.4%	$1.53	0.000%	0.01%

Source: OSHA Office of Regulatory Analysis. See full FEA (Ex.11).

Table V-7

Costs as a Percentage of Revenues and Profits for all Affected Small Entities*
(Based on Average Compliance Costs)

SIC	Industry	Revenues ($1,000)	SBA Entities	Average Revenues ($1,000)	Profit Rate	Average Profits	Affected Entities		Average Compliance Costs to Affected Entities	Compliance Costs as a % of Revenues	Compliance Costs as a % of Profits
07	Agricultural services	$38,501,047	109,663	$351.1	6.02%	$21,130	6,718	6.1%	$0.13	0.000%	0.00%
08	Forestry	$1,496,747	2,400	$623.6	10.30%	$64,235	233	9.7%	$0.00	0.000%	0.00%
09	Fishing, hunting, and trapping	NA	NA	NA	5.80%	NA	NA	NA	NA	NA	NA
13	Oil and gas extraction	$29,931,841	14,787	$2,024.2	8.65%	$175,093	890	6.0%	$18.51	0.001%	0.01%
15	General building contractors	$234,203,450	195,315	$1,199.1	4.00%	$47,964	17,540	9.0%	$1.11	0.000%	0.00%
16	Heavy construction, except building	$68,664,092	35,618	$1,927.8	4.00%	$77,112	3,314	9.3%	$3.43	0.000%	0.00%
17	Special trade contractors	$270,401,924	426,477	$634.0	4.00%	$25,361	34,756	8.1%	$15.53	0.002%	0.06%
20	Food and kindred products	$104,629,113	15,992	$6,542.6	3.46%	$226,600	1,781	11.1%	$8.03	0.000%	0.00%
21	Tobacco products	$1,255,255	91	$13,794.0	4.02%	$554,130	10	11.1%	$0.00	0.000%	0.00%
22	Textile mill products	$20,377,246	4,845	$4,205.8	2.77%	$116,423	458	9.4%	$2.71	0.000%	0.00%
23	Apparel and other textile products	$38,507,048	22,383	$1,720.4	2.56%	$44,010	841	3.8%	$0.00	0.000%	0.00%
24	Lumber and wood products	$58,343,756	35,076	$1,663.4	3.90%	$64,854	1,278	3.6%	$2.08	0.000%	0.00%
25	Furniture and fixtures	$26,295,821	11,217	$2,344.3	3.51%	$82,285	1,540	13.7%	$1.88	0.000%	0.00%
26	Paper and allied products	$31,334,277	4,057	$7,723.5	4.50%	$347,629	249	6.1%	$7.33	0.000%	0.00%
27	Printing and publishing	$85,620,541	57,018	$1,501.6	3.80%	$57,055	91	0.2%	$0.00	0.000%	0.00%
28	Chemicals and allied products	$59,010,014	8,227	$7,172.7	4.49%	$321,776	1,955	23.8%	$52.28	0.001%	0.02%
29	Petroleum and coal products	$13,950,653	1,047	$13,324.4	2.99%	$398,317	118	11.3%	$52.22	0.000%	0.01%
30	Rubber and misc. plastics products	$58,709,872	13,043	$4,501.3	4.02%	$181,167	1,627	12.5%	$5.14	0.000%	0.00%
31	Leather and leather products	$4,003,751	1,675	$2,390.3	2.20%	$52,509	184	11.0%	$4.34	0.000%	0.01%
32	Stone, clay, and glass products	$34,254,470	11,791	$2,905.1	4.93%	$143,127	1,393	11.8%	$14.13	0.000%	0.01%
33	Primary metal industries	$36,511,582	4,806	$7,597.1	4.52%	$343,213	1,023	21.3%	$18.88	0.000%	0.01%
34	Fabricated metal products	$113,752,781	34,250	$3,321.2	4.55%	$150,988	4,015	11.7%	$3.26	0.000%	0.00%
35	Industrial machinery and equipment	$127,178,710	52,548	$2,420.2	4.05%	$97,917	4,176	7.9%	$3.48	0.000%	0.00%
36	Electronic and other electric equipment	$69,499,940	14,355	$4,841.5	5.59%	$270,705	1,292	9.0%	$5.67	0.000%	0.00%
37	Transportation equipment	$41,544,504	10,653	$3,899.8	3.74%	$145,974	1,984	18.6%	$10.84	0.000%	0.01%
38	Instruments and related products	$33,908,725	10,190	$3,327.6	5.06%	$168,410	787	7.7%	$8.93	0.000%	0.01%
39	Miscellaneous manufacturing industries	$30,627,905	17,837	$1,717.1	3.80%	$65,322	2,267	12.7%	$12.90	0.001%	0.02%
40	Railroad transportation	NA	NA	NA	11.08%	NA	NA	NA	NA	NA	NA
41	Local and interurban passenger transit	$7,690,615	16,537	$465.1	4.51%	$20,964	540	3.3%	$1.40	0.000%	0.01%
42	Trucking and warehousing	$79,888,400	114,623	$697.0	3.91%	$27,278	3,166	2.8%	$2.64	0.000%	0.01%
44	Water transportation	$14,075,608	8,051	$1,748.3	7.48%	$130,855	46	0.6%	$3.73	0.000%	0.00%
45	Transportation by air	$15,156,218	6,386	$2,373.4	3.62%	$85,925	22	0.3%	$0.00	0.000%	0.00%
46	Pipelines, except natural gas	$986,979	39	$25,307.2	6.55%	$1,657,050	5	13.9%	$0.43	0.000%	0.00%
47	Transportation services	$19,513,397	40,529	$481.5	3.39%	$16,327	6	0.0%	$0.00	0.000%	0.00%
48	Communications	$41,125,079	17,482	$2,352.4	5.58%	$131,244	28	0.2%	$0.00	0.000%	0.00%
49	Electric, gas, and sanitary services	$10,824,146	8,938	$1,211.0	10.37%	$125,641	1,323	14.8%	$1.69	0.000%	0.00%
50	Wholesale trade--durable goods	$837,107,306	258,492	$3,238.4	2.54%	$82,401	9,740	3.8%	$7.55	0.000%	0.01%
51	Wholesale trade--nondurable goods	$637,454,650	143,751	$4,434.4	4.46%	$197,917	4,455	3.1%	$41.68	0.001%	0.02%
52	Building materials and garden supplies	$37,776,200	46,450	$813.3	2.37%	$19,289	1,368	2.9%	$0.00	0.000%	0.00%
53	General merchandise stores	$3,346,901	8,796	$380.5	2.70%	$10,283	85	1.0%	$0.00	0.000%	0.00%
54	Food stores	$101,566,550	123,572	$821.9	1.41%	$11,595	852	0.7%	$0.00	0.000%	0.00%
55	Automotive dealers and service stations	$149,337,410	116,015	$1,287.2	1.45%	$18,609	5,043	4.3%	$0.61	0.000%	0.00%
56	Apparel and accessory stores	$18,706,435	50,308	$371.8	1.85%	$6,867	63	0.1%	$0.00	0.000%	0.00%
57	Furniture and homefurnishings stores	$45,392,798	78,842	$575.7	2.28%	$13,142	1,494	1.9%	$0.00	0.000%	0.00%
58	Eating and drinking places	$128,561,814	355,297	$361.8	3.00%	$10,850	0	0.0%	NA	NA	NA
59	Miscellaneous retail	$119,265,615	258,538	$461.3	2.49%	$11,479	488	0.2%	$0.00	0.000%	0.00%
60	Depository institutions	$15,538,559	14,378	$1,080.7	10.80%	$116,718	186	1.3%	$0.00	0.000%	0.00%
61	Nondepository institutions	$13,454,697	21,262	$632.8	15.05%	$95,230	117	0.6%	$0.00	0.000%	0.00%
62	Security and commodity brokers	$19,644,662	27,262	$720.6	13.32%	$95,949	157	0.6%	$0.00	0.000%	0.00%
63	Insurance carriers	$5,850,805	4,967	$1,177.9	6.82%	$80,375	73	1.5%	$0.00	0.000%	0.00%
64	Insurance agents, brokers, and service	$47,083,678	119,907	$392.7	6.83%	$26,800	616	0.5%	$0.00	0.000%	0.00%
65	Real estate	$142,479,284	230,304	$618.7	13.31%	$82,340	1,139	0.5%	$0.00	0.000%	0.00%
67	Holding and other investment offices	$35,174,755	21,022	$1,673.2	24.01%	$401,733	116	0.6%	$0.00	0.000%	0.00%
70	Hotels and other lodging places	$24,876,889	47,698	$521.5	6.96%	$36,302	1,070	2.2%	$0.84	0.000%	0.00%
72	Personal services	$36,957,629	176,477	$209.4	5.86%	$12,262	7,222	4.1%	$0.30	0.000%	0.00%
73	Business services	$188,061,601	337,126	$557.8	4.79%	$26,703	9,637	2.9%	$0.84	0.000%	0.00%
75	Auto repair, services, and parking	$66,003,052	167,057	$395.1	4.39%	$17,356	22,771	13.6%	$0.99	0.000%	0.01%
76	Miscellaneous repair services	$25,861,556	63,328	$408.4	5.44%	$22,198	2,756	4.4%	$6.67	0.002%	0.03%
78	Motion pictures	$13,026,870	29,959	$434.8	5.14%	$22,341	9	0.0%	$0.00	0.000%	0.00%
79	Amusement and recreation services	$47,922,810	90,742	$528.1	4.28%	$22,604	1,231	1.4%	$0.00	0.000%	0.00%
80	Health services	$243,370,668	413,561	$588.5	6.17%	$36,312	11,837	2.9%	$0.18	0.000%	0.00%
81	Legal services	$54,265,197	156,877	$345.9	17.50%	$60,534	47	0.0%	$0.00	0.000%	0.00%
82	Educational services	$25,677,552	40,592	$632.6	8.14%	$51,502	398	1.0%	$0.00	0.000%	0.00%
83	Social services	$50,553,841	117,544	$430.1	4.44%	$19,088	3,960	3.4%	$0.16	0.000%	0.00%
84	Museums, botanical, zoological gardens	$2,928,264	4,912	$596.1	21.45%	$127,873	186	3.8%	$0.00	0.000%	0.00%
86	Membership organizations	$78,452,141	242,081	$324.1	7.21%	$23,371	429	0.2%	$0.00	0.000%	0.00%
87	Engineering and management services	$151,671,072	271,169	$559.3	6.39%	$35,745	8,091	3.0%	$2.93	0.001%	0.01%
89	Services, n.e.c.	$8,169,059	16,395	$498.3	6.80%	$33,882	4	0.0%	$0.00	0.000%	0.00%
	Totals	$5,197,315,827	5,382,627	$965.6	4.67%	$45,139	191,294	3.6%	$6.40	0.001%	0.01%

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When costs exceed one percent of revenues or five percent of profits, OSHA considers the impact on small entities significant for the purposes of complying with the RFA. For all classes of affected small entities, the Agency found that the costs were less than one percent of revenues and five percent of profits. Therefore, OSHA certifies that this regulation would not have a significant impact on a substantial number of small entities.

VI. Summary and Explanation of the Final Standard

This section of the preamble provides a summary and explanation of each revision made to OSHA's Respiratory Protection Standard involving APFs.

A. Definition of Assigned Protection Factor

As part of its 1994 proposed rulemaking for the Respiratory Protection Standard, OSHA proposed a definition for APFs that read as follows: ''[T]he number assigned by NIOSH [the National Institute for Occupational Safety and Health] to indicate the capability of a respirator to afford a certain degree of protection in terms of fit and filter/cartridge penetration'' (59 FR 58938). OSHA proposed this definition on the assumption that NIOSH would develop APFs for the various respirator classes, building on the APFs in the 1987 NIOSH RDL (59 FR 58901–58903). However, NIOSH subsequently decided not to publish a list of APFs as part of its 42 CFR 84 Respirator Certification Standards (60 FR 30338), and reserved APFs for a future NIOSH rulemaking.

During his opening statement on June 15, 1995, at an OSHA-sponsored expert-panel discussion on APFs, Adam Finkel, then Director of the Agency's Directorate of Health Standards Programs, noted that OSHA would explore developing its own list of APFs (H–049, Ex. 707–X). The Agency then announced in the preamble to the final Respiratory Protection Standard (63 FR 1182) that it would propose an APF table ''based on a thorough review and analysis of all relevant evidence'' in a subsequent rulemaking. In the final Respiratory Protection Standard, OSHA reserved space for a table for APFs, a paragraph ((d)(3)(i)(A)) for APF requirements, and a definition of APF under paragraph (b).

In its 1987 RDL, NIOSH defined an APF as ''[t]he minimum anticipated protection provided by a properly functioning respirator or class of respirators to a given percentage of properly fitted and trained users'' (Ex. 1–54–437Q). ANSI subsequently developed a definition for an APF in its Z88.2–1992 Respiratory Protection Standard that reads, ''The expected workplace level of respiratory protection that would be provided by a properly functioning respirator or class of respirators to properly fitted and trained users'' (Ex. 1–50). The ANSI Z88.2 subcommittee that developed the 1992 standard used the NIOSH definition of an APF as a template for its APF definition. However, the Z88.2 subcommittee revised the phrase ''minimum anticipated protection'' in the NIOSH definition to ''expected workplace level of respiratory protection.'' It also removed the NIOSH phrase ''to a given percentage'' from its definition.

The phrase ''a given percentage'' implies that some respirator users will not achieve the full APF under workplace conditions. The ''given percentage'' usually is about five percent, which is a percentage derived from statistical analyses of results from WPF studies. In this regard, five percent represents the 5th percentile of the geometric distribution of individual protection factors in a WPF study. Therefore, the 5th percentile is the threshold for specifying the APF for the respirator tested under those workplace conditions. Using the 5th percentile means that about five percent of the employees who use the respirator under these workplace conditions may not achieve the level of protection assigned to the respirator (or class of respirators), even after they receive proper fit testing and use the respirator correctly under a comprehensive respiratory protection program. However, ANSI dropped the phrase ''to a given percentage'' to reduce confusion (i.e., the phrase did not specify a percentage), and to emphasize the level of protection needed by the vast majority of employees who use respirators in the workplace. See also subsection E.4 (''Analysis of Updated Database on APRs'') of Section III (''Methodology for Developing APFs for Respirators'') of this preamble.

The Agency's review of the available data on respirator performance, as well as findings from surveys of personal protective equipment (Exs. 6–1 and 6–2), indicate that existing APF definitions are confusing to the respirator-using public. Accordingly, OSHA has developed its own definition in this final rule that will reduce confusion among employers and employees regarding APFs, thereby assisting employers in providing their employees with effective respirator protection, consistent with its Respiratory Protection Standard.

The major revision the Agency made to the ANSI APF definition in developing the proposed APF definition included adding the phrase ''when the employer implements a continuing, effective respiratory protection program as specified by 29 CFR 1910.134.'' The Agency added this phrase to emphasize the already existing requirement that employers must select a respirator in the context of a comprehensive respiratory protection program. Also, the Agency revised the phrase ''as specified by 29 CFR 1910.134'' at the end of the proposed APF definition to read ''as specified by this section'' to conform to style conventions for referencing an entire standard. Therefore, the Agency is adopting the APF definition that was proposed in the NPRM except for this minor revision. OSHA's final definition for APF reads as follows:

Assigned protection factor (APF) means the workplace level of respiratory protection that a respirator or class of respirators is expected to provide to employees when the employer implements a continuing, effective respiratory protection program as specified by this section.

B. APF Provisions

1. Paragraph (d)(3)(i)(A)—APF Provisions

Paragraph (d)(3)(i)(A) is the provision in OSHA's Respiratory Protection Standard that requires employers to use the APFs in Table 1 of this final standard to select respirators. The language of the final provision is the same as the language in the proposal. Therefore, paragraph (d)(3)(i)(A) in the final rule reads as follows:

(A) *Assigned Protection Factors (APFs).* Employers must use the assigned protection factors listed in Table 1 to select a respirator that meets or exceeds the required level of employee protection. When using a combination respirator (e.g., airline respirators with an air-purifying filter), employers must ensure that the assigned protection factor is appropriate to the mode of operation in which the respirator is being used.

The proposed language in paragraph (d)(3)(i)(A) also contained the following note that addressed two issues related to APFs:

Note to paragraph (d)(3)(i)(A): The assigned protection factors listed in Table 1 are effective only when the employer has a continuing, effective respiratory protection program as specified by 29 CFR 1910.134, including training, fit testing, maintenance and use requirements. These assigned protection factors do not apply to respirators used solely for escape.

The first sentence of the note was proposed to remind employers that the APFs in Table 1 are effective only when

they have a complete respirator program that meets the requirements of OSHA's Respiratory Protection Standard. Table 1 of the final rule already contains a note (footnote 2) that essentially repeats this language. Therefore, to avoid unnecessary duplication, the Agency decided to remove this language for the final rule. However, the Agency is retaining the last part of the note as a footnote in Table 1 of the final rule (see discussion of footnote 5 in the following subsection).

2. Table 1—APF Table

The NPRM contained Table 1 (''Assigned Protection Factors''), which listed the APFs for the various respirator classes. The final APFs for these respirators are discussed in detail in subsection C (''Assigned Protection Factors for Specific Respirator Types'') of this section.

The proposed APF Table also contained a set of footnotes that informed users regarding the application of APFs in the table. In the final rule, footnote 1 remains essentially unchanged from the proposal. Footnote 2 has been clarified to explain when APFs are effective, rather than when APFs apply. All employers who use respirators need to comply with the Respiratory Protection Standard. The language in footnote 3 of the proposed table was revised from the proposal. Proposed footnote 3 stated ''This APF category includes quarter masks, filtering facepieces, and half-masks.'' The reference to quarter masks has been removed from this footnote since quarter mask respirators have been assigned a separate APF in Table 1. Also, the phrase ''with elastomeric facepieces'' has been added to the description of half masks to clarify that elastomeric facepieces are included in the half mask respirator class. Final footnote 3 reads as follows in the final rule: ''This APF category includes filtering facepieces, and half masks with elastomeric facepieces.''

Footnote 4 relates to the testing of PAPRs with helmets or hoods to demonstrate that these respirators can perform at the required APF of 1,000 or greater for this class. The proposed footnote and the changes made to it in the final standard are discussed in subsection C (''Assigned Protection Factors for Specific Respirator Types'') in item 4 (''APF for Powered Air-Purifying Respirators (PAPRs)'') of this section.

Footnote 5 in the proposal described limitations for the APF of 10,000 (maximum) for pressure-demand SCBAs. The proposed footnote 5 described an SWPF study demonstrating that, when test subjects used pressure-demand SCBAs under high work rates, a few of the study results indicated that the respirators may not achieve an APF of 10,000. Consequently, the proposed footnote cautioned employers not to use these respirators under conditions that would require protection above this level. In discussing this footnote in the proposal, OSHA stated that, ''the employer must restrict [pressure-demand SCBA] use to conditions in which the required level of employee protection is at or below an APF of 10,000'' (68 FR 34105). While the Agency received no comments on the proposed footnote, it believes that, when employers use these respirators, they must assess the exposure conditions prior to such use as required by paragraph (d)(1)(iii) of OSHA's Respiratory Protection Standard. In view of the already existing requirement, the Agency decided that the information in proposed footnote 5 was unnecessary, and, therefore, removed it from the final rule.

As noted previously under subsection B (''Paragraph (d)(3)(i)(A)—APF Provisions'') of this section, OSHA is adding a new footnote 5 to Table 1 in the final rule. The new footnote will remind employers that they cannot apply the APFs specified in Table 1 to emergency-escape conditions. OSHA believes this footnote is important because precise exposures levels, which serve as the basis for determining APFs, cannot be assessed accurately for emergency-escape conditions. Under these conditions, the only appropriate respirators for employee use are respirators designated for escape (i.e., escape respirators), consistent with the requirements specified by OSHA's Respiratory Protection Standard at 29 CFR 1910.134(d)(2)(ii). New footnote 5 is similar to the APF provisions of the Agency's substance-specific standards that designate appropriate respirators for use under emergency-escape conditions. Because both the substance-specific standards and 29 CFR 1910.134(d)(2)(ii) contain requirements for selecting escape respirators, the Agency is revising the note slightly to ensure that employers refer to the appropriate provisions. Therefore, footnote 5 to Table 1 in the final rule will read as follows:

> These APFs do not apply to respirators used solely for escape. For escape respirators used in association with specific substances covered by 29 CFR part 1910 subpart Z, employers must refer to the appropriate substance-specific standard in that subpart. Escape respirators for other IDLH atmospheres are specified by 29 CFR 1910.134(d)(2)(ii).

C. Assigned Protection Factors for Specific Respirator Types

OSHA received comments on APFs during the public comment period following publication of the NPRM, and at the public hearing. These comments and hearing testimony are addressed in the following sections.

1. APF for Quarter Mask Air-Purifying Respirators

Introduction. OSHA proposed an APF of 10 for quarter mask air-purifying respirators (i.e., quarter masks/quarter mask respirators), including them in the same category as filtering facepieces and half mask air-purifying respirators (68 FR 43115). However, the Agency specifically requested comment on whether this action was appropriate (see 68 FR 34112).

The following recommendations include all of the issues raised by commenters regarding quarter mask respirators: assign them an APF of 10; assign them an APF of 5; prohibit their use altogether; or refrain from assigning an APF to them until more studies become available. In general, those commenters who recommended an APF of 10 for quarter mask respirators based their recommendations on the analogous structural characteristics (i.e., similarities in design) of quarter mask and half mask respirators. Commenters who recommended an APF of 5 pointed out that the only available APF data for quarter mask respirators were in the 1976 study by Edwin C. Hyatt entitled ''Respiratory Protection Factors'' (i.e., the ''Hyatt Study'' (Ex. 2)). Based on this study, Hyatt assigned quarter masks an APF of 5.

Comments regarding quarter mask respirators. The commenters who advised OSHA to give quarter mask respirators an APF of 10 believed that when these respirators are used in a workplace where the employer has implemented a complete respirator program as required by 29 CFR 1910.134, their performance should be the same as that of half mask respirators. For example, Thomas Nelson of Nelson Industrial Hygiene Systems, Inc. testified,

> There is no unique property of a quarter mask respirator that makes it[s] use different from half facepiece respirators provided the person using the respirator is trained, fitted and maintains the respirator. OSHA should include quarter masks in the half facepiece category. (Ex. 10–17.)

Michael Runge of 3M Corporation recommended that both half mask and quarter mask respirators should receive an APF of 10 because of their similarity

in performance, which he described as follows:

> [L]eakage into a respirator can occur through three pathways[:] defects, filter penetration or faceseal leakage. Leakage through defects is controlled by the respirator maintenance program. Quarter facepiece respirators are no harder to maintain than half facepiece respirators; they have many of the same parts * * * Filter leakage is controlled by the NIOSH certification process * * * Faceseal leakage is controlled through fit testing. The same fit tests can be used with either type of respirator, hence the same maximum face seal leakage would be expected for the quarter and half facepiece respirator. (See Ex. 9–16.)

Daniel Shipp and Janice Bradley of the International Safety Equipment Association and Kenneth V. Bobetich of MSA made similar statements (Exs. 9–22, 9–37, and 16–14).

Thomas Nelson asserted that the Hyatt Study may have underestimated the APF for quarter mask respirators because the study did not control adequately for respirator leakage. His comment was based on the fact that the authors of the study: (1) Did not administer a proper fit test to the test subjects prior to measuring particle contamination inside the respirator, and (2) used a fine particle (sodium chloride) as a test aerosol, that may have penetrated both the faceseal and filter, thereby artificially increasing concentrations inside the respirator (Tr. at 163 and Ex. 18–9).

The commenters who recommended that OSHA assign quarter mask respirators an APF of 5 stressed that no studies, including WPF and SWPF studies, on quarter mask respirators have been performed since the Hyatt Study. Few quantitative data are thus available on which OSHA can rely to set an APF for quarter mask respirators. These commenters, who include NIOSH, pointed out that NIOSH used the Hyatt Study to set the APF for quarter mask respirators at 5 in its 1987 RDL. NIOSH commented further that, ''quarter mask respirators should be separated from half mask respirators into a class of their own with an APF of 5. The data from Hyatt's study [1976] do not support an APF of 10'' (Ex. 17–7–1). Similarly, James S. Johnson stated, ''We object to the agency's proposed APF of 10 for quarter mask respirators. There is no evidence in the record, from either WPF or simulated workplace protection factor (SWPF) studies that support this conclusion'' (Ex. 16–9–1). Johnson's comments were echoed by the AFL–CIO (Exs. 9–27 and 19–1–1). These comments indicate that the Hyatt Study was not a valid WPF or SWPF study because it was a fit test protocol, not an experimental study.

The International Brotherhood of Teamsters and the AFL–CIO Building and Construction Trades Department supported an APF of 5 for quarter mask respirators because they believed that quarter mask respirators were more likely than half mask respirators to move around on workers' faces when the workers communicate, or because of movement, exertion, or perspiration. These commenters stated:

> Since the lower seal of the facepiece in quarter mask respirators is on the chin, rather than below the chin, the seal is much more likely to be compromised than the seal on a half face respirator. Additionally, in use factors such as movement, exertion, and perspiration add to the likelihood that the seal of these masks will be compromised in the work place. (Exs. 9–12 and 9–29.)

The Nuclear Regulatory Commission commented that its regulations prohibit the use of quarter masks because of ''the potential lack of stability of fit and the availability of acceptable alternatives (half-face respirators)'' (Ex. 10–7). Tracy Fletcher of Parsons-Oderbrecht JV recommended that OSHA prohibit the use of both quarter and half masks, stating, ''Employees are required to wear eye protection with the respirator, and use of the two together is difficult as the wearer will find that the glasses rest on the nose piece of the respirator creating an entry point for an overspray, splash or whatever.'' (Ex. 10–1.)

A small number of commenters expressed the opinion that, because the Hyatt Study provides the only data on the protection afforded by quarter mask respirators, OSHA should reserve its decision on the APF for these respirators until more studies can be completed. ORC Worldwide commented that ''[q]uarter masks should be evaluated as individual respirator models. In the absence of comprehensive testing data over the last 27 years, there is no valid basis for giving them an APF of any kind'' (Ex. 10–27). David Spence, an industrial hygienist, stated:

> We recommend that SWPF studies be performed on quarter masks respirators in a manner analogous to the ORC SWPF studies performed on powered air-purifying respirators and supplied-air respirators. To not delay publishing APFs for the other classes of respirators, the section on APF of quarter masks could be reserved pending completion of SWPF studies. (Ex. 10–6.)

Summary and conclusions. In light of these comments, the Agency has reconsidered the proposed APF of 10 for quarter masks. The comments recommending an APF of 10 for quarter mask respirators are based solely on structural analogies between quarter masks and half masks, and not on the functional characteristics of these respirators. Accordingly, the rulemaking record contains no quantitative or qualitative data or other convincing evidence confirming that quarter mask and half mask respirators function in a similar fashion to provide employees with equal levels of respiratory protection. No WPF or SWPF studies conducted on quarter mask respirators were submitted to the record. The Hyatt Study, which consisted of testing quarter masks using a fit testing protocol, provides the only data available for quarter mask respirators, and it supports an APF of 5. Therefore, OSHA has decided to separate quarter mask respirators into their own category and assign them an APF of 5.

It is possible that the facepieces of quarter masks and half masks are not functionally analogous. Some commenters noted that half masks rest *under* the chin while quarter masks rest *on* the chin. Consequently, quarter masks are more prone than half masks to slip and compromise the face seal when a worker talks or performs heavy work. While the record contains no quantitative evidence supporting such assertions, there is ample qualitative evidence, and OSHA is entitled under these circumstances to take a conservative approach in weighing the available evidence (see, e.g., 29 U.S.C. 655(b)(5) and *United Steelworkers of America, AFL–CIO–CLC* v. *Marshall,* 647 F.2d 1189, 1248 (D.C. Cir. 1980)). Moreover, OSHA believes that these respirators can be used safely at an APF of 5 because properly administered fit testing protocols (including administering the fit test with glasses and other protective equipment worn during respirator use),[9] as well as appropriate respirator training, will inform employees of this problem and the procedures they can use to prevent it.

In further response to those commenters who advised OSHA to prohibit quarter masks, OSHA does not believe that this approach is reasonable. As discussed at the public hearing, quarter mask respirators are not widely used, but they do have some popularity in particular industries (Tr. at 558). All existing quarter mask respirators have received an N95 rating under NIOSH's certification program, indicating that the respirators are designed to prevent at least 95% of the challenge agent from penetrating the filter. Therefore, these certification results, along with the

[9] As required under Appendix A (Part IA, paragraph 13) of 29 CFR 1910.134.

other evidence in the rulemaking record, have convinced OSHA that employees can use these quarter mask respirators safely at an APF of 5 in workplaces that implement a respirator program that complies with 29 CFR 1910.134.

Regarding those commenters who advised OSHA to delay the APF decision for quarter mask respirators until WPF or SWPF studies are available, OSHA notes that in the intervening 29 years following the Hyatt Study, no WPF or SWPF studies have been conducted on quarter mask respirators. If OSHA was to delay setting an APF for quarter mask respirators pending further study, it could in effect be deciding to delay setting an APF for these respirators indefinitely. OSHA has not been persuaded by the record to delay setting an APF for quarter mask respirators. Moreover, as noted in the previous paragraph, OSHA has concluded that the record evidence supports an APF of 5 for quarter mask respirators.

2. APF for Half Mask Air-Purifying Respirators

Introduction. OSHA proposed an APF of 10 for both elastomeric and filtering facepiece half mask respirators. During the public comment period, interested parties expressed two divergent views on this proposed APF. The healthcare industry (Ex. 9–18 to 9–21), NIOSH (Tr. 107 and 112) and other commenters (e.g., Exs. 9–11, 9–22, 9–26, 9–42, and 10–18) agreed to an APF of 10 for both types of respirators, while a number of commenters stated that filtering facepieces should be assigned a protection factor of 5 (e.g., Exs. 9–8, 9–12, 9–29, and 10–6; AFL–CIO Tr. at 122–126). The following sections discuss this issue in detail.

A number of reasons were presented for limiting filtering facepiece half masks to an APF of 5. These reasons can be categorized generally into concerns related to: (1) WPF studies and associated data; (2) design of filtering facepiece respirators; (3) respirator use in the workplace; and (4) ANSI standards. As discussed in Section III above, some commenters believed that the WPF studies evaluated by OSHA suffered from multiple problems (e.g., old data, studies not representative of typical workplaces). While these points are addressed in detail in Section III of this preamble, some of these concerns warrant further discussion here.

Some filtering facepieces do not achieve an APF of 10. Comment was made that the data presented in the studies analyzed by OSHA indicate that not all filtering facepieces achieved an APF of 10. Consequently, these commenters argued that the entire class of respirators should receive an APF of 5 (Exs. 9–29, 9–27, and 10–54). The AFL–CIO stated:

> An examination of the summary table of WPF studies for filtering facepieces and half-mask elastomeric respirators at 68 FR 30495 of OSHA's preamble to this proposed rule justifies our position. Of the seven respirators that had a 5th percentile WPF less than 9, five of [the] respirators that failed consisted of the filtering facepiece style of respirator. Thus [of] the overwhelming majority of the half mask respirators that failed, five of the seven or 71%, were filtering facepieces. At the qualitative level then, this data clearly indicates that most of the problem with failing to provide adequate protection rests with filtering facepieces and not with half-mask elastomerics. (Ex. 9–27.)

The summary table in the proposal at 68 FR 34095 contains several studies that were reviewed by OSHA, but did not meet the selection criteria and were excluded from the quantitative analyses. The two filtering facepiece respirators (one model in each study) evaluated in these excluded studies had WPFs less than 9 (Cohen, Ex. 1–64–11; and Reed, Ex. 1–64–61), while five of the respirators included in OSHA's analyses failed to achieve a WPF of 9. Three of these five respirators were filtering facepiece respirators and the remaining two respirators were elastomeric half masks. As noted at the hearing, OSHA conducted a Chi-square analysis to determine if the proportion of filtering facepieces having a WPF less than 9 differed from the proportion of elastomerics with a WPF less than 9 (Trans. at 135–136). This statistical comparison showed that these proportions did not differ significantly from each other, indicating that similar proportions of filtering facepiece and elastomeric respirators performed at this level—i.e., that the filtering facepiece respirators did not perform more poorly than the elastomeric respirators.

After updating the proposal's half mask WPF database (Ex. 20–2) with new and additional data, Dr. Crump reanalyzed the database (Ex. 20–1). Plotting the observed protection factors for both the elastomeric and the filtering facepiece half masks shows that over 95% of each type of half mask attained an APF of at least 10. Moreover, a review of these updated analyses reveals that more elastomeric than filtering facepiece respirators failed to achieve an APF of 10 (see Table 2 in Ex. 20–1). Even when the data from studies excluded from these analyses were added to the database, over 95% of the WPFs for both types of half mask (separately and combined) are still equal to or greater than 10. (A detailed discussion of Dr. Crump's analyses can be found in section III (Methodology) of this preamble.) Therefore, OSHA does not agree that the evidence in the record supports an APF for filtering facepieces of 5 as suggested by these commenters.

Respirator configuration and certification issues. Commenters also stated that not all configurations (e.g., cups, duckbills, fold flats) of filtering facepiece respirators have been studied (e.g., Exs. 9–17, 9–34, 9–40, 10–33, and 10–34; Tr. at 204–205). In addition, some commenters mentioned that none of the respirators in the studies evaluated by the Agency for the proposal were certified under NIOSH's new 42 CFR 84 requirements (Exs. 9–33, 9–34, 10–22, and 10–38). The focus of these comments was that OSHA should not assume that all filtering facepieces perform the same as those filtering facepieces that were tested. These commenters believed that filtering facepiece half masks should be given an APF of 5 because, in their view, there is a lack of information on 42 CFR 84 filtering facepieces.

OSHA recognizes that its analyses do not encompass all configurations or models of filtering facepiece half masks. However, this is true for all types of respirators, not just filtering facepiece half masks. Since filter efficiency is certified by NIOSH, the filter media of all filtering facepiece (and elastomeric) half mask configurations are equivalent. Therefore, any differences in performance would arise from variations in faceseal leakage among the different configurations. OSHA's Respiratory Protection Standard requires that all respirator users pass a respirator fit test to ensure that a minimum acceptable faceseal performance is achieved. Therefore, because all respirators must be used in accordance with the Respiratory Protection Standard, the Agency sees no reason to conclude that differences in configuration will result in performance variations. In addition, Section III of this preamble discusses two studies that compare the workplace performance of 42 CFR 84 and 30 CFR 11 filtering facepiece half masks. The 42 CFR 84 respirators demonstrated superior performance when compared to the 30 CFR 11 respirators. OSHA concludes that, based on the more stringent filter efficiency certification requirements and these study results, 42 CFR 84 respirators provide performance at least equal to 30 CFR 11 respirators. Therefore, the record evidence does not support lowering the APF for filtering facepieces to 5.

Determining faceseal leakage. Several commenters mentioned that NIOSH had eliminated the fit test portion of its certification procedures. They believed that as a result of this NIOSH action, one could not be sure if a filtering facepiece respirator achieves an adequate faceseal and provides the expected protection (Exs. 9–8, 9–27, 9–29, 9–34, 9–35, 9–40, 9–41, 10–22, 10–33, 10–38, 10–50, and 10–55). During the public hearing, NIOSH indicated that it would establish a new respirator certification testing procedure, stating:

> Such changes would result in additional certification tests to assure or assess the overall performance of every respirator model, and thus assure that every model is capable of providing a level of protection consistent with the class APF. (Tr. at 103.)

Several commenters supported this approach, and indicated that implementing such a procedure would be beneficial. For example, Tim Roberts (Exs. 17–8 and 18–4) stated that the procedure would help to identify respirators that may not have adequate workplace performance. The AFL–CIO (Ex. 19–1) believed that while the procedure would help assure certified filtering facepieces are capable of fitting an employee properly, these respirators should still be given an APF of 5.

Two respirator manufacturers also addressed this issue. The 3M Company commented that no evidence exists showing that employee protection would be enhanced by adding a fit test requirement to NIOSH's certification procedures, and added that proper respirator fit must be determined by fit testing each wearer (Ex. 18–7). When asked by OSHA about the proposed NIOSH testing, Jay Parker of Bullard responded that he believed such testing would be an improvement over the current procedures (Tr. at 497).

OSHA has reviewed this information and supports NIOSH's plans to add performance testing to its respirator certification procedures. The Agency agrees with the 3M Company that proper facepiece fit can only be assured through individual fit testing. However, OSHA also agrees with Tim Roberts that performance testing will assist in identifying respirators with poor fitting characteristics that may not provide protection consistent with the respirator's APF. Thus, OSHA concludes that performance testing will enhance the information needed for selecting appropriate respirators, and encourages NIOSH to expedite its efforts in this area. However, employers and respirator users should note that using a respirator certified by NIOSH through performance tests would not preclude individual fit testing as required by OSHA's Respiratory Protection Standard.

Filtering facepiece design problems. Several commenters urged an APF of 5 for filtering facepiece half masks based on the design characteristics of these respirators. Some commenters expressed concern that, in comparison to elastomeric half masks, filtering facepieces are poorly constructed (e.g., non-adjustable head straps, prone to crushing or denting, facepiece too stiff or too soft) (e.g., Exs. 9–34, 10–37, 10–38, 10–54, and 12–7–1). For example, T.C. Lefford of Fluor Hanford stated:

> Elastomeric half-mask respirators provide a better face seal that filtering facepieces (Disposable respirators or maintenance-free masks). Most elastomeric half-mask respirators are made of more pliable silicone rubber that provides a much better seal on the face. Elastomeric half-mask respirators have three sizes with adjustable head straps and a head cradle to improve stability while the majority of filtering facepieces have one or two sizes and the head straps are non-adjustable. (Ex. 9–32.)

OSHA believes that concerns about loose, dented, or crushed filtering facepieces are addressed adequately by compliance with existing program requirements under 29 CFR 1910.134(d) and (g).

In addition, comment was received alleging that the 42 CFR 84 requirements for increased filter efficiency result in respirators with stiff facepieces, poor face seals, and high breathing resistance, thereby producing filtering facepieces with increased faceseal leakage (e.g., Exs. 9–34, 9–41–1, 10–46, and 10–50). Mark Haskew, Tim Roberts, and Ching-tsen Bien (Exs. 12–7–1, 16–12, 16–20–3, and 17–5) also expressed concern about the increased filter efficiency requirements of the new 42 CFR 84 certification standards and their effect on the performance of filtering facepiece respirators. In their written comments, Mark Haskew and Tim Roberts stated that the 42 CFR 84 filter efficiency requirements ''would increase the breathing resistance and in turn cause an increase in faceseal leakage when compared to 30 CFR part 11 filtering facepieces'' (Ex. 12–7–1). Haskew, Roberts and Bien also questioned the ability of 42 CFR 84 filtering facepieces to fit the user's face, and the applicability of 30 CFR part 11 study data to 42 CFR 84 respirators. For example, Mark Haskew testified:

> The other problem with the old data is that the 30 CFR 11 respirators are significantly different in performance, or at least we would anticipate that they may be different in the performance that they provide. Based on the newer filter media with the 95, 99 and 100 series, there's an allowance for increased breathing resistance. And because the efficiency has to be greater, the filter media itself tends to be stiffer. And the concern we have, of course, which is untested in the research as far as we know, is that it may not conform as well to a wearer's face. (Tr. at 203.)

Based on their opinion that manufacturers would have to produce thicker, stiffer filter media to meet the new filter efficiency requirements, these commenters concluded that the data for 42 CFR 84 filtering facepieces would show a decrease in performance compared to the older 30 CFR 11 respirators. These commenters, based on this assumption, concluded that it would be inappropriate to set the APF for filtering facepieces based on WPF studies of the older 30 CFR 11 respirators. However, they presented no data to substantiate this claim.

When NIOSH published the 42 CFR 84 respiratory protective devices final rule (60 FR 30336), Section 84.180 of this rule increased the maximum allowable breathing resistance levels during inhalation to 35 mm (of water pressure), and during exhalation, to 25 mm. NIOSH explained this increase as follows:

> [It will] enable manufacturers to produce respirators meeting the new requirements more expeditiously and at lower cost. * * * This small increase in maximum allowable breathing resistance for particulate respirators does not add substantially to physiologic burden for respirator users, and will be compensated for by increased worker protection provided by the new filter efficiency tests and classification system. (60 FR 30346.)

However, when respirator manufacturers developed new particulate filters to meet the 42 CFR 84 performance requirements, they were able to meet them without increasing the breathing resistance levels. For example, the 3M Company submitted the following table of breathing resistance values for several classes of 42 CFR 84 filters made by different manufacturers (Ex. 17–9–1, page 6; derived from a paper submitted by 3M to the OSHA docket (Ex. 9–16–1–3)).

Filter Class	Manufacturer A (ΔP mmH_2O)	Manufacturer B (ΔP mmH_2O)
N95	11.5	9.7
R95	No Product	13.6
P95	14.9	No Product
P100	23.9	17.3

No measurement in this table exceeds the 30 CFR 11 limit of 30 mm of water pressure. As the 3M Company stated, ''Breathing resistance of 42 CFR 84 respirators are contained within the range of breathing resistances allowed for 30 CFR 11 respirators, rather than being significantly higher'' (Ex. 16–25–2, page 17).

OSHA also received comments that higher breathing resistance leads to increased faceseal leakage (Exs. 9–34, 9–35, 9–41, 10–38, and 10–50). During the public hearings, 3M submitted two new studies of filtering facepiece respirators certified under 42 CFR 84 (Ex. 16–25–3). The 42 CFR 84 certified filtering facepieces used in these studies performed better, overall, than comparable filtering facepieces certified under 30 CFR 11 (see discussion above under Section III (''Methodology, etc.'')). These results indicate that faceseal leakage, if it existed, did not impair the performance of these filtering facepieces.

At the 2004 AIHCE in Atlanta, Georgia, Larry Janssen of the 3M Company presented the results of a recently completed study (Ex. 17–9–1) using the OHD FitTester 3000 controlled negative pressure (CNP) fit testing instrument to measure faceseal leak rate (i.e., a drop in pressure inside the mask). Leak-rate measurements first were made using the negative pressure and flow-rate settings listed for the CNP fit test in Appendix A of 29 CFR 1910.134. Without disturbing the fit of the respirator, four additional leak-rate measurements then were made at four different negative pressures and flow rates ranging from 5.6 through 20.1 mm of water pressure, followed by a final measurement at the CNP fit test rates. Janssen found that test subjects with a fit equal to or greater than a fit factor of 100:

> [D]id not show any increase in leak rate as pressure drop increased. Subjects with a fit factor below 100 * * * showed significant variability in leakage as the settings were changed, but the amount of leakage did not correlate with increasing pressure drop, i.e., sometimes the leakage was higher and sometimes lower. (Ex. 18–7, page 49.)

The 3M Company concluded that the study ''demonstrates the value of fit testing: respirators that fit well enough to be assigned to a worker do not exhibit increased leakage as pressure drop increases'' (Ex. 18–7, page 49). Janssen, in a summary of this study that he presented at the May 2004 AIHCE stated, ''Results of this study do not support the concept of increased faceseal leakage with increased pressure drop.''

While concern was expressed by some commenters about increased filter efficiency requirements resulting in increased breathing resistance and faceseal leakage, no data were submitted to support this viewpoint. However, studies were submitted that demonstrated that 42 CFR 84 filtering facepiece respirators perform at least as well as 30 CFR 11 filtering facepieces, and that increased filter efficiency does not result in increased faceseal leakage. After reviewing this information, OSHA is persuaded that 42 CFR 84 half masks are as protective as 30 CFR 11 half masks and that increased face seal leakage in such respirators has not been demonstrated by evidence in the record. Therefore, these arguments do not support an APF for filtering facepieces of 5.

The efficacy of user seal checks provided by respirator manufacturers also was questioned by several commenters. These commenters stated that user seal checks for filtering facepieces either could not be performed or were more difficult than user seal checks with elastomeric facepieces (e.g., Exs. 9–27, 9–31, 9–34, 9–35, 9–40–1, 9–41–1, and 10–54). In general, their opinion was that the inability to perform an adequate user seal check on filtering facepiece respirators would lead to decreased protection, thereby warranting a reduced APF for this type of respirator.

Bill Kojola of the AFL–CIO (Exs. 9–27 and 19–1) stated that ''user seal checks are rarely performed on filtering facepieces in the field and * * * it is extremely difficult, if not impossible, to perform effective user seal checks on filtering facepieces.'' He stated that it was ''easy for wearers to perform effective user seal checks on elastomerics.'' Kojola cited this difficulty in performing user seal checks as a reason for separating filtering facepieces from elastomerics, and giving filtering facepieces an APF of 5. However, he did not provide any data to support his experience that filtering facepieces demonstrate a difference in user seal check performance compared to elastomerics.

Similar concerns were voiced by Mark Haskew (Exs. 17–5 and 18–3), Tim Roberts (Exs. 9–8, 10–55, and 17–8), and Ching-tsen Bien (Exs. 9–43–2 and 18–5). In addition, Mark Haskew stated that filtering facepieces with adjustable nose pieces cannot normally obtain repeatable fit factors. However, these commenters did not submit any supporting data for this contention. In his post-hearing submission, Tim Roberts (Ex. 18–4) stated that data demonstrating this difference in performance are not available.

James Johnson (Exs. 10–33, 16–9–1, and 17–10) also stated that filtering facepieces cannot be fit checked effectively, and presented results from a series of fit tests he performed on himself with filtering facepieces and elastomeric half masks. Three of the four elastomeric half masks that he tested passed a positive or negative user seal check, and consistently achieved a fit factor of 1500 or more using the Portacount fit test instrument. One elastomeric half mask did poorly (fit factor of less than 100), and it was identified clearly as a failure by a user seal check and a subsequent fit test. He found that it was difficult to achieve a minimum fit factor of 100 or greater with filtering facepieces using the Portacount Companion fit test instrument. However, two of the eight filtering facepiece models he tested achieved fit factors of 100 or greater. He stated that he was able to identify obvious leaks with the filtering facepieces he tested by exhaling heavily and sensing the airflow, but that cupping his hands over the facepiece was not an effective user seal check for him. He stated further that these preliminary fit test results demonstrated a significant difference in performance between elastomeric and filtering facepiece half masks, and that OSHA should give filtering facepieces an APF of 5 based on these results.

The numerical differences in fit factors between filtering facepieces and elastomeric half masks reported by Johnson may not be significant. Achieving a fit factor of 170, as Johnson did with the 3M 9211 foldable filtering

facepiece using the Portacount Companion, is not necessarily worse than achieving a fit factor of 2200 with a MSA Comfo elastomeric half mask using the Portacount alone. In this regard, the fit test instruments identified the elastomeric half masks and filtering facepieces that provided adequate fits on Johnson (i.e., they met their required fit factor of 100), and he was able to perform user seal checks with both respirators. Therefore, OSHA finds that these fit test measurement differences are not a convincing argument for an APF for filtering facepiece respirators of 5. The Agency believes that Johnson's pilot study proves only that some makes and models of filtering facepieces are not suitable for his face size and shape. When he wore a filtering facepiece or elastomeric respirator that fit him, an APF of at least 10 was achieved.

In response to these concerns, the 3M Company (Ex. 17–9–2) and the Aearo Company (Ex. 17–3–1) submitted to the record instructions for conducting user seal checks on their filtering facepiece respirators. The Aearo Company instructs users to cup their hands over the respirator to test the seal, stating: ''If air flows around your nose, tighten the nosepiece; if air leaks around the edges, reposition the straps to fit better (Ex. 17–3–1).'' User seal check instructions for 3M filtering facepieces read, ''If air leaks between the face and faceseal of the respirator, reposition it and readjust the nose clip for a more secure seal'' (Ex. 17–9–2).

In their post-hearing comments (Exs. 9–16, 17–9–1, 18–7, and 19–3), 3M responded to the comments raised at the public hearing regarding the difficulty or impossibility of performing user seal checks on filtering facepiece respirators. The 3M Company pointed out that no data were offered to support this position, nor was recognition given to the methods contained in both the 1980 and 1992 editions of the ANSI Z88.2 respirator standard for performing user seal checks. The 3M Company also cited a study in the docket by Myers et al. (Ex. 9–16–1–13), which concluded that no difference was found in the effectiveness of performing user seal checks on filtering facepiece respirators or elastomeric respirators. This study also referenced a comment by Daniel K. Shipp of the ISEA (Ex. 9–22) that user seal checks can be performed with filtering facepieces. A second evaluation of user seal checks submitted by 3M (Ex. 17–9–10) involved the use of a 3M flat-fold filtering facepiece by novice respirator users. It showed that novice respirator users can be trained to effectively perform user seal checks, and that the use of seal checks improved the overall quality of respirator fit.

The 3M Company also stated that the ease or difficulty in performing user seal checks is based on many factors. These factors include difficulty in performing a user seal check on some elastomeric respirators when the exhalation valve cover must be removed without disturbing the fit. Also, it can be difficult to perform a user seal check on elastomerics by blocking off the filter when a respirator user has small hands. In addition, 3M cited an analysis from its report at the 2001 AIHCE (Ex. 4–10–7) that showed no significant differences in WPF results for filtering facepieces measured in the morning and afternoon, with repeated redonnings of the respirators performed during each of these periods. These results indicate that the user seal check conducted after each redonning was effective in ensuring proper respirator fit.

During the rulemaking, several commenters referred to the use of fit check cups to perform user seal checks. These devices are designed to assist the respirator user in performing a positive and negative pressure seal check by covering the surface of a filtering facepiece respirator. For example, Tim Roberts stated:

> One of the manufacturers did recognize that there was difficulty in doing these types of fit checks, and they designed, and constructed, and sold a fit-check cup that actually fit over the facepiece of a respirator, a filtering facepiece respirator, so that it would actually check the seal in a more conventional manner. We think that that may be another alternative approach to assuring that these respirators fit properly if there was a requirement to do that. (Tr. at 216.)

Another commenter who discussed the use of fit check cups was Donald Faulkner of the United Steelworkers, who stated during his questioning of Warren Myers:

> [W]e don't see a real good fit with the hands-over filtering facepiece. That's why the cups were developed by many manufacturers, but we don't see them being utilized, bought, or anything else. (Tr. at 95.)

He elaborated in his post-hearing comment: ''Filtering facepieces do not allow seal checks to be performed without the assistance of additional equipment [i.e., fit check cups] that is never provided by the employers, as being cost prohibitive.'' (Ex. 19–2.)

Bill Kojola of the AFL–CIO (Tr. at 132) and George Macaluso of the Building Construction Trades Department of the AFL–CIO (Tr. at 654) made similar statements regarding the infrequent use of fit check cups, i.e., that they are generally not used in the workplaces their unions represent. They asserted that user seal checks that involve cupping the hands over the facepiece were not effective, and that the use of fit check cups should be required by OSHA. They implied that fit check cups are a generic device for doing user seal checks, and that one manufacturer's fit check cup can be used with other types of filtering facepieces. On the other hand, Ken Wilson of the Ohio Board of Water Quality, Division of Safety and Hygiene (Ex. 10–3) stated that he has not seen fit check cups used in the field, and doubted that their use would allow a respirator user to achieve a successful fit check.

OSHA has considered carefully the opinions presented about fit check cups and user seal checks. The Agency recognizes that the use of a fit check cup is one way of performing a user seal check. However, these cups can be inconvenient when used in the workplace on a daily basis. In this regard, each respirator user would need ready access to a fit check cup, not only to perform the required user seal checks when initially donning the respirator, but for any repeated respirator donnings that occur throughout the workday. The fit check cup would be another piece of equipment for respirator users to carry with them, and it can be misplaced. However, most respirator manufacturers have not adopted the use of fit check cups, and these manufacturers recommend cupping the hands over the filtering facepiece to perform a user seal check. As the 3M Company stated in describing the use of fit check cups, ''Based on our experience, user seal checks without cups are effective, more convenient, and easier to perform'' (Ex. 17–9–1, page 4).

Since only a few respirator manufacturers have fit check cups, it is not surprising that they are seldom used in the workplace. The fit check cups that exist are designed by the respirator manufacturer to work with a specific facepiece configuration and respirator model, and the cups do not necessarily work with other models of respirators, even models made by the same manufacturer. OSHA knows of only one series of 42 CFR part 84 filtering facepiece respirators that have fit check cups available.

OSHA does not find merit in the comments that fit check cups are necessary to perform user seal checks with filtering facepieces. While a fit check cup designed to work with a particular model of respirator can be used to perform a user seal check, it is not the only way to perform this function. Accordingly, the Agency believes that respirator users can follow

a respirator manufacturer's instructions to perform a user seal check, e.g., whether the seal check involves cupping the hands over the facepiece or the use of a fit check cup.

The OSHA Respiratory Protection Standard requires that an employee perform a user seal check to use a respirator. The WPF database that OSHA developed contains over 1,000 WPF data points for half mask respirators collected from workers using respirators in programs that included user seal checks. Analyses of these data showed that the filtering facepiece respirators achieved an APF of 10. These data are derived from WPF studies in which user seal checks were performed on filtering facepiece respirators by 100s of workers. In addition, 3M's analysis (Ex. 4–10–7) indicates that user seal checks performed on filtering facepieces ensure proper redonning of these respirators. When a respirator user cannot perform a user seal check with a particular respirator model, then that respirator cannot be used by that employee, and the employer must find another respirator model on which a user seal check can be performed. This requirement applies to all tight-fitting facepieces, including filtering facepieces and elastomeric half masks. How easy or difficult it is for an employee to perform a user seal check on a particular type of respirator is not an issue that precludes other employees from using that respirator. Therefore, the comments on user seal checks do not provide convincing evidence that would support decreasing the APF for filtering facepieces to 5.

OSHA argued previously in *National Cottonseed Products Association* v. *Brock*, 825 F.2d 482 (D.C. Cir. 1987) that filtering facepieces used to protect employees against exposure to cotton dust should have an APF of 5 based on the difficulty of fit testing, particularly fit checking on a daily basis. However, the Agency now believes that the record evidence for this rulemaking shows that the industrial-hygiene research community has developed and refined qualitative and quantitative fit tests, as well as developed sophisticated techniques for determining respirator leakage. Several commenters (Exs. 16–25–3 and 17–9–1) provided evidence that filtering facepieces could be fit tested and then used effectively. Seal-check techniques and procedures (e.g., fit-test cups, manual testing) also have been developed to help ensure that filtering facepieces maintain their fit while being worn in the workplace. These new developments allowed the Agency to reassess filtering facepieces and find that these respirators can be reliably fit tested and fit checked.

The WPF studies provide further support for this conclusion. In fact, every WPF study of filtering facepieces in the OSHA APF database involved fit testing the respirator, using the new and refined methods, prior to the worker using the respirator in the study. Researchers used the available fit testing and checking technologies and methodologies in the studies to be assured that employees would be protected during the study by the respirators when exposed to airborne contaminants up to 10 times the PEL, and so that they could determine the results of the study would be accurate.

Non-compliance and economic incentive issues. Several commenters asserted that filtering facepiece half masks should be given an APF less than 10 because employers do not comply with the Respiratory Protection Standard (e.g., by not performing fit testing) (e.g., Exs. 9–40–1, 10–33, and 10–52; Tr. at 663). In this regard, Donald Faulkner of the United Steelworkers of America (USWA) stated:

> We observe in many worksites that the employers are issuing filtering masks as if they were candies. They don't have respiratory protection programs, requirements to be clean shaven, and no medical or no idea of the MUC of the contaminant that the worker needs to be protected from. (Ex. 9–40–1.)

However, the 3M Company commented that non-compliance with the Respiratory Protection Standard should not be a factor in determining APFs, noting:

> OSHA has appropriately made the proposed APFs contingent upon the existence of an effective and well-managed respiratory protection program. This is the only circumstance under which APFs can be used. Setting APFs on assumptions of poor fit and lack of training is impossible because of the countless variables that exist in the workplace and workforce. APFs can only apply under properly managed respiratory protection programs. This is supported by following the American Industrial Hygiene Association Respiratory Protection Committee definition of APFs: An APF is the level of respiratory protection that a properly functioning respirator or class of respirators would be expected to provide to properly fitted and trained users in the workplace. The APF takes into account all expected sources of facepiece penetration (e.g., face seal penetration, filter penetration, valve leakage). It is not intended to take into account factors that degrade performance such as poor maintenance, failure to follow manufacturers' instructions, and failure to wear the respirator during the entire exposure period. (Ex. 9–16.)

Several commenters voiced concern that assigning a protection factor of 10 to both elastomeric and filtering facepiece half masks will result in an economic incentive for employers to provide filtering facepiece respirators to employees rather than elastomeric half masks. These commenters assumed that the less expensive filtering facepiece respirators were less protective than the more expensive elastomerics (e.g., Exs. 9–29, 10–38, and 10–54; Tr. at 212–213 and 659–660). The USWA expressed this concern, stating, ''If OSHA gives the filtering face piece type of respirator an APF of 10, employers would interpret this as 'let's take the cheap way out.' It will be a dis-incentive to issue to workers the proven protection of the elastomeric face piece respirator'' (Ex. 9–40–1). Responding to an OSHA question about this issue, Thomas O'Connor of the National Grain and Feed Association stated:

> Well, clearly, if [you] had two respirators that provided the comfort and fit to the employee that's needed and one was half the cost of the other one, obviously anybody would select the lower cost respirator. But as I noted, that's not the primary motivation, cost. The primary motivation is complying with the standard, making sure that the employee[s] wear it and it fits properly and it's comfortable. * * * If an employee's wearing a respirator that's not comfortable, there's going to be an incentive for them possibly not to wear that respirator * * * when they should be wearing it. So from our perspective, comfort is one of the primary considerations in selecting a respirator for an employee. (Tr. at 684–685.)

OSHA considered these comments and concludes that neither cost nor non-compliance with the Respiratory Protection Standard is an appropriate basis for determining the final APF for half masks. Employers are required to comply with all the provisions of the Respiratory Protection Standard. Non-compliance is not an option for employers. Thus, there is no compliance reason to reduce the APF for half masks.

As to whether assigning a protection factor of 10 to filtering facepiece half masks will provide an economic incentive to use these respirators, OSHA concludes that so long as a respirator achieves an APF of 10, it doesn't matter what respirator an employer uses. Once again, OSHA's data analyses, as well as consensus standards, show that filtering facepieces can attain an APF of 10.

ANSI's updated APF of 5. Several commenters noted that the recent draft of the ANSI Z88.2 respirator standard gave filtering facepieces an APF of 5 (e.g., Exs. 9–8, 10–51, and 10–54; Tr. at 124–125 and 197–201). For example, Bill Kojola of the AFL–CIO testified:

> The AFL–CIO's position that filtering facepieces should be given an APF of 5 is

also provided by other organizations with considerable expertise on respiratory protection. Indeed, the ANSI Z88.2 Committee, charged with the responsibility for the American standard for respiratory protection, has recently proposed an APF of 5 for filtering facepiece respirators. We believe that OSHA should give serious consideration to this ANSI position as well when it issues its final rule. (Tr. at 124–125.)

OSHA considered the draft ANSI standard during this APF rulemaking. However, this draft standard currently is under appeal, and has not been designated by ANSI as a final standard (Ex. 17–9–10–2). Jill Snyder, Standards Coordinator for the AIHA secretariat of the ANSI Z88 committee, addressed the status of the draft ANSI Z88.2 revised respiratory protection standard in an e-mail sent to participants in Roundtable 228 held at the 2004 AIHCE. This e-mail stated:

Until a standard is approved by ANSI, it is not an ANSI standard. Therefore, we should not say things like 'ANSI completed drafting * * *' etc. It is actually the Accredited Standards Committee (ASC) Z88 or Z88.2 that put together what is still the DRAFT standard. We also have to make sure we call it a draft standard, not a standard at this point. (Ex. 17–9–10–2.)

The method used by ANSI to determine the draft APFs also differs from OSHA's approach, which used data analyses and expert opinion to arrive at the final APF for half masks. James Johnson, representing the ANSI Z88.2 subcommittee, stated that the subcommittee did not perform an extensive quantitative analyses similar to OSHA's in determining the draft APFs (Tr. at 357). In response to questions from Thomas Nelson, ANSI subcommittee member George Macaluso confirmed that an overall tabulation and review of available WPF data was not conducted by the ANSI subcommittee in determining APFs (Tr. at 663–666).

With regard to the decision of the ANSI subcommittee, James Johnson agreed that a subcommittee composed of other members may have reached a different conclusion regarding the APF for filtering facepiece half masks (Tr. at 354–355). He also stated:

There's nothing in the consensus process that says every part of the standard has to have an absolute defendable, scientific, technically traceable base. It doesn't exist. It's not there. We have tremendous numbers of standards that are out there that the professionals develop with the best knowledge and experience that they have, and this is the process. (Tr. at 363.)

Summary and conclusions. In this section, OSHA considered the issue of the appropriate APF for filtering facepieces. OSHA's data analyses in the record support an APF of 10 for filtering facepiece respirators. Moreover, a number of commenters supported the APF of 10. Some commenters recommended a lower APF for filtering facepieces than proposed based on the poor structural integrity of the mask, the availability of additional models of respirator protection, poor compliance with the respirator program requirements, difficulty performing user seal checks, increased breathing resistance among filtering facepieces approved under 42 CFR part 84, and the recent ANSI draft APF for filtering facepieces. As discussed in the previous sections, the evidence in the record with regard to these issues justifies retaining in this final rulemaking the proposed APF of 10 for filtering facepieces.

3. APF for Full Facepiece Air-Purifying Respirators

Introduction. In a 1976 report, Ed Hyatt of LANL developed an APF table that included this respirator class (Ex. 2). In this report, Hyatt used the results from quantitative fit testing to assess six models of full facepiece negative pressure air-purifying respirators equipped with HEPA filters. Five of these respirators achieved a protection factor of at least 100 for 95% of the respirator users. The sixth respirator attained this level of protection for 70% of the users. Based on the results for the sixth respirator, Hyatt recommended an APF of 50 for the respirator class as a whole.

The 1980 ANSI respirator standard listed an APF of 100 for full facepiece air-purifying respirators with DFM filters (Ex. 7–3). ANSI increased the APF for this respirator class from 50 to 100 because the poorly performing respirator in Hyatt's study was no longer in production. Using the 1976 LANL quantitative fit testing results, the 1980 ANSI standard increased this APF to a maximum of 1,000 when the respirator used HEPA filters and respirator users received quantitative fit testing (Ex. 7–3).

Based on Hyatt's 1976 data, the 1987 NIOSH RDL recommended that this respirator class receive an APF of 50 when equipped with a HEPA filter. However, the RDL gave these respirators an APF of 10 when using DFM filters. NIOSH gave these respirators an APF of 10 when equipped with DFM filters because testing that it conducted showed that the filters had relatively low efficiency.

The 1992 ANSI respirator standard retained the 1980 ANSI standard's APF of 100 for full facepiece air-purifying respirators, but required that respirator users perform quantitative fit testing and achieve a minimum fit factor of 1,000 prior to using the respirators. QNFTs were necessary because no QLFTs could achieve a fit factor of 1,000. The ANSI standard kept this APF because the ANSI committee found, as it did in 1980, that no WPF or SWPF studies had been performed for this respirator class.

The following table summarizes the previous APFs assigned to full facepiece air-purifying respirators.

Fully facepiece air-purifying respirators	APFs			
	LANL (1976)	1980 ANSI standard	NIOSH RDL (1987)	1992 ANSI standard
All respirators in the class	50 (with HEPA filter)	10 (with QLFT) ..... 100 maximum (with QNFT)	10 (with DFM filter) ..... 50 (with HEPA filter)	100

In the proposal, OSHA also discussed a WPF study that Colton, Johnston, Mullins, and Rhoe (Ex. 1–64–14) conducted in a lead smelter. The respirator used in this study was a 3M 7800 full facepiece air-purifying respirator equipped with HEPA filters. The authors found a 5th percentile protection factor of 95 for the sample, but concluded that the respirator only provided reliable protection at a protection factor of 50. In addition, a LANL SWPF study by Skaggs, Loibl, Carter, and Hyatt (Ex. 1–38–3) measured the protection afforded by the MSA Ultra Twin respirator with HEPA filters. The authors reported fit factors with geometric means ranging from 1,000 to 5,300. However, 23 of the 60 measurements reported were less than 1,000, seven were less than 100, and three were less than 50. Based on a careful review of these studies, OSHA proposed an APF of 50 for full facepiece air-purifying respirators.

OSHA requested comment in question #7 of the proposal on whether it should

limit full facepiece negative pressure respirators to an APF of 20 when N95 filters are used. The NIOSH certification tests for 42 CFR part 84 filters are conducted using monodisperse aerosols of the most penetrating particle size (0.3 μm) delivered at a high flow rate of 85 liters per minute. Also, the 42 CFR part 84 certification standards allow up to 5% filter leakage with an N95 filter. If this level of leakage were to occur in the workplace, an APF of 20 would be appropriate for a full facepiece respirator using N95 filters. However, as several commenters noted (Exs. 9–16, 9–22, 9–23, 9–37, 10–6, 10–17, 10–27, 10–59, and 10–60), workplace filter penetration is always much less than filter penetration estimated from certification testing. Kenneth Bobetich of MSA (Ex. 9–37) stated that while 5% leakage is the worst case, such leakage does not occur in the workplace. Compared to the aerosols used in certification testing, workplace aerosols are not monodisperse, are many times larger, and are delivered through the filters at a lower flow rate. In addition, the 3M Company (Ex. 9–16) cited studies performed by Janssen (Exs. 9–16–1–3 and 9–16–1–4) that compared the performance of N95 and P100 filters made by two manufacturers and used during grinding operations in a steel plant. Workplace performance of both filters was equivalent statistically, and the study showed that N95 filter performance was adequate under these conditions. Lisa Brosseau of the University of Minnesota (Ex. 10–59) stated that it was entirely inappropriate for OSHA to consider a 5% leakage effect for N95 filters because such leakage would only occur when the aerosol is monodisperse and of a small size, conditions that she said are unlikely to occur in most workplaces.

Bill Kojola of the AFL–CIO (Ex. 9–27), Pete Stafford of the Building Construction Trades Department of the AFL–CIO (Ex. 9–29), and Michael Watson of the International Brotherhood of Teamsters (Ex. 9–7) supported limiting the APF for full facepieces to 20 when N95 filters are used. Watson stated that if OSHA gave these respirators an APF higher than 20, employees would likely be exposed to hazardous levels of workplace contaminants. Kojola stated further that OSHA should take into account both sources of leakage (filter and faceseal), and lower the APF accordingly. However, neither Watson nor Kojola provided any evidence to support these misgivings about the performance of these respirators.

NIOSH (Ex. 9–13) recommended that OSHA consider the limitations of the filter, but did not have any WPF or SWPF data on the performance of full facepiece respirators certified under 42 CFR part 84 using N, R, or P95 filters. NIOSH stated that because the filters are tested at the most penetrating particle size, filter efficiency in the workplace should exceed certification efficiency. However, NIOSH noted that some workplace tasks, such as welding and grinding, may result in high leakage rates through the N95 filter because the tasks produce fine or ultra fine particles.

Loraine Krupa-Greshman of the American Chemistry Council (Ex. 10–25) stated that OSHA could not justify using a simplistic, generalized treatment of N95 filter efficiency to limit the APF to 20. She noted that using N95 or N100 filters is a matter of professional judgment, based on the type and concentration of the contaminant. Frank White of ORC Worldwide (Ex. 10–27) stated that reducing the APF to 20 was unnecessary because protection factors and filter performance need to be considered separately as part of the respirator selection process. Ted Steichen of the American Petroleum Institute (API) (Ex. 9–23) mentioned that API believes that OSHA should further evaluate the data before assigning, based on worst-case assumptions, an APF of 20 to these respirators. Thomas O'Connor of the National Grain & Feed Association (Ex. 10–13) commented that he was not aware of any scientific information that refuted assigning an APF of 50 to full facepiece respirators or justified lowering the APF for N95 filters to 20. He supported retaining the proposed APF of 50 for this class of respirators. Sheldon Coleman of the Hanford Site Respiratory Protection Committee (Ex. 10–40) stated that, based on fit testing data, an APF of 50 for these respirators already is conservative.

OSHA agrees with these commenters that full facepiece respirators with N95 filters provide sufficient protection to maintain an APF of 50, and Table 1 of the final standard reflects this decision. Any effect of filter penetration on respiratory protection is best addressed during respirator selection, which also is the case for half masks and other respirator classes using particulate filters. In rare cases, when workplace exposures consist of a large percentage of particles of the most penetrating size, this information must be taken into account by the employer when selecting the appropriate class of particulate filter for any respirator, not just for full facepieces.

Summary and conclusions. In the proposal, OSHA asked for any additional studies of full facepiece air-purifying respirators, but none was submitted. After carefully evaluating the original studies reviewed in the proposal, the Agency is setting an APF of 50 for full facepiece air-purifying respirators. The final APF agrees with the conclusion of Colton, Johnston, Mullins, and Rhoe (Ex. 1–64–14) cited earlier in this discussion that this class of respirators provides reliable protection at an APF of 50. Importantly, an APF of 50 corresponds with the APF previously assigned to full facepiece air-purifying respirators by OSHA in its substance-specific standards, and by NIOSH in its 1987 RDL. Therefore, OSHA is assigning an APF of 50 to full facepiece air-purifying respirators based on: the results of WPF and SWPF studies (which used N95 filters at moderate to high contaminant levels); The APFs given previously to this respirator class by NIOSH and ANSI; comments in the record indicating that N95 filters function effectively under the workplace exposure conditions in which they are used; and years of experience showing that these respirators, when equipped with an N95 filter, are safe when used in the manner prescribed by OSHA's respiratory protection standards. However, as with any respirator, if a full facepiece air-purifying respirator is unsuitable for the exposure conditions, paragraph (d)(1) of OSHA's Respiratory Protection Standard requires that employers select a respirator that will protect employees from the exposure hazards.

4. APF for Powered Air-Purifying Respirators (PAPRs)

Half mask tight-fitting PAPRs. In the proposal, OSHA assigned an APF of 50 to tight-fitting half mask PAPRs (68 FR 34098 and 34115) based on the 1987 NIOSH RDL and the Z88.2–1992 ANSI respirator standard. In arriving at a proposed APF of 50 for these respirators, the Agency relied heavily on the WPF study conducted by Lenhart and Campbell (Ex. 1–64–42), instead of the WPF study performed by Myers and Peach (Ex. 1–64–46) and the SWPF studies of Skaggs et al. (Ex. 1–38–3) and da Roza et al. (Ex. 1–64–94). In explaining its position, OSHA stated:

> [The Lenhart and Campbell] study was well controlled and collected data under actual workplace conditions; these conditions ensure that the results are reliable and represent the protection employees likely would receive under conditions of normal respirator use. The Agency did not consider the Myers and Peach WPF study * * * for this purpose because of problems involving filter assembly leakage and poor facepiece fit reported by the authors; consequently, the abnormally high levels of silica measured inside the mask would most likely underestimate the true protection

afforded by the respirator. The two SWPF studies * * * reported much higher geometric mean protection factors than did the WPF study performed by Lenhart and Campbell. However, OSHA believes that the higher protection factors reported for these SWPF studies are consistent with the proposed APF of 50 based on data obtained for this respirator class in the Lenhart and Campbell WPF study because SWPF studies typically report significantly higher protection factors than WPF studies of the same respirator. (68 FR 34098.)

During this rulemaking, OSHA received no substantive comments or other information regarding the proposed APF of 50 for these respirators. Nevertheless, OSHA believes that the existing WPF and SWPF studies on this class proved adequate support for OSHA's conclusion that an APF of 50 is an appropriate level to predict the protection capabilities of this class of respirators.

Full facepiece PAPRs and PAPRs with hoods or helmets. In the proposal, OSHA assigned an APF of 1,000 to tight-fitting full facepiece PAPRs (68 FR 34099). In support of the proposed APF, OSHA cited a WPF study by Colton and Mullins that found a corrected 5th percentile protection factor of 1,335 for these respirators. OSHA received no substantive comments or other information regarding the proposed APF of 1,000 for these respirators. However, the ANSI Z88.2–1992 respirator standard and the 2004 draft revision to the ANSI standard both assign an APF of 1,000 to this respirator class. Based on its review of these consensus standards and the existing WPF research literature (see Exs. 1–64–12 and 1–64–40), and SWPF research studies (Ex. 3–4), OSHA concludes that this respirator class warrants an APF of 1,000.

In proposing an APF of 1,000 for PAPRs with helmets or hoods, the Agency stated in footnote 4 of proposed Table 1 that ''only helmet/hood respirators that ensure the maintenance of a positive pressure inside the facepiece during use, consistent with performance at a level of protection of 1,000 or greater, receive an APF of 1,000'' and that ''[a]ll other helmet/hood respirators are treated as loose-fitting facepiece respirators and receive an APF of 25.'' (See 68 FR 34115.) OSHA proposed this condition because available WPF and SWPF studies found that some of these hood/helmet respirators achieved protection factors well below 1,000 (Exs. 3–4 and 3–5). Under the proposed condition, the burden of conducting any testing likely would fall on respirator manufacturers, but the employer would be responsible for selecting a properly tested respirator.

According to James Johnson of LLNL, simple and effective equipment and procedures are available for detecting leaks in these respirators. In this regard, Johnson noted that LLNL developed equipment that monitors and records positive pressure in these respirators using a commercially available device. As he stated at the hearing:

> [T]his is the one we chose, a data logging micro manometer, the TSI–DP Calc, with a range of –5 to +15 inches of water gauge, and data recording intervals of one second and longer were chosen. * * * We plan on using this technique periodically to monitor actual high-contamination work activities to assure this PAPR maintains a positive pressure. (Ex. 16–9–1.)

A number of commenters provided additional support for using positive pressure inside the facepiece as the criterion for protection. For example, Rick Givens of the Atlanta, GA Utilities Department stated that ''the maintenance of positive pressure is an appropriate method for distinguishing high-performing hood/helmet respirators from others'' (Ex. 10–2), while Sheldon Coleman of the Hanford, Washington DOE site asserted:

> In the last three years, our program has used approximately 10,000 PAPR hoods. We have conducted some limited fit testing using particulate fit testers (although the hood manufacturer does not recommend using a particulate tester due to the extensive dead space in the hood). All of our information suggests that an APF of 1,000 is appropriate for a PAPR hood that maintains positive pressure inside of the hood. (Ex. 10–40.)

Several commenters took exception to the positive pressure criterion. Craig Colton of 3M stated that ''3M disagrees with OSHA's proposed requirement that hoods and helmets demonstrate that they maintain positive pressure at all times of use to receive an APF of 1,000'' (Tr. at 390). In this regard, Colton argued that the recent study conducted on PAPRs with hoods/helmets by ORC and LLNL showed that every respirator tested in the study ''had two or more brief negative pressure spikes within the respiratory inlet covering. Under the current proposal, all of these respirators, except the poorest performing supplied-air respirator would have received an APF of 25, even though the 5th percentile SWPFs found in the study ranged from 86,000 to 250,000'' (Tr. at 391). Colton then added, ''This study indicates that pressure within the respiratory inlet covering is only one of a complex set of factors that determine the protection provided by PAPRs and supplied-air respirators, and should not be considered by itself'' (Tr. at 391). John P. Farris of Safe Bridge Consultants echoed this concern (Exs. 9–11 and 10–32).

Other comments focused either on the need for a protocol to determine if the respirators could perform at an APF level of 1,000, or on design characteristics that would permit respirator users to select appropriate respirators. In advocating the testing approach, Stephan Graham of the U.S. Army Center for Health Promotion and Preventative Medicine noted that respirators that have high APFs should receive credit for their design and performance. Graham recommended that manufacturers test their hooded and helmeted respirators, and set the maximum APF (to a maximum of 1,000) based on the results (Ex. 9–42–1). The 3M Company stated that if OSHA retains a testing requirement in the final rule, it must specify the testing conditions. The 3M Company recommended testing at a work rate of 40 liters per minute, ensuring that pressure inside the hood or helmet is maintained at a minimum level of one atmosphere at this work rate, measuring this pressure at the flow rate recommended by the manufacturer, and maintaining the maximum static pressure inside the hood or helmet at 38 mm of water pressure (Ex. 18–7). Similarly, Jay Parker of the Bullard Co. stated that ''without oversight and guidance, testing performed may not achieve such goals. This may lead to the use of respirators and an APF of 1,000 that actually should not be used at that level because the testing performed was not really capable of ensuring that level of performance'' (Tr. at 492).

ORC Worldwide stated that ''the approach proposed by OSHA would hold hood/helmet or loose-fitting facepiece PAPRs and SARs to a higher standard than that required of other respirator classes, based simply on the results of one model'' (Ex. 10–27), a point made as well by Alice E. Till of the Pharmaceutical Research and Manufacturers Association (PhRMA) (Ex. 9–24). Nevertheless, ORC concluded that, ''[s]hould OSHA retain this requirement, the final rule should clearly specify acceptable testing criteria to which respirator manufacturers must conform'' (Ex. 10–27). PhRMA believed that OSHA should consider the proposed APF table to be an interim step in a transition toward the development of a certification protocol by NIOSH that provides APFs for each respirator model (Ex. 9–24). Thomas Nelson of NIHS, Inc. agreed, stating, ''Specific test conditions and performance criteria must be identified'' (Ex. 10–17).

NIOSH provided the following information that addressed the concerns of these commenters:

> Respirator models should not be assigned to the higher APF level following promulgation of the proposed APF rule unless the respirator manufacturer provides evidence that testing of that model demonstrates performance at the higher APF level. A standard test protocol is needed to assure reliable and reproducible results when determining if a hood/helmet PAPR * * * can consistently achieve a protection factor of 1000. NIOSH will assist in developing this protocol. With implementation of new NIOSH certification criteria, every respirator model could be evaluated using this protocol as a condition of certification to assure overall performance consistent with the established APF. Thus, NIOSH will assure that approved respirators are capable of providing this assigned level of protection so that employers have appropriate guidance and APF values when selecting respirators for their workers. (Ex. 16–4.)

Proponents of using design criteria, instead of testing, to assess the protection afforded by these respirators recommended that poorer performing respirators should be identifiable by either their appearance or technical specifications. For example, John Ferris of Safe Bridge Consultants, stated:

> In my experience, the most important factor in achieving workplace protection factors of 1,000 or greater with these devices is the ability to tuck the inner bib (or shroud) into the outer work garment with the outer shroud placed over the shoulders on the outside of the garment. I support the use of a 1000-fold APF for helmet hood PAPRs without the footnote. (Ex. 9–11.)

Robert Barr of Alcoa noted that design flaws need to be identified, stating, ''For example, flip-front types could be designated 25; and helmets with shrouds at 1000'' (Exs. 9–26 and 10–31). PhRMA, ORC, and the American Chemistry Council argued that OSHA should base the APFs for these respirators on design and construction characteristics that would ''enable a more exacting selection process, and * * * would be conducive to eventually assigning protection factors based on individual model performance'' (Exs. 9–24 and 10–27). However, Jay Parker of the Bullard Co. noted that the latest ANSI Z88.2 subcommittee ''was unable to agree on the design characteristics of a hood or helmet that would lead to a performance level equivalent to an APF of 25'' (Tr. at 480). Continuing, Jay Parker stated:

> I don't see that we will ever be able to define the performance of a respirator by its design. We don't want to stifle innovation. We want to be able to allow respirator manufacturers to develop new hoods and helmets. If OSHA comes up with a definition that limits a hood or helmet to a certain design, then that would limit the manufacturer's ability to innovate with new designs. (Tr. at 480.)

After reviewing the comments on proposed footnote 4, OSHA concludes that: no single parameter (e.g., positive pressure inside the facepiece) will identify respirators that consistently perform at a high APF level; no agreement exists on how to determine APFs for these respirators based on design characteristics alone; no uniform testing criteria are available to use in determining APFs for these respirators; and ample evidence demonstrates that WPF or SWPF studies conducted under a variety of conditions reliably determine reliable and safe protection factors for these respirators. Therefore, OSHA is revising footnote 4 to Table 1 in the final standard to read as follows:

> The employer must have evidence provided by the respirator manufacturer that testing of these respirators demonstrates performance at a level of protection of 1,000 or greater to receive an APF of 1,000. This level of performance can best be demonstrated by performing a WPF or SWPF study or equivalent testing. Absent such testing, all other PAPRs and SARs with helmets/hoods are to be treated as loose-fitting facepiece respirators, and receive an APF of 25.

The Agency is setting an APF of 1,000 for tight-fitting facepiece PAPRs with hoods and helmets when the manufacturers of these respirators conduct testing that demonstrates that the respirators provide a level of protection of at least 1,000(*e.g.*, demonstrating WPFs of at least 10,000 or greater divided by a safety factor of 10, or lower fifth percentile SWPFs of at least 25,000 divided by a safety factor of 25). Based on its review of the record regarding these respirators, the Agency believes that tight-fitting facepiece PAPRs with hoods and helmets tested in a manner that is consistent with the SWPF testing performed previously under the ORC–LLNL study of respirators in this class (Ex. 3–4–1) will provide the required level of protection for employees who use these respirators.

While proposed footnote 4 emphasized that respirator manufacturers have responsibility for testing these respirators, it did not address who is responsible for selecting properly tested respirators. Consistent with Section 5 of the OSH Act (29 U.S.C. 654), which places the responsibility for employee protection on employers, footnote 4 in the final rule now clearly places the responsibility for proper respirator selection on employers. Accordingly, employers may use a respirator at an APF of 1,000 only when they have appropriate test results provided by the respirator manufacturer demonstrating that the respirator performs at a protection level of 1,000 or greater.

Evidence in the rulemaking record indicates that the technology exists to measure any leakage into the facepiece from the ambient atmosphere that could lessen the protection afforded by a PAPR or SAR with a helmet or hood (Ex. 16–9–1). This evidence also shows that small amounts of leakage measured by this technology during testing did not reduce the performance of the respirator below a level that was consistent with an APF of at least 1,000 (Exs. 3–4–1, 1–38–3, 1–64–12, and 1–64–40) Based on this evidence, OSHA believes that it is important for respirator manufacturers to determine, using available technology, that leakage into a respirator does not compromise the respirator's capability to maintain a level of performance throughout testing that is consistent with an APF of at least 1,000. Therefore, the Agency removed from footnote 4 in the final rule the language in proposed footnote 4 stating that ''only helmet/hood respirators that ensure the maintenance of positive pressure inside the respirator during use * * * receive an APF of 1000.''

Loose-fitting facepiece PAPRs with hoods or helmets. OSHA proposed an APF of 25 for loose-fitting PAPRs with hoods or helmets based on WPF studies described in the proposal (68 FR 34100), the NIOSH RDL, and the Z88.2–1992 ANSI respirator standard. In supporting the proposed APF, ISEA commented that ''as the reports of many WPF studies have shown, the performance of loose-fitting PAPRs with loose-fitting facepieces warrants a lower APF than for loose-fitting hoods and helmets'' (Ex. 9–24). Additional support came from Warren Myers, OSHA's expert witness at the rulemaking hearing, who stated:

> Our summary conclusion was that PAPRs were incorrectly considered as positive pressure devices by the respirator community and that a minimum certification air flow of 170 liters a minute, at least for the loose-fitting class of devices, does not necessarily provide a positive pressure operational characteristic with the respirator. And then finally, that the assigned protection factor for these devices with those types of air flows would be 25. (Tr. at 69.)

The WPF studies previously cited (68 FR 34100) demonstrate that OSHA based the proposed APF on valid data that were substantiated by the Myers study. OSHA concludes that an APF of 25 is appropriate for loose-fitting facepiece PAPRs with hoods or helmets, and therefore is retaining this APF for this respirator class in the final rule. No

adverse comments regarding the proposed APF were submitted.

5. APFs for Supplied-Air Respirators (SARs)

Half mask SARs. The Agency based its proposed APF of 10 for this respirator class on the analogous performance between these respirators and negative pressure half mask air-purifying respirators tested in WPF and SWPF studies (68 FR 34100). Furthermore, the Agency proposed to give half mask SARs that function in continuous flow or pressure-demand modes an APF of 50, consistent with the analogous performance between these respirators and half mask PAPRs operated in a continuous flow mode during WPF and SWPF studies. Additional support for the proposed APFs came from the Z88.2–1992 ANSI respirator standard that assigned an APF of 10 to half mask airline SARs operated in the demand mode, and an APF of 50 to these respirators when operated in the continuous flow or pressure-demand modes. The 1987 NIOSH RDL also gave half mask demand SARs an APF of 10, but recommended an APF of 1,000 for these respirators when functioning in the pressure-demand or other positive-pressure modes.

OSHA received no comments or other information during this rulemaking regarding these proposed APFs. However, the Agency is confident that the available WPF and SWPF studies for half mask air-purifying respirators cited in the proposal provide sufficient data to retain an APF of 10 for half mask SARs when operated in the demand mode, and an APF of 50 for these respirators when operated in the continuous flow or pressure-demand modes. Therefore, OSHA is retaining these APFs in Table 1 of the final rule.

Full facepiece SARs. OSHA stated in the proposal that ''[n]o WPF or SWPF studies were available involving tight-fitting full facepiece SARs operated in the demand mode. Therefore, in the absence of any such quantitative data, the Agency assigned this respirator class an APF of 50'' (68 FR 34102). OSHA based the proposed APF on the analogous operational characteristics of these respirators and negative pressure full facepiece air-purifying respirators tested under WPF conditions in the demand mode. Also, the proposed APF is the same as the APF recommended for this respirator class by the 1987 NIOSH RDL.

The Agency proposed an APF of 1,000 for full facepiece SARs operated in continuous flow, pressure-demand, or other positive-pressure mode (68 FR 34102). It based the proposed APF on a SWPF study (Ex. 1–38–3) in which the results for these respirators showed geometric mean protection factors ranging from 8,500 to 20,000. Further justification for the proposed APF came from the similarity in operational characteristics between these respirators and tight-fitting full facepiece continuous flow PAPRs, which had a proposed APF of 1,000. The proposed APF for these respirators also was consistent with the APFs of 1,000 assigned to them under the Z.88.2–1992 ANSI respirator standard, and was substantially lower than the APF of 2,000 recommended for these respirators by the 1987 NIOSH RDL.

OSHA received no comments on full facepiece SARs operated in a demand, pressure-demand, or other positive-pressure mode. The Agency believes that the evidence in the proposal is sufficient to support an APF of 50 for these respirators when operated in the demand mode, and an APF of 1,000 when the respirators function in a pressure-demand or other positive-pressure mode, and has included these APFs in the final standard.

SARs with hoods or helmets. Based on a number of WPF studies, OSHA proposed an APF of 1,000 for continuous flow SARs with hoods or helmets, contingent on the manufacturers' demonstration that the respirators meet the criteria specified in Table 1 of the proposed standard (68 FR 34103). In responding to the proposed APF, Paul Schulte of NIOSH noted that an APF of 1,000 is appropriate for these respirators only when the manufacturer demonstrates that the models performed at this level (Ex. 9–13). ORC Worldwide stated that only SWPF data would give employers the assurance that the SAR offers the necessary protection for their workers (Ex. 10–27). ISEA recommended that further testing be performed before assigning an APF of 1,000 for continuous flow SARs with hoods and helmets (Ex. 9–22). MSA concluded that an APF of 1,000 is appropriate (Ex. 16–10) because, it asserted, every credible WPF study demonstrates that continuous flow SARs with hoods and helmets perform at an APF of 1,000.

These commenters generally agree that continuous flow SARs with hoods or helmets should be assigned an APF of 1,000 only after manufacturers demonstrate through appropriate WPF or SWPF studies that the respirators are capable of performing at an APF of 1000. Therefore, based on the evidence cited in the proposal, the comments from ORC Worldwide, NIOSH, and ISEA, and the absence of any new studies or evidence submitted in response to the proposal, OSHA is assigning these respirators an APF of 1,000 in the final rule only when the employer can provide evidence from the respirator manufacturers that demonstrates the respirators perform at that level; absent such testing, these respirators must receive an APF of 25.

Loose-fitting facepiece SARs. OSHA proposed an APF of 25 for this class of respirators based on analogous performance between these respirators and loose-fitting facepiece PAPRs (68 FR 34104). Additional support cited in the proposal included data from NIOSH showing that the two types of respirators (i.e., loose-fitting facepiece SARs and PAPRs) have the same minimum airflow rates when evaluated under 42 CFR part 84. The proposed APF also is consistent with the APF specified for respirators in the 1987 NIOSH RDL and the Z88.2–1992 ANSI respirator standard.

Commenters agreed with OSHA's proposed APF of 25 (Exs. 9–22 and 10–39; Tr. at 75 and 546). For example, Warren Myers stated, ''I believe it is reasonable for OSHA to use analogous operational characteristics between PAPRs and SARs equipped with loose-fitting hoods or helmets to set the APF for the SARs devices at 25'' (Tr. at 75). ISEA noted that WPF studies conducted on loose-fitting facepieces justify an APF of 25 for these respirators (Ex. 9–22). Based on these comments, the analogous performance with loose-fitting PAPRS, NIOSH certification testing at the same minimum flow rates, and the APFs given these respirators in the 1987 NIOSH RDL and the ANSI Z88.2–1992 respirator standard, OSHA has concluded that an APF of 25 is appropriate for this respirator class. Therefore, the final rule will list an APF of 25 for SARs with loose-fitting facepieces.

6. APF for Self-Contained Breathing Apparatuses (SCBAs)

Ed Hyatt, in 1976, assigned a protection factor of 50 to a full facepiece SCBA operated in the demand mode, the same protection factor he assigned to full facepiece SARs used in this mode. Based on results from a panel of 31 respirator users tested at LANL, he gave full facepiece SCBAs used in the pressure demand mode an APF of 10,000+ (Ex. 2). The 1980 ANSI respirator standard listed half mask and full facepiece SCBAs operated in the demand mode with APFs of 10 and 100, respectively, when qualitatively fit tested. The APFs for half mask or full facepiece SCBAs functioning in the demand mode were the protection factors obtained during quantitative fit

testing, with this APF limited to the sub-IDLH value. Full facepiece SCBAs used in the pressure-demand mode received an APF of 10,000+. The 1987 NIOSH RDL recommended that half mask and full facepiece SCBAs operated in the demand mode receive APFs of 10 and 50, respectively, and that the APF for full facepiece SCBAs operated in the pressure-demand or other positive pressure mode be 10,000.

The Z88.2 subcommittee responsible for the 1992 ANSI respirator standard could not reach a consensus on an APF for full facepiece pressure-demand SCBAs. Available WPF and SWPF studies reported that, in some cases, the respirators did not achieve an APF of 10,000 (Ex. 1–50). Nevertheless, the subcommittee found that a maximum APF of 10,000 was appropriate when employers use the respirators for emergency-planning purposes and could estimate levels of hazardous substances in the workplace.

Two respirators equipped with hoods, Draeger's Air Boss Guardian and Survivair's Puma, have operational characteristics similar to SCBAs. The facepiece of the Draeger respirator consists of a hood with an inner nose cup and a tight-fitting seal at the neck, and an air cylinder that supplies breathing air to the facepiece. NIOSH reviewed this respirator in accordance with its 42 CFR part 84 certification requirements, and in January 2001 certified the respirator as a tight-fitting full facepiece demand SCBA when equipped with a cylinder having a 30-minute service life. NIOSH also approved the respirator for use in entering and escaping from hazardous atmospheres. In a May 16, 2001 letter to OSHA's Directorate of Enforcement Programs (Ex. 7–1), Richard Metzler of NIOSH justified the classification of the Draeger respirator as an SCBA on the basis that the neck seal, which is integral to the facepiece, forms a gas-tight or dust-tight fit with the face consistent with the definition of a tight-fitting facepiece specified by 42 CFR 84.2(k). This letter also noted that the fit testing procedures used for full facepiece demand SCBAs apply to the Draeger SCBA, and that, as a full facepiece demand SCBA, NIOSH recommended that the respirator receive an APF of 50 in accordance with its 1987 RDL.

NIOSH subsequently certified the Survivair Puma respirator, which has a tight-fitting hood supplied by an air cylinder, as a pressure-demand SCBA with a tight-fitting facepiece. As part of the 42 CFR part 84 certification process, NIOSH specified that the fit testing requirement for tight-fitting SCBAs would apply to this respirator. However, Steve Weinstein of Survivair (Ex. 7–2) stated that the hood totally encapsulates the respirator user's hair, making quantitative fit testing (e.g., with a Portacount) impossible. In such cases, the fit testing instrument treats dander and other material shed by the hair as particulates originating from outside the respirator, causing the fit factor to be artificially low. Nevertheless, qualitative fit testing with the hood is possible because Survivair provides an adapter and P100 filters for this purpose. Such fit testing meets the fit-testing requirements for tight-fitting SCBAs specified in paragraph (f)(8) of OSHA's Respiratory Protection Standard.

The table below provides a summary of APFs given to the half mask and full facepiece SCBAs by different groups.

SCBAs	APFs			1992 ANSI standard
	LANL (1976)	1980 ANSI standard	NIOSH RDL (1987)	
Tight-fitting half mask	10 (demand)	10 (demand; with QLFT) Same as QNFT factor (demand; sub-IDLH value max.).	10 (demand).	
Tight-fitting Full facepiece.	50 (demand)	100 (demand; with QLFT) Same as QNFT factor (demand; sub-IDLH value max.).	50 (demand).	
Tight-fitting Full facepiece.	10,000 (pressure demand).	10,000+ (pressure demand)	10,000 (pressure demand).	10,000 maximum (emergency planning purposes only).

OSHA received no new WPF or SWPF studies for tight-fitting half mask SCBAs and tight-fitting full facepiece SCBAs operated in the demand mode in response to the proposal. In the only WPF study conducted on full facepiece positive-pressure SCBAs, Campbell, Noonan, Merinar, and Stobbe of NIOSH assessed the performance of two different models of full facepiece pressure-demand SCBAs that met the NFPA 1981 air-flow requirements for respirators used by firefighters (Ex. 1–64–7). While the authors could not determine protection factors for these respirators because contaminant levels measured inside the facepiece were too low, pressure measurements taken inside the facepiece proved more useful. These measurements showed that four of the 57 test subjects (i.e., firefighters) experienced one or more negative pressure incursions inside the facepiece while performing firefighting tasks. After analyzing the data for these firefighters using two different methods, the authors estimated that the overall protection factor exceeded 10,000.

In the first of two SWPF studies performed on full facepiece SCBAs used in the pressure-demand mode, McGee and Oestenstad determined the protection afforded to members of a respirator test panel who used the Biopack 60 closed-circuit SCBA (Ex. 1–64–86). Three members of the panel had protection factors of 4,889, 7,038, and 18,900, with the remaining members having protection factors over 20,000. In the second study, Johnson, da Roza, and McCormack of LLNL (Ex. 1–64–98) tested the Survivair Mark 2 SCBA that met NFPA 1981 air-flow requirements. During testing, a panel of 27 test subjects exercised on a treadmill at 80% of their cardiac reserve capacity. Although the authors found negative pressure incursions inside the facepiece at high work rates, they concluded that the respirator ''provided [a minimum] average fit factor of 10,000 [for any single subject], with no single subject having a fit factor less than 5,000 at a high work rate.'' The tables below summarize the results of the WPF and SWPF studies performed on full facepiece pressure-demand SCBAs.

WPF studies for tight-fitting full facepiece pressure demand SCBAs (by name of authors and model of respirator tested)	Sample size	Geometric mean	Geometric standard deviation	5th percentile WPF
Campbell et al. (Ex. 1–64–7) Unspecified model (with NFPA-compliant airflow).	57	.....	.....	>10,000 (estimated).

SWPF studies for ight-fitting full facepiece pressure demand SCBAs (by name of authors & mode of respirator tested)	Sample size	Geometric mean	Geometric standard deviation	5th percentile WPF
McGee and Oestenstad (Ex. 1–64–86) Biopack 60 (closed circuit)	23	>20,000	.....	.....
Johnson et al. (Ex. 1–64–98) Survivair mark 2 with NFPA-compliant airflow)	27	29,000	1.63	.....

Janice Bradley (Ex. 9–22) of the International Safety Equipment Association and Kenneth Bobetich of the MSA Company (Ex. 9–37) both stated that footnote 5 in the proposed OSHA APF Table 1 was not necessary because most SCBA models now meet the increased air-flow requirements in the NFPA 1981 standard. They further noted that the study that served as the basis of the footnote was more than 15 years old, and that OSHA should remove the footnote. They recommended that the APF should be 10,000 for pressure-demand SCBAs that meet the air-flow requirements of NFPA 1981. Janice Bradley (Tr. at 531) cited the WPF study NIOSH performed with firefighters (Ex. 1–64–7) as supporting the conclusion that SCBAs meeting the NFPR 1981 requirements would provide APFs of 10,000.

Summary and conclusions. OSHA is setting APFs of 10 and 50, respectively, for tight-fitting half mask SCBAs and tight-fitting full facepiece SCBAs operated in the demand mode. In the absence of any new WPF and SWPF studies on these respirators, the Agency is basing the final APFs on analogous operational characteristics between these respirators and half mask facepiece and full facepiece air-purifying respirators, that have APF values of 10 and 50, respectively. In addition, the final APFs are consistent with the APFs recommended by the 1987 NIOSH RDL for these respirators. (Note that the 1992 ANSI standard did not assign APFs for these respirator classes.)

For tight-fitting full facepiece SCBAs used in the pressure-demand or other positive pressure modes, OSHA is setting an APF of 10,000 in the final standard, which is consistent with the 1987 NIOSH RDL and the 1992 ANSI respirator standard. Empirical support for the final APF comes from the WPF study conducted by Campbell, Noonan, Merinar, and Stobbe (Ex. 1–64–7). This study showed that protection factors for these respirators, when operating at NFPA-compliant air flows, far exceed 10,000. While four respirator wearers experienced momentary negative-pressure spikes inside their facepieces, which indicates possible leakage into the facepiece under some workplace conditions, these spikes did not impair overall respirator performance. The Agency concludes that these study results justify an unrestricted APF of 10,000 for tight-fitting full facepiece SCBAs.

For the class of respirators designated as pressure-demand SCBAs with tight-fitting hoods or helmets, including the Survivair Puma, OSHA is setting an APF of 10,000. The basis for this final APF is the analogous operational characteristics between these respirators and tight-fitting full facepiece pressure-demand SCBAs.

D. Definition of Maximum Use Concentration

Employers use MUCs to select appropriate respirators, especially for use against organic vapors and gases. MUCs specify the maximum atmospheric concentration that an employee can experience while wearing a specific respirator or class of respirators. MUCs are a function of the APF determined for a respirator (or class of respirators), and the exposure limit of the hazardous substance in the workplace.

1. Introduction

Ed Hyatt, in the 1976 LASL report on respiratory protection factors (Ex. 2, Docket H049), recounted the early history of MUCs, starting with the MUC recommendations of the joint AIHA–ACGIH committee in 1961. This committee recommended that, for highly toxic compounds, full facepiece respirators with HEPA filters use a maximum limit of 100 times the TLV. Hyatt noted that Dr. Letts in 1961 in the United Kingdom, recommended that half mask dust respirators provided effective protection against airborne contaminant levels no greater than 10 times the TLV.

In 1974, NIOSH and OSHA started the Standards Completion Program to develop standards for substances with existing PELs. As part of this process, the initial respirator decision logic was developed and the concept of MUCs began to be used. NIOSH Criteria Documents also recommended MUCs for different types of respirators. The information for these MUCs were obtained from various sources, including NIOSH Current Intelligence Bulletins and recognized industrial hygiene references. NIOSH later published this information in its Pocket Guide to Chemical Hazards. Other source documents for MUC definitions and regulations include the 1987 NIOSH RDL, and the ANSI Z88.2–1980 and ANSI Z88.2–1992 respiratory protection standards.

OSHA's 1994 proposed Respiratory Protection Standard contained the following definition of MUC:

> *Maximum use concentration (MUC)* means the maximum concentration of an air contaminant in which a particular respirator can be used, based on the respirator's assigned protection factor. The MUC cannot exceed the use limitations specified on the NIOSH approval label for the cartridge, canister, or filter. The MUC can be determined by multiplying the assigned protection factor for the respirator by the permissible exposure limit for the air contaminant for which the respirator will be used. (59 FR 58884.)

Several commenters to this 1994 proposal recommended alternatives to this definition. Reynolds Metal Company recommended defining MUC as ''the maximum concentration of an air contaminant in which a particular respirator can be used, based on the respirator's assigned protection factor'' (Ex. 1–54–222). The American Petroleum Institute (API) noted NIOSH developed the term ''MUC,'' and that, to avoid confusion, OSHA should not use the term (Ex. 1–54–330). API proposed using the term ''assigned use concentration'' to replace MUC. API defined ''assigned use concentration'' as ''the maximum concentration of an air contaminant in which a particular

respirator can be used, based on the respirator's assigned protection factor'' (Ex. 1–54–330). However, when the Agency published the final Respiratory Protection Standard in 1998, it reserved the definition of MUC in paragraph (b), and the MUC requirements in paragraph (d)(3)(i)(B), for future rulemaking because it reserved the APF provisions of the respirator selection section of the standard (i.e., MUCs could not be determined without knowing the APF values).

In the June 6, 2003 proposal, OSHA defined MUC as follows:

Maximum use concentration (MUC) means the maximum atmospheric concentration of a hazardous substance from which an employee can be expected to be protected when wearing a respirator, and is determined by the assigned protection factor of the respirator or class of respirators and the exposure limit of the hazardous substance. The MUC usually can be determined mathematically by multiplying the assigned protection factor specified for a respirator by the permissible exposure limit, short-term exposure limit, ceiling limit, peak limit, or any other exposure limit used for the hazardous substance. (68 FR 34036.)

Under this definition, MUC represents the maximum atmospheric concentration of a hazardous substance against which a specific respirator or class of respirators with a known APF can protect employees who use these respirators. Accordingly, MUCs are a function of the APF determined for a respirator (or class of respirators) and the exposure limit of the hazardous substance in the workplace.

The last sentence in the definition describes the MUC in terms of a mathematical calculation, i.e., that employers can ''usually'' determine the MUC by multiplying the APF for the respirator by the exposure limit used for the hazardous substance.[10] The last sentence of the proposed definition also specifies the exposure limits as ''permissible exposure limit (PEL), short-term exposure limit (STEL), ceiling limit (CL), peak limit, or any other exposure limit used for the hazardous substance.'' Although OSHA received no comments on the proposed definition, it nevertheless is making several minor revisions to the definition in the final rule. First, the Agency is removing the term ''usually'' from the definition because multiplying the assigned protection factor by the exposure limit for a hazardous substance is the currently accepted method used by safety and health professionals for calculating MUCs. Absent any other accepted method, the term ''usually'' is confusing and unnecessary.

The second revision to the proposed MUC definition involves the last part of the second sentence, which required employers to consider an ''exposure limit'' when determining an MUC. OSHA is making two changes to this proposed language to make clear its intent regarding the information employers need to consider when making this calculation. First, OSHA is clarifying the language to require employers to calculate an MUC using an OSHA exposure limit in those instances where one exists. OSHA was concerned that employers could have misinterpreted the language in the proposed MUC definition as meaning that they could use any available exposure limit for calculating an MUC (and, by implication, for protecting employees from hazardous airborne contaminants). This revision emphasizes the priority that OSHA exposure limits have in regulating hazardous airborne contaminants.

Second, OSHA is changing the language to make clear the information employers need to consider to determine an MUC in the absence of an OSHA exposure limit. The Agency revised the language to require employers to use relevant available information and informed professional judgment when determining an MUC when no OSHA exposure limit exists. This language more clearly states OSHA's intent that employers can utilize a wide range of available information in calculating an MUC when OSHA has not yet promulgated an exposure limit for a hazardous airborne contaminant. While not required, some employers may choose to conduct individualized risk assessments of hazards. Others may consult information from manufacturers or other published exposure limits (e.g., the NIOSH RELs or the AIHA WEELs) for making MUC determinations. However, whatever approach employers choose to take, the MUC must provide adequate protection for their employees. OSHA believes this approach provides employers with greater flexibility than the proposed MUC definition while still maintaining employee protection.

The Agency also broadened the language in this second sentence by requiring employers to ''take the best available information into account'' when determining an MUC in the absence of an OSHA exposure limit. This language is consistent with the guidance that the Agency provided to employers in the preamble to the Respiratory Protection Standard for determining APFs in the absence of a final APF standard (see, e.g., 63 FR 1203). OSHA believes this language gives employers maximum flexibility to develop MUCs that protect their employees from hazardous airborne contaminants, including the use of other exposure limits when appropriate.

In the proposal to this final rule, OSHA requested comments on the development of the MUC for substances with no OSHA PEL, limiting factors such as eye irritation, LELs and IDLHs, and mixtures of substances (68 FR 34112). OSHA received numerous comments on these issues, as well as on hazard ratios, an issue raised by several commenters. These issues are discussed in the following sections.

2. MUCs for Substances With No OSHA PEL or Other Limiting Factors

OSHA received many comments on this issue. Some commenters believed that in the absence of a PEL it is appropriate for the Agency to require calculation of MUCs based on other information (Exs. 10–54, 9–27, and 10–3). Other commenters supported using any occupational exposure limit for this purpose, but some of these commenters specified that no other limiting factors should be used (Exs. 9–26, 9–42, 10–27). Others specified that additional limiting factors were needed (Exs. 9–13, 9–15, 9–29, 10–6, and 10–60). Several commenters recommended using only the OSHA PELs with limiting factors (Ex. 10–17, 10–25, and 9–16) or without limiting factors (Exs. 9–22 and 9–23). A few commenters addressed limiting factors only, either supporting specific factors (Exs. 9–12 and 10–1) or stating that no limiting factors were needed when determining MUCs (Ex. 9–37). These comments are discussed in the following paragraphs.

W.M. Parris of Alabama Power (Ex. 9–15) proposed the following generic definition of MUC that would include all possible MUCs:

Maximum use concentration (MUC) means the maximum atmospheric concentration of a hazardous substance from which an employee can be expected to be protected when wearing a respirator. The MUC will be the lowest of the following: (1) IDLH value for the substance, (2) the LEL value, (3) limitations set by manufacturer, or (4) mathematically determined by multiplying the assigned protection factor specified for the respirator by the permissible exposure limit, short term exposure limit, ceiling limit, peak, or another occupational exposure limit used for the hazardous substance.

Paul Schulte of NIOSH (Exs. 9–13, 13–11–1, and 16–4) recommended that

[10] For example, when the hazardous substance is lead (with a PEL of 50 $\mu g/m^3$), and the respirator used by employees has an APF of 10, then the calculated MUC is 500 $\mu g/m^3$ or 0.5 mg/m^3 (i.e., 50 $\mu g/m^3 \times 10$).

employers use the RELs, or in the absence of a REL, another appropriate exposure limit. Schulte also stated that, for both regulated and non-regulated substances, the MUC for any respirator other than a pressure-demand SCBA should never exceed the IDLH value. Schulte noted further that NIOSH did not agree with the use of the LEL as an appropriate respirator-selection factor for MUCs unless the respirator is the source of an ignition hazard (e.g., respirators with communication systems). Accordingly, Schulte (Ex. 9–13) proposed revising the MUC definition to read as follows:

Maximum use concentration (MUC) means the maximum atmospheric concentration of a hazardous substance from which an employee can be expected to be protected when wearing a respirator, and is determined by the lesser of

- APF times (x) exposure limit
- The respirator manufacturer's maximum use concentration for a hazardous substance (if any)
- The IDLH, unless the respirator is a positive-pressure, full facepiece SCBA

Daniel K. Shipp of the International Safety Equipment Association (ISEA) (Ex. 9–22) commented that ISEA believed that OSHA should not expand the MUC definition to include MUCs for hazardous substances not regulated by OSHA, and that the definition should not involve limiting factors. He indicated that employers should have the flexibility to determine what to do in these situations. Shipp also stated that the NIOSH approval labels on chemical cartridges already read ''Do not exceed maximum use concentrations established by regulatory standards.'' In this regard, he suggested that OSHA rewrite the MUC definition to require that MUCs used to select respirators shall not be exceeded.

Michael Sprinker of the International Chemical Workers Union Council of the United Food and Commercial Workers Union (Ex. 10–54) believed that OSHA's definition of MUC should be revised because it is unclear whether the MUC is a concentration never to be exceeded or a time weighted average. He also stated that OSHA should require employers to determine MUCs for substances for which no OSHA PEL is available, and that these MUCs can be derived from occupational exposure limits issued by NIOSH, ACGIH, EPA, or the manufacturer.

Robert W. Barr and Linda M. Maillet of Alcoa, Inc. (Exs. 9–26 and 10–31) said that OSHA should not expand the definition and application of MUCs to hazardous substances it does not regulate because that would constitute adoption of these exposure limits as OSHA rules. The Alcoa representatives said that employers should be free to select the criteria for calculating MUCs based on their own risk assessments. Also, they did not want the lower NIOSH RELs to replace OSHA PELs in calculating MUCs. They did not believe that OSHA should specify the LEL or 10% of the LEL as a limiting factor because LEL is an independent indicator of a physical hazard. They asserted that respirator users who could be exposed to an explosive level of a substance must not enter such an area because of the physical hazard—the characteristics of their respirators are irrelevant in such situations. Similarly, Daniel P. Adley and William L. Shoup of the Society for Protective Coatings (Ex. 9–10) did not agree with the ''or any other exposure limit'' in the definition of MUC, which would give regulatory authority to TLVs, RELs, and other industry—established exposure limits.

Bill Kojola of the AFL–CIO (Exs. 9–27 and 16–5) believed that OSHA should expand the definition and application of MUC to include substances it does not regulate, and that the exposure limits issued by NIOSH, ACGIH, EPA, or the manufacturer should be used when available. Pete Stafford of the Building and Construction Trades Department, AFL–CIO (Ex. 9–29) recommended that OSHA expand the definition of MUC to include appropriate exposure values because thousands of harmful and potentially harmful chemicals used in the workplace are not regulated by OSHA. He indicated that alternative MUCs calculated for chemicals using a non-OSHA exposure limit should be used when these MUCs are lower than the MUCs determined from using PELs. He also recommended that OSHA specify 10% of the LEL as a limiting factor for MUCs.

Stephan C. Graham of the United States Army Center for Health Promotion and Preventive Medicine (Exs. 9–42, 9–42–1, and 9–42–2) indicated that OSHA should expand the MUC definition to include hazardous substances it does not regulate. However, he did not believe that NIOSH MUCs should be used when they are lower than the MUCs calculated using OSHA PELs. Rick N. Givens of Augusta Utilities Department (Ex. 10–2) also agreed that OSHA should require employers to calculate MUCs for substances that do not have OSHA PELs. Ken M. Wilson of the Division of Safety & Hygiene, Ohio Board of Water Control (Ex. 10–3) stated that OSHA should require employers to determine MUCs for substances that have no OSHA PEL because many of these substances can harm employees.

David L. Spelce (Ex. 10–6) stated that the PELs in 29 CFR 1910.1000 were adopted by OSHA in 1971 and came mostly from the 1968 ACGIH TLVs. He recommended that OSHA require employers to use the ACGIH TLVs and AIHA Workplace Environmental Exposure Levels when no OSHA PEL exists. He indicated that these alternative values also should be used when they are more stringent than the OSHA PELs. He agreed with OSHA that when the IDLH level is lower than the calculated MUC, the IDLH concentration must take precedence. In such circumstances, only the most protective atmosphere-supplying respirators should be used. He also stated that IDLH limits should be established based on toxicological data, but, in the absence of toxicological data, 10% of the LEL should be used as the limiting factor (i.e., having the same weight as the IDLH for flammable substances).

Thomas C. O'Connor of the National Grain and Feed Association (NGFA) (Exs.10–13 and 16–19) recommended a revised MUC definition that would read as follows:

Maximum use concentration (MUC) * * * usually can be determined mathematically by multiplying the assigned protection factor specified for a respirator by the permissible exposure limit or ceiling value as appropriate. In a situation when such regulatory limits have not been set by OSHA, the employer may rely on limits established by non-regulatory organizations based on professional judgment and the working environment.

However, he (Ex. 10–13) said that NGFA strongly opposes requiring employers to determine MUCs for substances for which no OSHA PELs are available. The NGFA also opposed any requirement that employers rely on MUCs developed by NIOSH, but supported the use of non-OSHA exposure limits as aids employers can use in establishing MUCs.

Thomas Nelson of NIHS, Inc. (Ex. 10–17) indicated that OSHA should not require employers to determine MUCs for substances that have no OSHA PELs. Nelson said that OSHA first must determine when a need for such exposure limits exists, and then issue new PELs. Furthermore, Nelson stated that OSHA cannot rely on other groups to establish limits for OSHA's use. He also said that the only limiting factors that should be used in calculating MUCs are APFs and IDLHs, and that the Agency should specify the LEL, or a value close to the LEL (e.g., 90% of the

LEL), when no IDLH exists for a substance.

Lorraine Krupa-Greshman of the American Chemistry Council (ACC) (Ex. 10–25) indicated that NIOSH MUCs should not be adopted as a specific requirement, but should remain available for guidance. The ACC also does not support requiring compliance with NIOSH MUCs when they are lower than OSHA's MUCs. The ACC recommends a requirement for employers to determine the appropriate MUCs for substances that do not have an OSHA PEL. However, employers should be allowed to designate and document the basis for these MUCs using either the OSHA formula or other criteria. She stated that the IDLH is a reasonable limit on the MUC for some types of respirators, and that an IDLH should be based on health effects. She noted that using the LEL or a percentage of the LEL to limit MUCs is confusing and inappropriate because an LEL is used to determine whether an employee can safely enter an area with a fire hazard, not for selecting respirators.

Frank A. White of ORC Worldwide (Ex. 10–27) stated that OSHA should not require employers to calculate MUCs for substances that have no OSHA PEL, but that employers should have the freedom to select the occupational exposure limits used for calculating MUCs based on their own risk assessments. He emphasized that it is important that employers be able to show the documented evidence used to support their MUC decisions. ORC Worldwide also indicated that OSHA should not expand the application of MUCs to hazardous substances it does not regulate because these exposure limits (e.g., developed by chemical manufacturers, ACGIH, NIOSH, EPA) would become OSHA regulations. He also stated that OSHA should not enforce the 1994 NIOSH IDLHs, but instead should continue to rely on those IDLHs that NIOSH developed in 1990. OSHA should not use either the LEL or 10% of the LEL as a limiting factor because these factors are not health-based, and are used as indicators of a physical hazard.

Ted Steichen of the American Petroleum Institute (Ex. 9–23) believed that the determination of MUCs for substances with no OSHA PELs should be left to the good practices of the employer. He stated that OSHA would be exceeding its authority if it expanded the definition and application of MUC to hazardous substances that it does not regulate. Steichen said that the use of the LEL to limit the MUC is confusing and inappropriate. He stated that the LEL has no relationship to the protection provided by a respirator, but is an essential factor to consider when working with flammable or combustible materials.

Paul Hewett of Exposure Assessment Solutions, Inc. (Ex. 10–60) believed that OSHA should require employers to determine MUCs for those substances that have no OSHA PEL. He pointed out that employers already are required to consider all hazardous substances, including those substances without an OSHA PEL, under the ''recognized hazards'' provision of the general-duty clause of the OSH Act. He recommended that OSHA indicate, either by regulation or by repeated emphasis in the preamble of this final standard and in all respirator guidelines, that these requirements also apply to overexposures involving unregulated substances. Hewett also stated that OSHA should not require employers to comply with MUCs calculated using NIOSH RELs when these MUCs are lower than the MUCs calculated using OSHA PELs. He recommended as well that OSHA should specify an upper bound on MUCs that is a percentage of the IDLH for a substance, e.g., the MUC is no more than 25% of the IDLH.

Michael Watson of the International Brotherhood of Teamsters, AFL–CIO (Ex. 9–12), Pete Stafford of the Building and Construction Trades Department, AFL–CIO (Ex. 9–29), and Rick N. Givens of the Augusta Utilities Department (Ex. 10–2) agreed with using the IDLH as a limiting factor for MUCs. Givens also recommended that OSHA specify 10% of the LEL as an additional limiting factor for MUCs.

Michael Runge of the 3M Company (Exs. 9–16, 16–25, and 16–25–2) said that only APFs and IDLHs should be used to calculate MUCs. The LEL and eye irritation, as well as all other limitations, already are considered in the respirator selection process, and do not necessarily need to be considered when establishing specific MUCs. He did not support use of 10% of the LEL as a limiting factor, but stated that OSHA should specify the LEL when no IDLH is available for a chemical. He also stated that when employers use the REL for an unregulated contaminant to select a respirator, the APF and MUC principles specified in the proposal should apply.

Kenneth Bobetich of Mine Safety Appliances (Ex. 9–37) believed that OSHA's definition of MUC is sufficient to cover the limitations, and that MUCs should not be based on eye irritation. Tracy C. Fletcher of Parsons-Odebrecht JV (Ex. 10–1) recommended that OSHA use 10% of the LEL as an MUC-limiting factor. Accordingly, when the atmosphere reaches 10% of the LEL, the employee should be removed and steps taken to make the work area safe (e.g., ventilate the area). When the area cannot be made safe, the employer should provide the employee with a fire-retardant suit and supplied air.

3. Summary and Conclusions

As noted above in the discussion of the MUC definition, the final standard will require employers to use an OSHA exposure limit when available. However, absent an OSHA exposure limit, employers must use relevant available information combined with informed professional judgment to determine MUCs. The purpose of this approach is to permit employers to rely on existing data sources and professional judgment when determining an MUC that will provide adequate protection for their employees from hazardous airborne contaminants that have no OSHA exposure limit.

E. MUCs for Mixtures and Hazard Ratios

1. MUCs for Mixtures

Paragraph (d)(3)(i)(B)(1) requires employers to select respirators for employee use that maintains the employees exposure to the hazardous substance at or below the MUC. However, a question arises regarding how to make these calculations for mixtures. Question 12 in Section VIII. (''Issues'') of the proposal addressed this issue by requesting comments on the proposed MUC for mixtures., About half of the commenters supported the MUC provisions as proposed, but believed that insufficient data were available to perform the calculations for mixtures (Exs. 9–23, 9–37, 10–17, 10–25, and 10–59). Another group of commenters supported performing the calculations based on information that each component of a mixture has a non-additive effect on independent organ systems. In this case, the commenters suggested either a separate MUC for each component, or lowering the MUC according to the proportion of each component in the mixture (Exs. 9–12, 9–13, 9–22, 9–29, and 9–37). Still others recommended lowering the MUC by an unspecified proportion when individual components of the mixture have synergistic effects on organ systems (Ex. 9–42), or simply requiring employers to use supplied-air respirators when employees are exposed to mixtures (Ex. 10–1).

Daniel K. Shipp of the International Safety Equipment Association (Ex. 9–22) pointed out that the effect of the mixture on canister/cartridge service life

must be evaluated, and an appropriate change schedule established for a mixture of gases or vapors. Shipp indicated that no MUC equation is available for mixtures. He suggested that when the health effects of a mixture's components are not additive, then each component should be evaluated separately, and the respirator must be appropriate for the sum of the individual chemical concentrations.

Kenneth Bobetich of Mine Safety Appliances (Ex. 9–37) noted that no evidence exists to indicate that respirator performance is different when the exposure is to a mixture of particulates versus a single particulate. However, the effect of a mixture of gases or vapors on canister/cartridge service life must be evaluated, and an appropriate change schedule established. He further mentioned that Dr. Gerry Wood of LANL is conducting a study to evaluate the effect of mixtures on service life, and is developing a model to predict cartridge service life. Bobetich indicated that when the health effects of the mixture components are on the same organ system and these effects are additive, an additive formula can be used to establish the PEL for the mixture. However, when the health effects are not additive, then each component should be evaluated individually and the respirator must be appropriate for the sum of the individual chemical concentrations.

Thomas Nelson of NIHS, Inc. (Ex. 10–17) said that, because exposures to multiple organic vapors will affect the service life of a cartridge, the employer already is required to consider multiple contaminants in setting a cartridge change schedule. He recommended that, to determine the MUC for a mixture that affects the same organ system, employers should assume that the health effects of each component are additive.

Frank A. White of ORC Worldwide (Ex. 10–27) indicated that exposure to multiple gas or vapor contaminants may affect the service life of respirator filters and cartridges differently than exposure to a single contaminant. He, too, mentioned that Dr. Gerry Wood is working on this issue with NIOSH, and that a service life calculation model for multiple contaminants will soon be available. He emphasized that the more important consideration in determining MUCs for mixtures is the health effects of multiple contaminants. He stated that the employers are in the best position to apply recommendations from chemical manufacturers and information on health effects to their specific workplaces. He noted that industrial hygienists should determine if the contaminants have additive health effects, and they should use the additive mixture formula set by ACGIH and OSHA to calculate the MUC.

Michael Watson of International Brotherhood of Teamsters, AFL-CIO (Ex. 9–12) and Pete Stafford of the Building and Construction Trades Department, A FL-CIO (Ex. 9–29) stated:

> The presence of multiple contaminants in the workplace should be taken into consideration when the employer determines the MUC and respirator change schedules for gases and vapors. Mixtures may have similar effects on chemical cartridge loading, so the MUC of each component of a mixture should be lowered in proportion to its percentage of the total concentration of contaminants in air.

Paul Schulte of NIOSH (Exs. 9–13, 13–11–1, and 16–4) recommended that the equation $C_1/MUC_1 + C_2/MUC_2 + * * * + C_n/MUC_n = 1$ should be used to determine MUCs for mixtures. He asserted that the MUC would be safe only when the result is ≥1. Schulte also stated that the rated service life of the cartridge may be shortened during exposure to a mixture (i.e., one or more of the mixture's components may break through before the rated end-of-service-life).

Ted Steichen of American Petroleum Institute (Ex. 9–23) indicated that no data are available comparing respirator performance during exposure to multiple contaminants and exposure to single contaminants, and that it is impractical to discuss establishing different MUCs for mixtures. Stephan C. Graham of the United States Army Center for Health Promotion and Preventive Medicine (Exs. 9–42, 9–42–1, and 9–42–2) stated that MUCs for mixtures should differ from MUCs for single compounds depending on whether the health effects are additive or synergistic.

Tracy C. Fletcher of Parsons-Odebrecht JV (Ex. 10–1) believed that supplied-air respirators should be used to eliminate the risk of filter failure caused by chemical reactions that may occur among the components of a mixture. Lorraine Krupa-Greshman of the American Chemistry Council (ACC) (Ex. 10–25) indicated that by addressing contaminants with additive effects, 29 CFR 1910.1000(d)(2)(i) and the proposal provide adequate means of achieving suitable protection. Also, she said that MUCs can be developed for multiple contaminants that have independent health effects by using the change schedule provisions of 1910.134(d)(3)(iii)(B)(2). The ACC does not believe that adequate information and data are available to develop MUCs for mixtures with synergistic effects.

Lisa M. Brosseau of the University of Minnesota (Ex. 10–59) believed that the issue of mixtures, as addressed in the proposal, is confusing and incorrect. She stated that the only requirements needed are to assure that respirators have the required filters and that gases and vapors have appropriate cartridges.

2. Use of Hazard Ratios

Michael Runge of the 3M Company (Ex. 9–16), Daniel K. Shipp of the International Safety Equipment Association (Ex. 9–22), and Lisa M. Brosseau of the University of Minnesota (Ex. 10'59) supported another method for selecting respirators, the hazard ratio (HR). The HR is defined as the ratio of the workplace concentration of an airborne contaminant divided by the occupational exposure limit (e.g., PEL). Any respirator that has an APF equal to or greater than the HR may be selected. They stated that the HR is more useful to employers than MUCs because employers likely will have information on airborne concentrations and occupational exposure limits when selecting respirators. Both Runge and Shipp said that the HR is similar to the MUC. Brosseau noted that it makes more sense to use the HR rather than the MUC to select respirators, and she recommended that OSHA require the HR method, and use the MUC as guidance.

OSHA is not adopting hazard ratios under this final rulemaking because it was not addressed in the notice of proposed rulemaking. Accordingly, OSHA would have to provide the public with notice and an opportunity for comment on this issue before taking such action.

3. Summary and Conclusions

OSHA agrees with the commenters who stated that the data on mixtures are limited, and that no revision is needed for OSHA's proposed single-contaminant MUC definition (Exs. 9–23, 9–37, 10–17, 10–25, and 10–59). The existing requirement for setting change schedules for respirator cartridges and canisters specified in 29 CFR 1910.134 (d)(3)(iii)(B)(2) already requires that employers consider the effects of each component in organic vapor mixtures when they develop change schedules. The Agency recognizes that reliable methods are not available to develop MUCs for mixtures based on whether the components of the mixture act additively or synergistically, and whether they affect the same organ or different organs. Therefore, OSHA will rely on the provisions at 29 CFR 1910.1000(d)(2)(i) to assist employers in calculating MUCs.

While the determination of MUCs and service life are both necessary for respirator selection, they should not be confused. MUCs can be used to decide if a certain type of respirator even qualifies for consideration for use in defined workplace concentrations. Service life estimation identifies how long a properly selected respirator can be expected to provide worker protection and, therefore, is useful for setting change schedules.

OSHA has established at 29 CFR 1910.1000(d)(2)(i) an equivalent exposure requirement for mixtures of air contaminants. Accordingly, MUCs for respirators used in a mixture of contaminants must satisfy the following equation:

$E_m = (C_1 \div L_1 + C_2 \div L_2) + * \ * \ * + (C_n \div L_n)$

Where:

E_m is the equivalent exposure for the mixture

C is the concentration of a particular contaminant

L is the exposure limit for that substance

The value of E_m shall not exceed unity (1).

OSHA is maintaining the MUC as a requirement in the final standard for determining the maximum concentration of an airborne contaminant from which a respirator will protect an employee. In addition, the Agency cannot revise the final rule to mandate the use of hazard ratios because the regulated community must have adequate notice of, and an opportunity to comment on, any such revision to the standard.

F. MUC Provisions

1. Paragraph (d)(3)(i)(B)—MUC Provisions

These final requirements consist of three separate paragraphs ((d)(3)(i)(B)(*1*) through (d)(3)(i)(B)(3)). Paragraph (d)(3)(i)(B)(*1*), which sets the requirements for the use and application of MUCs, reads, ''The employer must select a respirator for employee use that maintains the employee's exposure to the hazardous substance, when measured outside the respirator, at or below the MUC.'' This paragraph, which has the same designation in the proposal, requires employers to select respirators for employee protection that are appropriate to the ambient levels of the hazardous substance found in the workplace, i.e., that the ambient level of the hazardous substance must never exceed the MUC, which is the exposure limit specified for the hazardous substance multiplied by the respirator's APF. Accordingly, this provision ensures that employers maintain employees' direct exposure to hazardous substances (i.e., inside the respirator) below levels specified by OSHA's Z tables and substance-specific standards, and, when OSHA has no standards, below exposure levels determined by the employer. Therefore, this provision provides employee protection consistent with existing regulatory requirements and prevailing industrial-hygiene practice.

In the MUC provision following paragraph (d)(3)(i)(B)(*1*) in the proposal, OSHA had incorporated a note that stated: ''MUCs are effective only when the employer has a continuing, effective respiratory protection program as specified by 29 CFR 1910.134, including training, fit testing, maintenance and use requirements.'' The Agency is removing this note because the program already is required under its Respiratory Protection Standard for all employers using respirators, and OSHA believes that duplicating this information in a note is unnecessary.

The second MUC provision in the proposal, paragraph (d)(3)(i)(B)(*2*), required employers to use MUCs determined by respirator manufacturers when those MUCs were lower than the MUCs determined using the general calculation (i.e., MUC = APF × PEL). Several commenters objected to the proposed provision, stating that it gave regulatory status to manufacturer's MUCs (e.g., Exs. 9–10, 9–22, 9–23, 9–24, 9–26, and 10–13). However, the Agency often defers in its rules to instructions and other documents published by manufacturers (e.g., no fewer than seven provisions of OSHA's Respiratory Protection Standard refer to manufacturers' instructions or recommendations). Nevertheless, the Agency believes that the proposed provision is unnecessary because using the general calculation specified in the MUC definition is an accepted safe practice in the industrial-hygiene community.

Paragraph (d)(3)(i)(B)(2) of the final MUC provisions (which was designated as paragraph (d)(3)(i)(B)(*3*) in the proposal) specifies that employers must not use MUCs to select respirators for employees who are entering an IDLH atmosphere. OSHA previously specified the requirements for selecting respirators for use in IDLH atmospheres in paragraph (d)(2) of its Respiratory Protection Standard. Paragraph (d)(2) requires employers to select for this purpose a full facepiece pressure-demand SCBA certified by NIOSH to have a service life of at least 30 minutes, or a combination full facepiece pressure-demand supplied-air respirator with an auxiliary self-contained air supply. In the preamble to the final Respiratory Protection Standard, the Agency justified selecting these respirators as follows: ''In [IDLH] atmospheres there is no tolerance for respirator failure. This record supported OSHA's preamble statement that IDLH atmospheres 'require the most protective types of respirators for workers' '' (59 FR 58896). Commenters to the APF proposal, including NIOSH, ANSI, and representatives of both labor and management, agreed that employees should use these respirators, which are the most protective respirators available, when exposed to IDLH atmospheres. (See 63 FR 1201 for a more complete discussion of these comments.)

Ted Steichen of the American Petroleum Institute (Ex. 9–23) requested that OSHA clarify that a pressure-demand full facepiece SAR with auxiliary SCBA can be used at an APF higher than 1,000. He said that positive-pressure SARs with auxiliary SCBAs often are used by the petroleum industry for non-emergency work in high-hazard operations (e.g., cleaning refinery flare systems) that may involve potential exposures greater than 1,000 times the PEL. Under proposed Table 1, he questioned whether OSHA would consider this use of SARs with auxiliary SCBAs to be acceptable. The Agency notes that paragraph (d)(2)(i)(B) of its Respiratory Protection Standard already permits employers to use a combination full facepiece pressure-demand supplied-air respirator (SAR) with auxiliary self-contained air supply in IDLH atmospheres. Also, paragraph (d)(3)(i)(A) of this final standard states, ''When using a combination respirator * * * employers must ensure that the assigned protection factor is appropriate to the mode of operation in which the respirator is being used.'' In this case, the combination pressure-demand full facepiece SAR with auxiliary SCBA respirator is equivalent to an SCBA, and, therefore, the APF for an SCBA applies.

The last MUC provision, proposed paragraph (d)(3)(i)(B)(*4*), would have required that ''[w]hen the calculated MUC exceeds another limiting factor such as the IDLH level for a hazardous substance, the lower explosive limit (LEL), or the performance limits of the cartridge or canister, then employers must set the maximum MUC at that lower limit.'' Accordingly, the IDLH limits for hazardous substances would take precedence over the calculated MUC when the IDLH limits result in lower employee exposures to the hazardous substances. Consequently,

this provision increases employee protection against these hazardous substances. OSHA is retaining a revised version of this proposed provision in the final rule (redesignated as paragraph (d)(3)(i)(B)(*3*)). The remaining paragraphs of this subsection discuss the revisions.

The previous discussion of MUCs for substances with no OSHA PEL or other limiting factors (see subsection 2 (''MUCs for Substances with No OSHA PEL or Other Limiting Factor'') of this section) addressed the use of the LEL as a limiting factor to be considered when calculating the MUC. NIOSH did not agree with the use of the LEL as a limiting factor for MUCs in respirator selection unless the respirator is the source of an ignition hazard (Ex. 9–13). Alcoa, Inc. did not believe OSHA should use the LEL as a limiting factor for MUCs since the LEL ''is not health-based, rather it is an independent indicator of a physical hazard'' (Ex. 10–31). The American Chemical Council commented using the LEL to set MUCs was confusing and inappropriate, because the LEL is used to determine whether an employee can safely enter an area with a fire hazard, not for selecting respirators (Ex. 10–25). The American Petroleum Institute also questioned the use of the LEL to limit the MUC because the LEL has no relationship to the protection provided by a respirator, but is a factor to consider when working with flammable or combustible substances (Ex. 9–23). The 3M Company stated that the LEL already is required under the Respiratory Protection Standard when selecting respirators, and does not need to be taken into account when establishing specific MUCs (Ex. 9–16).

The Agency agrees with these commenters that the LEL is not appropriate as a limiting factor in setting MUCs. Therefore, OSHA removed from paragraph (d)(3)(i)(B)(*3*) in the final rule the language that identified the LEL as a limiting factor in setting MUCs. The Agency made this revision to the proposal because the LEL is not related to the performance of the respirator, but is an independent indicator of a physical hazard (i.e., the flammability or combustibility of a substance) that already must be considered when determining whether an employee can safely enter a hazardous area.

The revised and redesignated final paragraph (d)(3)(i)(B)(*3*) now reads as follows:

(*3*) When the calculated MUC exceeds the IDLH level for a hazardous substance, or the performance limits of the cartridge or canister, then employers must set the maximum MUC at that lower limit.

G. Superseding the Respirator Selection Provisions of Substance-Specific Standards in Parts 1910, 1915, and 1926

1. Introduction

OSHA proposed to revise the provisions in its substance-specific standards under 29 CFR parts 1910, 1915, and 1926 that regulate APFs (except the APF requirements for the 1,3-Butadiene Standard at 29 CFR 1910.1051). These substance-specific standards specify numerous requirements for regulating employee exposure to toxic substances. The proposed revisions would have removed the APF tables from these standards, as well as any references to these tables, and would have replaced them with a reference to the APF and MUC provisions specified by proposed paragraphs (d)(3)(i)(A) and (d)(3)(i)(B) of the Respiratory Protection Standard at 29 CFR 1910.134. In justifying these proposed revisions, the Agency stated that the proposed revisions would simplify compliance for employers by removing many APF requirements across its substance-specific standards. The proposed revisions would enhance consolidation and uniformity of these requirements, and conform them to each other and to the general APF and MUC requirements specified by 29 CFR 1910.134 (68 FR 34107).

As noted elsewhere in this preamble to the final APF rule, OSHA developed the final APFs using the best available evidence. The development of these final APFs included a careful review of the comments, testimony, data, and other evidence submitted to the rulemaking record, a quantitative (i.e., statistical) analysis of the results from WPF studies performed among workers wearing air-purifying half mask respirators (both filtering facepieces and elastomerics) discussed above in this preamble, and a thorough quantitative and qualitative review of existing WPF and SWPF studies performed with other types of respirators. Using the best data and analytic techniques available, as well as the extensive comments and testimony provided to the rulemaking record, lends a high degree of reliability and validity to the final APF determinations.

The Agency believes that the final APFs developed under this rulemaking will improve the substance-specific standards. The final APFs will provide employers with confidence that their employees will receive the level of protection from airborne contaminants signified by these APFs when they implement a respiratory protection program that complies with the requirements of 29 CFR 1910.134. In addition, applying the final APFs to the substance-specific standards is consistent with OSHA's goal of bringing uniformity to its respiratory protection requirements. Moreover, protection for workers likely will be increased because the final APFs result in regulatory consistency, enhanced employer compliance, and reduced the compliance burden on the regulated community, and, consequently, further increases the protection afforded to employees who use respirators.

In its Respiratory Protection Standard, OSHA noted that the revised standard was to ''serve as a ''building block'' standard with respect to future standards that may contain respiratory protection requirements.'' (See 63 FR 1265, 1998.) However, in the proposed APF rulemaking that would provide generic APFs and MUCs as part of the Respiratory Protection Standard, the Agency decided to retain former respirator selection provisions in the existing substance-specific standards that it found supplemented or supplanted the proposed APFs and MUCs (e.g., organic vapor cartridge and canister procedures, prohibiting use of filtering facepieces or half mask respirators). OSHA did so because these provisions enhance the respirator protection afforded to employees.

2. Comments Regarding the Respirator Selection Provisions of the 1,3-Butadiene Standard

The former respirator selection provisions being retained in this final rule include those provisions in the 1,3-Butadiene (BD) Standard. In issue 13 of the proposed APF rule (68 FR 34112), OSHA asked if exclusion of this standard was warranted. The responses to this question addressed only the service life requirement for cartridges used to absorb atmospheric BD. Typical of these responses is the following comment from the 3M Company:

A short service life does not affect the ability of a specific respirator to reduce a concentration of a contaminant below the PEL. * * * [W]ith the cartridge change requirements in 1910.134 there is no need to limit the use of organic vapor cartridges or canisters to specific levels of BD. The employer is required to determine a useful service life. If that service life is very short, the employer will need to determine if the replacement schedule is realistic. (Ex. 18–7.)

However, two other commenters made important observations. First, the American Chemistry Council representative noted that ''[E]xclusion of [the BD] standard is reasonable since this standard has a more comprehensive

respirator section that includes end of service life specifications' (Ex. 10–25). Second, ORC Worldwide stated, ''Excluding [BD] is warranted. Additional verbiage relative to service lives developed under a negotiated rulemaking process should not be changed'' (Ex. 10–27).

Commenters who recommended adopting the change-out schedule provisions of 29 CFR 1910.134 provided no compelling rationale for disturbing the extensive change-out schedules developed for the BD Standard on the recommendation of industry and labor representatives . Substituting the performance-based provisions that regulate change schedules under 29 CFR 1910.134 for the existing BD Standard's change schedule provisions for the sake of convenience is insufficient justification for revisiting these relatively recently promulgated provisions. In this regard, the latter two commenters clearly recognized the importance of the process that resulted in the existing change schedule requirements.

In the preamble to the final BD Standard, the Agency reviewed test data that demonstrated short breakthrough times for BD concentrations above 50 ppm. Accordingly, these short breakthrough times justified setting at 50 ppm the upper limit at which employees can use air-purifying respirators for protection against BD exposures. The Agency used these data to develop change schedules for cartridges and canisters that are unique for BD exposures (see Table 1 of the BD Standard). OSHA reviewed the test data when it published the final standard in 1996 and found that these conclusions remain valid. The Agency believes that it would impose an unnecessary burden on employers who are subject to the BD Standard to require them to repeat the review already conducted by OSHA on BD breakthrough times, and then develop their own change-out schedules under 29 CFR 1910.134. Moreover, employee protection from exposure to BD is unlikely to be increased.

The Agency acknowledged in the preamble to the final BD Standard that it took a conservative approach to employee protection. In this regard, OSHA noted that its ''decision to rely on the more protective NIOSH APFs is based on evidence showing that organic vapor cartridges and canisters have limited capacity for adsorbing BD and may have too short a service life when used in environments containing greater than 50 ppm BD.'' (See 61 FR 56816.) With regard to the change-out schedules, the Agency concluded:

> Allowing for a reasonable margin of protection, and given that test data were available only for a few makes of cartridges and canisters, OSHA believes that air-purifying devices should not be used for protection against BD present in concentrations greater than 50 ppm, or 50 times the 1 ppm PEL. Thus, OSHA finds that the ANSI APFs of 100 for full facepiece, air-purifying respirators and 1,000 for PAPRs equipped with tight-fitting facepieces are inappropriate for selecting respirators for BD.

Accordingly, OSHA is retaining the respirator selection provisions of the BD Standard to avoid imposing on employers the new burden of developing their own change-out schedules, and to ensure maximum protection for employees exposed to BD.

3. Comments Regarding the Respirator Selection Provisions of Other Substance-Specific Standards

The Agency proposed to retain a number of special respirator selection provisions in the existing substance-specific standards. In this regard, OSHA noted that the respirator selection requirements proposed for retention were developed in rulemakings to provide protection against a hazardous characteristic or condition that is unique to the regulated substance. Additionally, the Agency stated that retaining these requirements would not increase the existing employer burden because they already must comply with these requirements. Consequently, retaining these provisions would maintain the level of respiratory protection currently afforded to employees. These provisions were in the substance-specific standards regulating employee exposure to vinyl chloride, inorganic arsenic, asbestos, benzene, coke oven emissions, cotton dust, ethylene oxide, and formaldehyde.

Under issue 13 in the proposal, OSHA requested comments on the need to standardize the respirator selection provisions being proposed for retention. The Agency received numerous comments and hearing testimony on this issue. Most of these comments and testimony encouraged OSHA not to retain these provisions in their existing form, but instead to subsume these provisions under the Respiratory Protection Standard at 29 CFR 1910.134. An example of such a recommendation was provided by the 3M Company (3M) when it stated, in its hearing testimony, ''It is neither necessary nor justified to retain any of the specific requirements in the substance-specific standards. * * * They do not reflect the changes in science and technology, respirator design, respirator certification, or respirator regulation under 29 CFR 1910.134'' (Tr. at 393). In subsequent testimony, a representative from 3M stated, ''We contend that requiring separate respirator APFs and selection requirements in the substance-specific standards as proposed would only add confusion to the respirator selection process, and is not justified by any scientific or practical evidence'' (Tr. at 394). Thomas Nelson of NIHS, Inc., provided similar rationale in support of standardizing these provisions, stating:

> The proposal would retain information [on] cartridge change schedules, filter selection and some specific respirator selection requirements in the substance specific standards. None of these requirements are necessary in the substance specific standard[s]. The current 1910.134 with the addition of an assigned protection factor table contains requirements that are protective. (Ex. 18–9.)

Many of these comments addressed issues involving single substance-specific standards, including their cartridge, canister, and filter requirements. The following paragraphs provide a summary of the comments that pertain to individual substance-specific standards, as well as OSHA's response to these comments.

• *Inorganic Arsenic (29 CFR 1910.1018).* A commenter wanted OSHA to ''[c]larify if filtering facepieces will be acceptable [under this standard],'' and asserted that requiring ''gas masks or SARs for exposures above the PEL is unnecessary (Ex. 9–5). Two commenters, the Mine Safety Appliances Co., and the 3M Company, questioned the need to require a HEPA filter when using a cartridge or canister for exposures above a specified limit (Exs. 9–37, 18–7), while one of these commenters claimed that any filter approved by NIOSH under 42 CFR part 84 would provide the required level of filter efficiency (Ex. 18–7).

The Agency did not address, as part of this rulemaking, the use of filtering facepieces during inorganic arsenic exposures. This question deals with compliance. The other two commenters provided no basis for questioning the requirement for HEPA filters, while the issue of filters approved under 42 CFR part 84 is addressed below (see section entitled ''Substituting N95 Filters for HEPA Filters'').

• *Asbestos (29 CFR 1910.1001 and 29 CFR 1926.1101).* The 3M Company (3M) objected to the provision in this standard that prohibits the use of disposable half masks, but permits the use of elastomeric respirators, at asbestos concentrations that are 10 times the PEL (Ex. 18–7). In these comments 3M stated that this disparity ''is counter to OSHA's analysis of WPF data that does not show a difference

between filtering facepieces and elastomeric facepieces.'' The 3M Company continued by noting that NIOSH stated that the aerosol size used in its respirator certification test ensures that filter performance will be at least as efficient ''for essentially all other aerosol sizes'' (see 60 FR 30344). While this comment implies that NIOSH would accept filtering facepieces for protection against asbestos, another commenter observed that the 1997 *NIOSH Pocket Guide to Chemical Hazards* expressly prohibits such use (Ex. 18–5).

The rebuttal made by the last commenter indicates that 3M's concerns regarding the use of disposable respirators are controversial. Consequently, revision would require a new rulemaking.

• *Coke Oven Emissions (29 CFR 1910.1029).* A 3M representative asserted that OSHA made an error when it proposed to revise the term ''single-use respirator'' to ''filtering facepiece respirators'' in item (b)(1) of Table 1 in paragraph (g)(3) of this standard (Ex. 18–7). This commenter supported this assertion by noting that ''[t]he 'single use type' respirator was a term that NIOSH started after promulgation of the coke oven emission standard,'' and that ''[d]isposable dust/mist respirators are not prohibited from use under the * * * standard.'' In conclusion, this commenter remarked that, by revising the term ''single-use respirator'' to ''filtering facepiece respirators,'' the Agency is ''prohibiting disposable particulate respirators from being used, which was not the intent of the original standard.'' However, another commenter took exception to removing the proposed prohibition against all filtering facepiece respirators (Ex. 18–5), claiming that the particle size of coke oven emissions is unknown, and that coke oven fumes may degrade the electrostatic filters used in filtering facepieces. This commenter asserted that employers should use only HEPA filter cartridges, or P100 filtering facepieces that respirator manufacturers demonstrate will not degrade when exposed to coke oven fumes.

The Agency agrees with the first commenter that the term ''single-use respirator'' is outdated. It believes that the regulated community now designates these respirators as filtering facepiece respirators. Accordingly, the definition of filtering facepiece respirators in paragraph (b) of 29 CFR 1910.134 consists of three key characteristics—they function under negative pressure, are used against particulates and vapors, and consist of a filtering medium that is an integral part of the facepiece or that constitutes the entire facepiece. These characteristics also describe single-use respirators. This definition does not specify the functional characteristics of filtering facepieces, only their structural features. In this regard, both filtering facepiece and single-use respirators generally are considered disposable, with the period of effectiveness determined by the functional characteristics of either respirator. Therefore, because single-use and filtering facepiece respirators are identical with regard to their structural characteristics, OSHA is retaining the proposed terminology in the final APF standard. However, while paragraph (b)(1) of the Table I in the Coke Oven Emissions Standard prohibits using a single-use, filtering facepiece respirator, paragraph (b)(2) of this table permits its use when it functions as a ''particulate filter respirator.'' Accordingly, employers may select filtering facepiece respirators when employees are exposed to coke oven emissions and those emissions (1) consist solely of particulates, and (2) the exposure conditions are no more than 10 times the PEL for coke oven emissions. Finally, OSHA simply cannot adopt the recommendation of the second commenter to use only P100 filtering facepieces under these conditions as this issue was not part of this rulemaking.

• *Cotton Dust (29 CFR 1910.1043).* The comments concerning this standard addressed whether filtering facepieces used to protect employees against cotton dust exposure should retain the current APF of 5 or be upgraded to an APF of 10. In this regard, one commenter believed that revising this standard to upgrade the APF of filtering facepieces to 10 would be consistent with the results of OSHA's statistical analysis of WPF studies for filtering facepiece respirators (Ex. 18–7). This commenter stated, ''[F]iltering facepieces should have the same APF of 10 for cotton dust as they would for all other dusts. Filtering facepieces do not show selective performance to cotton dust versus other aerosols.'' Three additional commenters echoed a similar concern with regard to filtering facepieces used against cotton dust. Two of these commenters noted that no technical reason exists ''to reduce the APF to 5 for filtering facepieces'' (Exs. 9–22 and 9–37), while the third commenter stated that ''[n]ot allowing filtering facepieces for greater than 5 times the PEL is inconsistent with an APF of 10 indicated in [proposed] Table 1'' (Ex. 9–42).

Several commenters responded negatively to the recommendations to raise the APF from 5 to 10 for filtering facepieces used for protection against cotton dust (Exs. 12–7–1 and 18–5; Tr. at 41–43). However, these commenters provided no technical or safety-and-health rationale for their position. Typical of these comments was the following statement made at the rulemaking hearing by one of the participants: ''If OSHA goes ahead and assigns a 10 * * * for [filtering facepieces] for the cotton dust standard * * *, you're going against what was established way back when and settled by the court [at] an APF of 5.'' (Tr. at 43.)

The first set of commenters recommended revising this standard to raise the APF for filtering facepieces from 5 to 10, consistent with the APF for filtering facepieces proposed for 29 CFR 1910.134. However, the Agency did not propose to raise the APF for filtering facepieces used against cotton dust, and the record is inadequate to make that decision at this time. The second set of comments noted that revising the APF from 5 to 10 for filtering facepieces used during exposures to cotton dust would be foreclosed by the court's decision in *Minnesota Mining and Manufacturing Co.* v. *OSHA,* 825 F.2d 482 (D.C. Cir. 1987); this decision upheld the Cotton Dust Standard's assignment of an APF of 5 for disposable respirators. While OSHA is not revising the APF for filtering facepieces used against cotton dust at this time, the Agency notes that the court's decision in this case does not preclude it from revising the Cotton Dust Standard in the future based on an appropriate rulemaking record.

4. Change-Out Schedules for Vinyl Chloride (29 CFR 1910.1017), Benzene (29 CFR 1910.1028), Formaldehyde (29 CFR 1910.1048), and Ethylene Oxide (29 CFR 1910.1047)

The International Safety Equipment Association (ISEA), the Mine Safety Appliances Co., and the 3M Company (3M) requested OSHA to remove the existing cartridge change-out schedules under the Vinyl Chloride Standard and replace them with the change-out schedule provisions of 29 CFR 1910.134 (Exs. 9–22, 9–37, and 18–7). In its comments on this issue, 3M stated that ''the nature of toxicity of any analyte does not affect the service life of a chemical cartridge'' (Ex. 18–7). ISEA and 3M submitted similar comments regarding the existing cartridge change-out schedules in the Benzene Standard (Exs. 9–22 and 18–7). Accordingly, 3M noted that the Agency should not limit cartridge selection to only organic vapor

cartridges specified for benzene absorption, but should expand the permitted cartridges to organic vapor cartridges for acid gas or formaldehyde absorption, as well as multi-gas cartridges (Ex. 18–7). The three commenters also recommended that OSHA remove the requirements for cartridges, filters, and the cartridge change-out schedules in the Ethylene Oxide Standard, as well as the specifications for cartridges/canisters and change-out schedules in the Formaldehyde Standard, asserting that employers could refer to 29 CFR 1910.134 to obtain the necessary information (Exs. 9–22, 9–37, and 18–7).

In response to these commenters, the Agency notes that it believes that the minimum change-out schedules specified by these standards ensure that employers use the designated respirators at appropriate concentration levels of the regulated substance. OSHA also recognizes that retaining these specifications may limit employers' flexibility in adopting change-out schedules. However, it considers this limitation justified because the specified change-out schedules provide a high level of protection for employees against the dangerous properties of these substances. In addition, adopting the change-out schedule provisions of 29 CFR 1910.134 for current OSHA health standards is beyond the scope of this APF rulemaking. The Agency cannot make revisions to this final rule based on these comments because the regulated community must have adequate notice of, and an opportunity to comment on, any proposed revisions.

5. Miscellaneous Comments Regarding Superseding Other Substance-Specific Standards

A number of comments were general, and did not address a single substance-specific standard. These comments centered on respirator selection issues that involved two or more of the substance-specific standards, such as HEPA filters and training. The following paragraphs identify the issues addressed in these comments, and provide a summary of the comments that address these general issues, including OSHA s response to them.

• *Skin absorption and eye irritation.* Three commenters argued that it was unnecessary to preclude the use of half masks against eye irritants in the Ethylene Oxide, Methylene Chloride, and Formaldehyde standards when employees wear appropriate eye protection with half masks (Exs. 9–22, 9–37, and 9–42). A fourth commenter made a similar statement regarding protection against eye irritants, but did not identify any specific substances (Ex. 9–59). One of these commenters asked, ''Why make it a requirement to wear eye protection unless the concentrations are at irritant levels?'' (See Ex. 9–42.) This commenter also noted that OSHA does not permit the use of half mask respirators during exposure to arsenic trichloride, but did not apply this prohibition to other chemicals that employees may absorb rapidly through the skin. This commenter recommended that the Agency ''[p]rovide consistent recommendations that involve chemicals that can be absorbed through the skin in significant amounts (e.g., chemicals with PEL or TLV with 'skin' notations).'' Another commenter took a different approach to this issue, proposing that OSHA should ''[r]emove all references to [the] use of respirators for protection from substances that can be absorbed through the skin or irritate the skin or eyes. There are other ways that the skin can be protected'' (Ex. 10–59).

The purpose of this rulemaking was to provide the regulated community with notice of, and an opportunity to comment on, specific respirator selection provisions that the Agency proposed for revision. In this regard, OSHA proposed no revisions to any requirements in the substance-specific standards that addressed protection against eye or skin irritants. Accordingly, these provisions will remain intact. The Agency believes that the requirements of existing substance-specific standards that specify the use of protective clothing and the other personal protective equipment requirements of 29 CFR 1910 subpart D will prevent serious skin absorption of toxic substances. Moreover, provisions in the substance-specific standards that require the use of full facepiece respirators and other high-end respirators for eye protection will provide employees with an integrated protection system that assures maximum respiratory and eye protection.

• *HEPA Filters.* Several commenters took exception to requirements in many substance-specific standards that some respirators use HEPA filters. For example, one commenter stated that NIOSH's updated respirator testing protocol in 42 CFR 84 eliminated the need for HEPA filters (Ex. 9–22). Similarly, a second commenter noted that HEPA filters were no longer listed in the NIOSH certification categories, and that OSHA should update the language in the Respiratory Protection Standard to be consistent with these categories (Ex. 10–59). A third commenter recommended that the Agency remove references to HEPA filters from a number of its substance-specific standards because ''[p]article properties such as size and form are no longer needed in filter selection'' (Ex. 9–37). Another commenter stated that P100 filters were equivalent to HEPA filters, and that OSHA should ''[p]rovide clear generic guidance on when HEPA or P100 filters should be used, as opposed to another less efficient filter''(Ex. 9–42).

In addressing other issues, one commenter stated that OSHA would be breaching an earlier decision if it superseded dust-mist-fume respirators with respirators using HEPA filters at lead levels that are equal to or below 0.5 mg/m^3 (Ex. 10–4).[11] Another commenter recommended limiting the use of all electrostatic (fiber) filters (Ex. 18–5). This commenter based this recommendation on evidence presented at the 1994 NIOSH hearing on the proposed filter certification requirements of 42 CFR 84. This commenter stated that the evidence showed, when tested with a heated DEHP aerosol challenge agent, the average filter efficiency for electrostatic P100 filters was less than the average filter efficiency for respirators that used a mechanical filter media. In one of these tests, the average filter efficiency for a P100 electrostatic filter was as low as 84.5%.

While it is beyond the scope of this rulemaking to make the revisions recommended by these commenters, the Agency notes that the definition of HEPA filters in paragraph (b) of 29 CFR 1910.134 equates these filters with high-end filters tested under the NIOSH certification scheme specified by 42 CFR 84. In this regard, the definition notes that, under 42 CFR 84, HEPA filters are equivalent to the N100, R100, and P100 particulate filters certified by NIOSH. Therefore, the Respiratory Protection Standard already describes HEPA filters in language that equates them to N100, R100, and P100 filters certified by NIOSH (i.e., the terms are interchangeable). OSHA Directive No. CPL 2–0.120 of September 25, 1998 (''Inspection Procedures for the Respiratory Protection Standard'') also states, ''When HEPA filters are required by an OSHA standard, N100, R100, and P100 filters can be used to replace them.'' In addition, an Agency letter of interpretation to Neoterik Health Technologies, Inc. dated March 18, 1996 concludes that, ''when any OSHA standard requires the use of HEPA filters[,] then the employer may satisfy

[11] OSHA published this decision at 44 FR 5446 (January 26, 1979).

the requirement by choosing to use a P100, N100, or R100 filter certified under 42 CFR 84, since such filters would exhibit minimum leakage.'' Therefore, for over eight years, OSHA has consistently equated HEPA filters to the high-end filters certified by NIOSH under 42 CFR 84.

OSHA believes that this definition is sufficient to meet the recommendations of these commenters regarding the need to update the description of HEPA filters consistent with the NIOSH certification program, including the need to provide the ''clear generic guidance'' requested by one of the commenters (Ex. 9–42). As noted by another commenter (Ex. 9–37), the definition of HEPA filters contained in the Respiratory Protection Standard also specifies the filtering criterion that these filters must meet in terms of particulate size. The definition recognizes that the N100, R100, and P100 filters meet this criterion, thereby updating the HEPA definition as recommended by this commenter.

Contrary to the assertions made by one of the commenters (Ex. 10–4), the Agency is not breaching its earlier decision to permit the use of dust-mist-fume respirators (instead of respirators configured with HEPA filters) when employees are exposed to lead levels that are equal to or below 0.5 mg/m^3. Although this commenter mentioned that the decision covered N95 respirators as well, N95 respirators were not even available in 1979 when the Agency published the decision and, therefore, were never part of the decision. The remarks of the last commenter (Ex. 18–5) described special testing conditions (using a heated DEHP aerosol challenge agent) that appeared to degrade specific types of filters. While this information may be of interest to NIOSH in determining the efficacy of its filter certification program, it is unclear how useful this information would be in selecting respirators for use in workplaces that vary substantially from these specialized testing conditions.

• *Substituting N95 Filters for HEPA Filters.* A representative for the 3M Company (3M) argued strongly that OSHA should require only N95 particulate filters for respirators, noting that OSHA based the existing requirement to use HEPA filters under some exposure conditions on NIOSH's outdated filter certification process specified in 30 CFR 11 (Tr. at 396). The 3M Company then described a WPF study conducted by Jensen et al. in a steel foundry on employees who performed a grinding operation involving a heavy work load (i.e., as shown by high airflow rates through the filters) and exposure to an iron aerosol. The 3M Company claimed that under these conditions, no significant difference existed between P95 and P100 particulate filters used by these employees with regard to the percentage of workplace iron penetration inside the filter. In addition, they asserted that neither type of filter permitted any detectable oil mist penetration (Ex. 18–7; Tr. at 397).

Later in the hearing, when asked about the test conditions under which NIOSH certifies filter efficiency, the 3M representative stated:

> NIOSH's testimony yesterday, which I agree with, is that they've got a worst case, or close to worst case, testing, and, as they've stated, * * * they expect performance in the workplace to be better than that rating. * * * So I believe that in the N95 filter[s], while you see a difference in their performance in the laboratory, when they're used against workplace aerosols, there is no difference. (Tr. at 429.)

In his testimony the previous day, the NIOSH representative made the following statement:

> Well, NIOSH does not accept the premise that efficiency levels for filters that we test should be considered at higher efficiency levels. The approval program designates an efficiency level for the filters, which is well known to be tested with a near-worst case aerosol. However, this is done so that every workplace does not have to conduct sizing tests before they selected proper filters in the workplace. We think that this is a proper way to go, and we also do not think that assuming particle sizes and greater efficiencies on the filters is a very wise approach for protecting workers. (Tr. at 121.)

The 3M Company also mentioned that another justification for substituting N95 filters for N100 filters is that ''increased breathing resistance caused by use of a 100 filter may decrease overall respirator effectiveness by reducing user comfort and thereby reducing the time the respirator is worn'' (Ex. 18–7).

In its post-hearing comments, NIOSH acknowledged, ''It is possible that a specific NIOSH certified 95-level filter may have filter penetration less than 5% in a specific workplace. However, this type of workplace-specific result may not be generalized to all 95-level filters in all workplace settings''' (Ex. 17–7–1). Later in these comments it stated, ''NIOSH has included rigorous certification tests to help assure that filter performance in the workplace will be maintained at least at the certification level even under severe conditions,'' and ''the NIOSH certification criteria are designed to assure that filters meet minimum performance requirements. NIOSH does not certify that they will perform any better than these criteria.''

Revising the existing respirator selection requirements for HEPA filters, or for filters certified by NIOSH as N100, R100, and P100 under 42 CFR part 84, is beyond the scope of the present rulemaking. Additionally, the commenters did not provide any evidence demonstrating that 95-level filters would protect employees when used under the worst-case conditions simulated during the NIOSH certification tests. However, from the evidence presented here, OSHA believes that NIOSH's filter certification program provides a substantial margin of protection to employees who use respirators. In addition, it is unclear from the study discussed by these commenters whether the results are applicable to the extreme range of exposure conditions used by NIOSH in its filter certification testing. Consequently, the Agency believes that adopting the recommendations made by these commenters may enable employers to purchase respirators that do not perform at the designated level of efficiency under extreme workplace exposure conditions, thereby jeopardizing seriously the health of their employees. Absent data demonstrating that 95-level filters perform effectively under near worst-case experienced conditions, OSHA is retaining its existing HEPA filter requirements.

• *Mixed-Versus Single-Substance Contaminants.* Several commenters recommended superseding the individualized canister/cartridge change-out schedules in the substance-specific standards with the performance-based provisions for developing change-out schedules described in OSHA's Respiratory Protection Standard. Their rationale for this recommendation is that schedules developed using the Respiratory Protection Standard provisions are capable of accommodating employee exposure to multiple contaminants, while the schedules provided in the substance-specific standards are limited to a single atmospheric contaminant. For example, 3M noted that:

> [T]he benzene standard requires the cartridges be changed before the beginning of the next shift. In a refinery, workers may be exposed to benzene along with [toluene] and [x]ylene. The change schedule should be based on the exposure to the mixture as required by 29 CFR 1910.134, not just the benzene, because the mixture may result in requiring the cartridge to be changed sooner than eight hours. By following the requirements of 134, a change schedule would be established resulting in changing

the cartridge before loss of service life, thereby, increasing worker protection. (Tr. at 396.)

The International Safety Equipment Association and Thomas Nelson of NIHS, Inc., made similar statements (Tr. at 518 and Ex. 18–9). In further justification, 3M remarked that ''[r]espirator program administrators may not be aware that the cartridge change schedules contained in the substance specific [standards] may not be protective if multiple contaminants are present'' (Ex. 18–7).

These comments are a variation of the comments cited earlier in this section that recommended removing the change-out schedules specified for substance-specific standards and replacing them with the provisions of 29 CFR 1910.134 governing change-out schedules. This recommendation involves a major revision to these standards, and, therefore, is beyond the scope of this rulemaking. However, such a revision likely is unnecessary because change-out schedules involving multiple-contaminant exposures would not be covered under the substance-specific standards. Instead, employers must develop these change-out schedules for air-purifying respirators not equipped with an end-of-service-life indicator according to the requirements of the Respiratory Protection Standard, notably paragraph (d)(3)(iii)(B)(2).

• *Retaining APF Tables for Lead and Asbestos.* Several unions requested that OSHA retain the revised APF tables in the construction standards for lead and asbestos. During the hearing, a representative from the Building Construction Trades Department of the AFL–CIO (BCTD) stated that union-management training centers ''conduct a great deal of worker training on lead and asbestos,'' and that ''these tables * * * greatly facilitate the understanding of appropriate respirator selection'' (Tr. at 615). This representative stated further:

> It is much more usable for these parties to go directly to the substance-specific standard with the air-monitoring results and choose the appropriate type of respirator. If employers had to do calculations to determine the appropriate type of respirator to select, that is simply an added barrier to compliance. Additionally, the tables are of great help when communicating the need for respirators to employers who may not normally be engaged in lead and asbestos work. (Tr. at 615.)

The BCTD representative later noted that ''[i]t's the idea of jumping from [the respiratory protection] standard to [the lead/asbestos construction] standard, that's why we don't want the table [removed]'' (Tr. at 647). The BCTD post-hearing comments expanded on this testimony, stating, ''Calculations to determine appropriate respirator add [a] barrier to compliance * * *'' (Ex. 9–29).

A representative of the Insulators and Asbestos Workers International (''IAWI'') found the tables to be invaluable as a teaching aid, and added that:

> I am asked by all types of people, regulators, legislators, facility engineers, owners of companies, [and] consultants where to find the information [about APFs]. I just tell them [to] look in the tables. * * * The common worker knows where to find this. It is where it should be. There are no OSHA libraries on the job sites. * * * I am asked by a lot of people in charge of sites where these [APFs] are in writing. If it is taken out of the rules, if it is not written, it will not be adhered to. (Tr. at 623.)

However, this representative later admitted that ''[e]very one of our supervisors gets a copy of an updated [construction] standard,'' and ''[h]e gets the 1910.134 [i.e., the Respiratory Protection Standard]'' (Tr. at 645.) Similarly, another commenter remarked that ''[e]mployers covered by [substance-]specific standards are already required to refer to 29 CFR 1910.134 for most respirator program elements including fit testing, inspection and cleaning, and program evaluation,'' and that ''[i]f some employers would not bother to consult 29 CFR 1910.134 for APFs, these same employers are most likely not complying with other necessary program elements''(Ex. 18–7).

The Agency believes that employers know they are required to use the Respiratory Protection Standard. Retaining the APF tables in the construction standards for lead and asbestos is unlikely to result in any savings or convenience to employers or other parties because these tables cannot be used safely and effectively without consulting the requirements of 29 CFR 1910.134. Even one of the union representatives recognized this necessity when stating that supervisors must have access to both the construction standards and the Respiratory Protection Standard at the job site (Tr. at 646). In addition, OSHA believes that any respirator selection requirements that are unique to a substance-specific standard (i.e., not subsumed by this rulemaking under the Respirator Protection Standard) will remain available for easy access under the particular standard. In this regard, the Agency concludes that it is unnecessary to retain the APF tables for the lead and asbestos standards in the construction standards because the required APF tables can be assembled readily for training purposes from the available information in the revised substance-specific standards and the Respiratory Protection Standard.

• *Upgrading Respirator Type at Employee Request.* At the hearing, the BCTD representative mentioned that several of the substance-specific standards required employers to upgrade respirators when requested to do so by employees. The representative encouraged the Agency to include such a requirement in current and future substance-specific standards (Tr. at 616). The IAWI representative commented:

> [S]ome of our members, for a variety of reasons, like working in PAPRs. * * * Some people work in them, feel comfortable in them. They want them. And it makes them more at ease at doing their work. * * * It makes the person more productive, cools them down; there's a variety of reasons. (Tr. at 648.)

When asked how often employers upgrade respirators when doing so is discretionary, this representative replied, ''I wouldn't say it's 100 percent. I'd say a portion of them would allow somebody that activity'' (Tr. at 649).

Placing a burden on employers to upgrade respirators at an employee's request is beyond the scope of this rulemaking. However, the Agency recognizes the advantages, as well as disadvantages, to upgrading a respirator at an employee's request. As it stated in the preamble to the Respiratory Protection Standard with regard to PAPRs:

> OSHA continues to believe that under some circumstances PAPRs provide superior acceptability. These include situations where employees wear respirators for full shifts, where employees frequently readjust their negative pressure respirators to achieve what they consider a more comfortable or tighter fit, and where the air flow provided by a PAPR reduces the employee's psychological and physiological discomfort. However, where ambient temperatures are extremely high or low, PAPRs are often unacceptable because of the temperature of the airstream in the facepiece. * * * (63 FR 1201.)

OSHA noted further, ''The Agency continues to believe that it is good industrial hygiene practice to provide a respirator that the employee considers acceptable'' (63 FR 1201). Therefore, employers are free to upgrade respirators voluntarily at an employee's request when the employee meets the medical qualifications for using the respirator and receives the necessary training.

5. Summary of Superseding Actions

The following table summarizes final revisions to the existing respirator selection provisions of OSHA's

substance-specific standards. Section VIII (''Amendments to Standards'') of this rulemaking notice provides the full, plain-language regulatory text of these final revisions.

SUMMARY OF SUPERSEDING ACTIONS FOR SUBSTANCE-SPECIFIC STANDARDS

Existing provisions	Final action
29 CFR 1910.1001(g)(2)(ii)	Revise.
.1001(g)(3)	Remove Table 1 and revise.
.1001(l)(3)(ii)	Redesignate Table 2 as Table 1.
.1017(g)(3)(i)	Remove table and revise.
.1017(g)(3)(iii)	Remove.
.1018 (Tables I and II)	Remove.
.1018(h)(3)(i)	Revise.
.1018(h)(3)(ii)	Remove.
.1018(h)(3)(iii)	Redesignate as .1018 (h)(3)(ii).
.1025(f)(2)(ii)	Remove Table II.
.1025(f)(3)(i)	Revise.
.1027(g)(3)(i)	Remove Table 2 and revise.
.1028(g)(3)(ii)	Remove Table 1.
.1028(g)(2)(i)	Revise.
.1028(g)(3)(i)	Revise.
.1029(g)(3)	Remove Table I and revise.
.1043(f)(3)(i)	Remove Table I and revise.
.1043(f)(3)(ii)	Revise.
.1044(h)(3)	Remove Table 1 and revise.
.1045(h)(2)(i)	Revise.
.1045(h)(3)	Remove Table I and revise.
.1047(g)(3)	Remove Table 1 and revise.
.1048(g)(2)	Revise.
.1048(g)(3)	Remove Table 1 and revise.
.1050(h)(3)(i)	Remove Table 1 and revise.
.1052(g)(3)	Remove Table 2 and revise.
29 CFR 1915.1001(h)(2)(i) through (h)(2)(v)	Remove Table 1 and revise.
29 CFR 1926.60(i)(3)(i)	Remove Table 1 and revise.
.62 (f)(3)(i)	Remove Table 1 and revise.
.1101(h)(3)(i) through (h)(3)(iv)	Remove Table 1 and revise.
.1127(g)(3)(i)	Remove Table 1 and revise.

6. Use of Plain Language

In the proposal, OSHA rewrote into plain language the respirator-selection provisions of the substance-specific standards retained in this final rule. The Agency received no comments on these proposed revisions. OSHA believes that using plain language will improve the uniformity and comprehensibility of these provisions. These improvements will, in turn, enhance employer compliance with the provisions and, concomitantly, increase the protection afforded to employees. The Agency also found that rewriting the respirator-selection provisions of the existing substance-specific standards into plain-language provisions did not alter the substantive requirements of the existing provisions. (The following table lists the plain-language provisions in the final rule and the corresponding provisions in the existing standards.) Therefore, OSHA is retaining these plain-language revisions in the final rule.

PLAIN-LANGUAGE PROVISIONS IN THE FINAL RULE AND CORRESPONDING PROVISIONS IN THE EXISTING STANDARDS

Plain-language provisions	Existing provisions
§ 1910.1001(g)(2)(ii)	§ 1910.1001(g)(2)(ii).
§ 1910.1001(g)(3)(i)	§ 1910.1001(g)(3); Table 1.
§ 1910.1001(g)(3)(ii)	§ 1910.1001(g)(3); Table 1.
§ 1910.1017(g)(3)(i)(B)	§ 1910.1017(g)(3)(i); undesignated table.
§ 1910.1017(g)(3)(i)(C)	§ 1910.1017(g)(3)(i); undesignated table.
§ 1910.1018(h)(3)(i)(B)	§ 1910.1018(h)(3)(i); Table II (footnote 2).
§ 1910.1018(h)(3)(i)(C)	§ 1910.1018(h)(3)(i); Table I and Table II.
§ 1910.1018(h)(3)(i)(D)(*1*)	§ 1910.1018(h)(3)(ii).
§ 1910.1018(h)(3)(i)(D)(*2*)	§ 1910.1018(h)(3)(i); Table II.
§ 1910.1025(f)(3)(i)(B)	§ 1910.1025(f)(3)(i); Table II (footnote 2).
§ 1910.1025(f)(3)(i)(C)	§ 1910.1025(f)(3)(i); Table II.
§ 1910.1025(f)(3)(ii)	§ 1910.1025(f)(3)(ii).
§ 1910.1027(g)(3)(i)(B)	§ 1910.1027(g)(3)(i)(B); Table 2 (footnote b).
§ 1910.1027(g)(3)(i)(C)	§ 1910.1027(g)(3)(i)(B); Table 2.
§ 1910.1028(g)(3)(i)(B)	§ 1910.1028(g)(3)(i); Table 1.
§ 1910.1028(g)(3)(i)(C)	§ 1910.1028(g)(3)(i); Table 1.
§ 1910.1028(g)(3)(i)(D)	§ 1910.1028(g)(3)(i); Table 1 (footnote 1).
§ 1910.1029(g)(3)	§ 1910.1029(g)(3); Table I.
§ 1910.1043(f)(3)(i)(A)	§ 1910.1043(f)(3)(i); Table I.

PLAIN-LANGUAGE PROVISIONS IN THE FINAL RULE AND CORRESPONDING PROVISIONS IN THE EXISTING STANDARDS—Continued

Plain-language provisions	Existing provisions
§ 1910.1043(f)(3)(i)(B)	§ 1910.1043(f)(3)(i); Table I.
§ 1910.1043(f)(3)(ii)	§ 1910.1043(f)(3)(ii).
§ 1910.1044(h)(3)(ii)	§ 1910.1044(h)(3); Table 1.
§ 1910.1045(h)(3)(ii)	§ 1910.1045(h)(3); Table I.
§ 1910.1047(g)(3)(i)	No provision of the original ethylene oxide standard contains this text. However, the only respirators designated for selection are either full facepiece respirators or respirators with hoods and helmets. Also, § 1910.1047(g)(4) (''Protective clothing and equipment'') states, ''When employees could have eye or skin contact with EtO or EtO solutions, the employer must select and provide * * * appropriate protective clothing or other equipment * * * to protect any area of the employee's body that may come in contact with the EtO or EtO solution * * *.''
§ 1910.1047(g)(3)(ii)	§ 1910.1047(g)(3); Table 1.
§ 1910.1047(g)(3)(iii)	§ 1910.1047(g)(3); Table 1.
§ 1910.1048(g)(2)(ii)	§ 1910.1048(g)(2)(ii).
§ 1910.1048(g)(3)(i)(B)	§ 1910.1048(g)(3)(i); Table 1.
§ 1910.1048(g)(3)(i)(C)	§ 1910.1048(g)(3)(i); Table 1.
§ 1910.1048(g)(3)(ii)	§ 1910.1048(g)(3)(i); Table 1 (footnote 2).
§ 1910.1048(g)(3)(iii)	§ 1910.1048(g)(3)(ii).
§ 1910.1050(h)(3)(i)(B)	§ 1910.1050(h)(3)(i); Table 1.
§ 1910.1050(h)(3)(i)(C)	§ 1910.1050(h)(3)(i); Table 1.
§ 1910.1050(h)(3)(i)(D)	§ 1910.1050(h)(3)(i); Table 1 (footnote 2).
§ 1910.1052(g)(3)(i)	No provision of the original methylene chloride standard contains this text. However, the only respirators designated for selection are either full facepiece respirators or respirators with hoods and helmets. Also, § 1910.1052(h)(1) (''Protective work clothing and equipment'') states, ''Where needed to prevent MC-induced skin and eye irritation, the employer shall provide clean protective clothing and equipment which is resistant to MC * * *.''
§ 1910.1052(g)(3)(ii)	§ 1910.1052(g)(3); Table 2.
§ 1915.1001(h)(2)(i)	§ 1915.1001(h)(2)(i); Table 1.
§ 1915.1001(h)(2)(ii)	§ 1915.1001(h)(2)(i); Table 1.
§ 1915.1001(h)(2)(iii)	§ 1915.1001(h)(2)(iii)(A).
§ 1915.1001(h)(2)(iv)	§ 1915.1001(h)(2)(iv).
§ 1915.1001(h)(2)(v)	§ 1915.1001(h)(2)(v).
§ 1926.60(i)(3)(i)(B)	§ 1926.60(i)(3)(i); Table 1.
§ 1926.60(i)(3)(i)(C)	§ 1926.60(i)(3)(i); Table 1.
§ 1926.60(i)(3)(i)(D)	§ 1926.60(i)(3)(i); Table 1 (footnote 2).
§ 1926.62(f)(3)(i)(B)	§ 1926.62(f)(3)(i); Table 1 (footnote 2).
§ 1926.62(f)(3)(i)(C)	§ 1926.62(f)(3)(i); Table 1.
§ 1926.1101(h)(3)(i)(A)	§ 1926.1101(h)(3)(i); Table 1.
§ 1926.1101(h)(3)(i)(B)	§ 1926.1101(h)(3)(i); Table 1.
§ 1926.1101(h)(3)(ii)	§ 1926.1101(h)(3)(ii).
§ 1926.1101(h)(3)(iii)	§ 1926.1101(h)(3)(iii).
§ 1926.1101(h)(3)(iv)	§ 1926.1101(h)(3)(iv).
§ 1926.1127(g)(3)(i)(B)	§ 1926.1127(g)(3)(i); Table 1 (footnote b).
§ 1926.1127(g)(3)(i)(C)	§ 1926.1127(g)(3)(i); Table 1.

VII. Procedural Determinations

A. Legal Considerations

The purpose of the Occupational Safety and Health Act, 29 U.S.C. 651 et seq. (''the Act'') is to ''assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources'' (29 U.S.C. 651(b)). To achieve this goal, Congress authorized the Secretary of Labor to promulgate and enforce occupational safety and health standards (see 29 U.S.C. 654(b) (requiring employers to comply with OSHA standards) and 29 U.S.C. 655(b) (authorizing promulgation of standards pursuant to notice and comment)).

A safety or health standard is a standard ''which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment or places of employment.'' (29 U.S.C. 652(8)). A standard is reasonably necessary or appropriate within the meaning of Section 652(8) of the Act when it substantially reduces or eliminates significant risk, and is technologically and economically feasible, cost effective, consistent with prior Agency action or supported by a reasoned justification for departing from prior Agency action, and supported by substantial evidence; it also must effectuate the Act's purposes better than any national consensus standard it supersedes (see *International Union, UAW* v. *OSHA* (*LOTO II*), 37 F.3d 665 (DC Cir. 1994; and 58 FR 16612–16616 (March 30, 1993)).

The APFs specified by this final rule are an integral part of OSHA's Respiratory Protection Standard. This standard ensures that respirators reduce or eliminate the significant risk to employee health resulting from exposure to hazardous airborne substances. Accordingly, employers need the APFs provided in this final rule to select appropriate respirators for employees use when the employers

must rely on respirators to maintain hazardous substances at safe levels in the workplace. The APFs in this final rule will help ensure that the Respiratory Protection Standard achieves the annual health benefits estimated for that standard (i.e., 932 averted work-related deaths (best estimate) and 4,046 work-related illnesses (best estimate)) (see 63 FR 1173).

In this rulemaking, OSHA also is superseding the existing APF requirements in its substance-specific standards. As noted in section V of this preamble (''Summary of the Final Economic Analysis and Regulatory Flexibility Analysis''), the Agency estimates that the final APFs will reduce significantly employee exposures to the hazardous airborne substances regulated by these substance-specific standards, especially asbestos, lead, cotton dust, and arsenic. Consequently, employees will receive additional protection against the chronic illnesses resulting from exposure to these hazardous substances, notably a variety of cancers and cardiovascular diseases.

The Agency believes that a standard is technologically feasible when the protective measures it requires already exist, can be brought into existence with available technology, or can be developed using technology that can reasonably be expected to be available (see *American Textile Mfrs. Institute* v. *OSHA* (*Cotton Dust*), 452 U.S. 490, 513 (1981); *American Iron and Steel Institute* v. *OSHA* (*Lead II*), 939 F.2d 975, 980 (DC Cir. 1991)). A standard is economically feasible when industry can absorb or pass on the costs of compliance without threatening the industry's long-term profitability or competitive structure (see *Cotton Dust,* 452 U.S. at 530 n. 55; *Lead II,* 939 F.2d at 980), and a standard is cost effective when the protective measures it requires are the least costly of the available alternatives that achieve the same level of protection (see *Cotton Dust,* 452 U.S. at 514 n. 32; *International Union, UAW* v. *OSHA* (*LOTO III*), 37 F.3d 665, 668 (DC Cir. 1994)).

All standards must be highly protective (see 58 FR 16612, 16614–15 (March 30, 1993); *LOTO III,* 37 F.3d at 669). Accordingly, section 8(g)(2) of the Act authorizes OSHA ''to prescribe such rules and regulations as [it] may deem necessary to carry out its responsibilities under the Act'' (see 29 U.S.C. 657(g)(2)). However, health standards also must meet the ''feasibility mandate'' of section 6(b)(5) of the OSH Act, 29 U.S.C. 655(b)(5). Section 6(b)(5) of the Act requires OSHA to select ''the most protective standard consistent with feasibility'' needed to reduce significant risk when regulating health hazards (see *Cotton Dust,* 452 U.S. at 509). Section 6(b)(5) also directs OSHA to base health standards on ''the best available evidence,'' including research, demonstrations, and experiments (see 29 U.S.C. 655(b)(5)). In this regard, OSHA must consider ''in addition to the attainment of the highest degree of health and safety protection * * * the latest scientific data * * * feasibility and experience gained under this and other health and safety laws'' (Id.). Furthermore, section 6(b)(5) of the Act specifies that standards must ''be expressed in terms of objective criteria and of the performance desired'' (see 29 U.S.C. 655(b)(7)).

The APF and MUC provisions in this final rule are integral components of an effective respiratory protection program. Respiratory protection is a supplemental method used by employers to protect employees against airborne contaminants in workplaces when feasible engineering controls and work practices are not available, have not yet been implemented, or are not in themselves sufficient to protect employee health. Employers also use respiratory protection under emergency conditions involving, for example, the accidental release of airborne contaminants. The amendments to OSHA's Respiratory Protection Standard, and the Agency's substance-specific standards, specified in this final rule will provide employers with critical information to use when selecting respirators for employees exposed to airborne contaminants found in general industry, construction, shipyard, longshoring, and marine terminal workplaces. Since it is generally recognized that different types of respiratory protective equipment provide different degrees of protection against hazardous exposures, proper respirator selection is of critical importance. Failure to select the proper respirator for use against exposure to hazardous substances may result in employees being overexposed to these substances, thereby resulting in an increased incidence of cancer, cardiovascular disease, and other illnesses. The APF and MUC provisions in this final rule will greatly enhance an employer's ability to select a respirator that will adequately protect employees.

The Agency also developed the provisions of this final rule to be feasible and cost effective, and is specifying them in terms of objective criteria and the level of performance desired. In this regard, section V of this preamble (''Summary of the Final Economic Analysis and Regulatory Flexibility Screening Analysis'') provides the benefits and costs of the final rule, and describes several other alternatives as required by section 205 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1535). Based on this information, OSHA concludes that the APF and MUC provisions of the final rule constitute the most cost-effective alternative for meeting its statutory objective of reducing risk of adverse health effects to the extent feasible.

Several benefits will accrue to respirator users and their employers from this rulemaking. First, the standard benefits workers by reducing their exposures to respiratory hazards. Improved respirator selection augments previous improvements to the Respiratory Protection Standard, such as better fit-test procedures and improved training, contributing substantially to greater worker protection. At the time of the 1998 revisions to the Respiratory Protection Standard, the Agency estimated that the standard would avert between 843 and 9,282 work-related injuries and illnesses annually, with a best estimate (expected value) of 4,046 averted illnesses and injuries annually (63 FR 1173). In addition, OSHA estimated that the standard would prevent between 351 and 1,626 deaths annually from cancer and many other chronic diseases, including cardiovascular disease, with a best estimate (expected value) of 932 averted deaths from these causes. The APFs in this rulemaking will help ensure that these benefits are achieved, as well as provide an additional degree of protection. These APFs also will reduce employee exposures to several § 6(b)(5) chemicals covered by standards with outdated APF criteria, thereby reducing exposures to chemicals such as asbestos, lead, cotton dust, and arsenic. While the Agency did not quantify these benefits, it estimates that 29,655 employees would have a higher degree of respiratory protection under this APF standard. Of these employees, an estimated 8,384 have exposure to lead, 7,287 to asbestos, and 3,747 to cotton dust, all substances with substantial health risks.

In addition to health benefits, OSHA believes other benefits result from the harmonization of APF specifications, thereby making compliance with the respirator rule easier for employers. Employers also benefit from greater administrative ease in proper respirator selection. Employers no longer have to consult several sources and several OSHA standards to determine the best choice of respirator, but can make their choices based on a single, easily found

standard. Some employers who now hire consultants to aid in choosing the proper respirator should be able to make this choice on their own with the aid of this rule. In addition to having only one set of numbers (i.e., APFs) to assist them with respirator selection for nearly all substances, some employers may be able to streamline their respirator stock by using one respirator type to meet their respirator needs instead of several respirator types. The increased ease of compliance also yields additional health benefits to employees using respirators.

B. Paperwork Reduction Act

After a thorough analysis of the final provisions, OSHA believes that these provisions do not add to the existing collection-of-information (i.e., paperwork) requirements regarding respirator selection. OSHA determined that its existing Respiratory Protection Standard at 29 CFR 1910.134 has two provisions that involve APFs and also impose paperwork requirements on employers. These provisions require employers to: Include respirator selection in their written respiratory protection program (29 CFR 1910.134(c)(1)(i)); and inform employees regarding proper respirator selection (29 CFR 1910.(k)(ii)). The information on respirator selection addressed by these two provisions must include a brief discussion of the purpose of APFs, and how to use them in selecting a respirator that affords an employee protection from airborne contaminants. The burden imposed by this requirement remains the same whether employers currently use the APFs published in the 1987 NIOSH RDL or the ANSI Z88.2–1992 Respiratory Protection Standard, or implement the final APFs in this rulemaking. Therefore, the use of APFs in the context of these two existing respirator selection provisions does not require an additional paperwork-burden determination because OSHA already accounted for this burden under its existing Respiratory Protection Standard (see 63 FR 1152–1154; OMB Control Number 1218–0099).

Both OSHA's existing Respiratory Protection Standard and the final APF provisions require employers to use APFs as part of the respirator selection process. This process includes obtaining information about workplace exposure to an airborne contaminant, identifying the exposure limit (e.g., permissible exposure limit) for the contaminant, using this information to calculate the required level of protection (i.e., the APF), and referring to an APF table to determine which respirator to select. Admittedly, this process involves the collection and use of information, but it does not require employers to inform others, either orally or in writing, about the process they use to select respirators for individual employees, or the outcomes of this process. By not requiring employers to communicate this information to others, OSHA removed this process from the ambit of the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)). In the alternative, even if PRA–95 applies, the final provisions involve the same information collection and use requirements with regard to APFs as the existing standard (see paragraphs (d)(1) and (d)(3)(i) of 29 CFR 1910.134, and the rationale for the existing APF requirements in the preamble to the final Respiratory Protection Standard, 63 FR 1163 and 1203–1204). Accordingly, the paperwork burden imposed by the final standard would be equivalent to the burden already imposed under the existing standard.

C. Federalism

The Agency reviewed the final APF provisions according to the most recent Executive Order on Federalism (Executive Order 13132, 64 FR 43225, August 10, 1999). This Executive Order requires that federal agencies, to the extent possible, refrain from limiting state policy options, consult with states before taking actions that restrict their policy options, and take such actions only when clear constitutional authority exists and the problem is of national scope. The Executive Order allows federal agencies to preempt state law only with the expressed consent of Congress. In such cases, federal agencies must limit preemption of state law to the extent possible.

Under section 18 of the Occupational Safety and Health Act (''the Act''), Congress expressly provides OSHA with authority to preempt state occupational safety and health standards to the extent that the Agency promulgates a federal standard under section 6 of the Act. Accordingly, section 18 of the Act authorizes the Agency to preempt state promulgation and enforcement of requirements dealing with occupational safety and health issues covered by OSHA standards unless the state has an OSHA-approved occupational safety and health plan (i.e., is a state-plan state) (see *Gade* v. *National Solid Wastes Management Association,* 112 S. Ct. 2374 (1992)). Therefore, with respect to states that do not have OSHA-approved plans, the Agency concludes that this final rule conforms to the preemption provisions of the Act. Additionally, section 18 of the Act prohibits states without approved plans from issuing citations for violations of OSHA standards; the Agency finds that this final rulemaking does not expand this limitation.

OSHA asserts that it has authority under Executive Order 13132 to issue final APF requirements because the problems addressed by these requirements are national in scope. As noted in section V (''Summary of the Final Economic Analysis and Regulatory Flexibility Screening Analysis'') of this preamble, hundreds of thousands of employers must select appropriate respirators for millions of employees. These employees are exposed to many different types and levels of airborne contaminants found in general industry (including healthcare), construction, shipyard, longshoring, and marine terminal workplaces. Accordingly, OSHA concludes that the requirements in this final rule will provide all covered employers in every state with critical information to use when selecting respirators to protect their employees from the risks of exposure to airborne contaminants. However, while OSHA drafted the final APF and MUC requirements to protect employees in every state, section 18(c)(2) of the Act permits state-plan states to develop their own requirements to deal with any special workplace problems or conditions, provided these requirements are at least as effective as the requirements specified by this final rule.

D. State Plans

The 26 states and territories with their own OSHA-approved occupational safety and health plans must adopt provisions comparable to the provisions in this final rule within six months after the Agency publishes the rule. These State-Plan states and territories are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Connecticut, New Jersey, New York, and the Virgin Islands have OSHA-approved State Plans that apply to state and local government employees only. Until a state-plan state promulgates its own comparable provisions, federal OSHA will provide the state with interim enforcement assistance, as appropriate.

E. Unfunded Mandates

The Agency reviewed the final APF and MUC provisions according to the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*) and Executive Order 12875. As discussed in

section V (''Summary of the Final Economic Analysis and Regulatory Flexibility Screening Analysis'') of this preamble, OSHA estimates that compliance with this final rule will require private-sector employers to expend about $4.6 million each year. However, while this final rule establishes a federal mandate in the private sector, it is not a significant regulatory action within the meaning of section 202 of the UMRA (2 U.S.C. 1532).

OSHA standards do not apply to state and local governments, except in states that have voluntarily elected to adopt an OSHA-approved state occupational safety and health plan. Consequently, the provisions of this final rule do not meet the definition of a ''Federal intergovernmental mandate''(see section 421(5) of the UMRA (2 U.S.C. 658(5)). Therefore, based on a review of the rulemaking record, the Agency believes that few, if any, of the affected employers are state, local, and tribal governments. Therefore, the requirements of this final rule do not impose unfunded mandates on state, local, and tribal governments.

F. Applicability of Existing Consensus Standards

Section 6(b)(8) of the Occupational Safety and Health Act (29 U.S.C. 655(b)(8)) requires OSHA to explain ''why a rule promulgated by the Secretary differs substantially from an existing national consensus standard,'' by publishing ''a statement of the reasons why the rule as adopted will better effectuate the purposes of the Act than the national consensus standard.'' Regarding APFs, the American National Standard Institute (ANSI) issued in 1992 is the only publicly available consensus standard (i.e., ANSI Z88.2–1992, ''Respiratory Protection'') that provided APFs for the various respirators covered by this final rule (i.e., ''the 1992 ANSI APFs'') (Ex. 1–50). However, ANSI withdrew this consensus standard in 2003, and it has yet to officially adopt a replacement standard.

The Agency relied heavily on the 1992 ANSI APFs in developing this final standard. Nevertheless, the APFs specified in this final rule differ in important ways from the 1992 ANSI APFs. For example, the APFs for full facepiece air-purifying respirators differ substantially between the two standards. Additionally, the APF of 1,000 for powered air-purifying respirators with helmets or hoods listed in Table 1 of this final rule is based on achieving specific test results, while the 1992 ANSI APF for this respirator class is not contingent on any test results. As noted above in section VI of the preamble to this final rule (''Summary and Explanation of the Final Standard''), OSHA has determined that the differences between the APFs specified in this final rule and the 1992 ANSI APFs will afford employees increased protection when they are exposed to hazardous airborne contaminants. Therefore, the Agency did not adopt outright the 1992 ANSI APFs under this final rule.

In addition to the differences between the APF standards described in the previous paragraph, use of the 1992 ANSI APFs depends on meeting six other respirator-selection provisions, several of which differ substantially from the respirator-selection provisions specified in OSHA's Respiratory Protection Standard. In this regard, use of the 1992 ANSI APFs is contingent on ''the nature of the hazardous operation or process,'' ''the location of the hazardous area in relation to the nearest area having respirable air,'' ''the activities of workers in hazardous areas,'' and ''the physical characteristics and functional capabilities and limitations of the various types of respirators''; none of these conditions is specified in this manner in the Agency's Respiratory Protection Standard. Revising OSHA's Respiratory Protection Standard to accommodate the six respirator-selection provisions that are an integral part of the 1992 ANSI APFs is beyond the scope of this rulemaking, which provides additional justification for the Agency not adopting directly the 1992 ANSI APFs.

Finally, the APFs adopted here represent a clear enforceable requirement, not merely a recommendation. When employers and employees can easily determine what respirator is appropriately protective, compliance is simplified and enhanced.

List of Subjects in 29 CFR Parts 1910, 1915, and 1926

Assigned protection factors, Airborne contaminants, Health, Occupational safety and health, Respirators, Respirator selection.

Authority and Signature

Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210, directed the preparation of this notice. The Agency issues these final sections under the following authorities: Sections 4, 6(b), 8(c), and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Section 3704 of the Contract Work Hours and Safety Standards Act (the Construction Safety Act) (40 U.S.C. 3701 *et seq.*); Section 41, the Longshore and Harbor Worker's Compensation Act (33 U.S.C. 941); Secretary of Labor's Order No. 5–2002 (67 FR 65008); and 29 CFR part 1911.

Signed at Washington, DC on August 9, 2006.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor.

VIII. Amendments to Standards

■ For the reasons stated in the preamble of this final rule, the Agency is amending 29 CFR parts 1910, 1915, and 1926 to read as follows:

PART 1910—[AMENDED]

Subpart I—[Amended]

■ 1. Revise the authority citation for subpart I of part 1910 to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); and Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (62 FR 50017), or 5–2002 (67 FR 65008), as applicable.

Sections 1910.132, 1910.134, and 1910.138 of 29 CFR also issued under 29 CFR part 1911.

Sections 1910.133, 1910.135, and 1910.136 of 29 CFR also issued under 29 CFR part 1911 and 5 U.S.C. 553.

■ 2. Amend § 1910.134 as follows:

■ a. Add the text of the definitions for ''Assigned protection factor (APF)'' and ''Maximum use concentration (MUC)'' to paragraph (b);

■ b. Add the text of paragraphs (d)(3)(i)(A), including Table 1, and (d)(3)(i)(B); and

■ c. Revise paragraph (n).

The added and revised text reads as follows:

§ 1910.134 Respiratory protection.

* * * * *

(b) * * *

Assigned protection factor (APF) means the workplace level of respiratory protection that a respirator or class of respirators is expected to provide to employees when the employer implements a continuing, effective respiratory protection program as specified by this section.

* * * * *

Maximum use concentration (MUC) means the maximum atmospheric concentration of a hazardous substance from which an employee can be expected to be protected when wearing a respirator, and is determined by the assigned protection factor of the respirator or class of respirators and the

exposure limit of the hazardous substance. The MUC can be determined mathematically by multiplying the assigned protection factor specified for a respirator by the required OSHA permissible exposure limit, short-term exposure limit, or ceiling limit. When no OSHA exposure limit is available for a hazardous substance, an employer must determine an MUC on the basis of relevant available information and informed professional judgment.

* * * * *

(d) * * *

(3) * * *

(i) * * *

(A) *Assigned Protection Factors (APFs).* Employers must use the assigned protection factors listed in Table 1 to select a respirator that meets or exceeds the required level of employee protection. When using a combination respirator (e.g., airline respirators with an air-purifying filter), employers must ensure that the assigned protection factor is appropriate to the mode of operation in which the respirator is being used.

TABLE 1.—ASSIGNED PROTECTION FACTORS [5]

Type of respirator [1,2]	Quarter mask	Half mask	Full facepiece	Helmet/hood	Loose-fitting facepiece
1. Air-Purifying Respirator	5	[3] 10	50	.....	.....
2. Powered Air-Purifying Respirator (PAPR)	.....	50	1,000	[4] 25/1,000	25
3. Supplied-Air Respirator (SAR) or Airline Respirator					
• Demand mode	.....	10	50	.....	.....
• Continuous flow mode	.....	50	1,000	[4] 25/1,000	25
• Pressure-demand or other positive-pressure mode	.....	50	1,000	.....	.....
4. Self-Contained Breathing Apparatus (SCBA)					
• Demand mode	.....	10	50	50	.....
• Pressure-demand or other positive-pressure mode (e.g., open/closed circuit)	.....	.....	10,000	10,000	.....

Notes:

[1] Employers may select respirators assigned for use in higher workplace concentrations of a hazardous substance for use at lower concentrations of that substance, or when required respirator use is independent of concentration.

[2] The assigned protection factors in Table 1 are only effective when the employer implements a continuing, effective respirator program as required by this section (29 CFR 1910.134), including training, fit testing, maintenance, and use requirements.

[3] This APF category includes filtering facepieces, and half masks with elastomeric facepieces.

[4] The employer must have evidence provided by the respirator manufacturer that testing of these respirators demonstrates performance at a level of protection of 1,000 or greater to receive an APF of 1,000. This level of performance can best be demonstrated by performing a WPF or SWPF study or equivalent testing. Absent such testing, all other PAPRs and SARs with helmets/hoods are to be treated as loose-fitting facepiece respirators, and receive an APF of 25.

[5] These APFs do not apply to respirators used solely for escape. For escape respirators used in association with specific substances covered by 29 CFR 1910 subpart Z, employers must refer to the appropriate substance-specific standards in that subpart. Escape respirators for other IDLH atmospheres are specified by 29 CFR 1910.134 (d)(2)(ii).

(B) *Maximum Use Concentration (MUC).* (*1*) The employer must select a respirator for employee use that maintains the employee's exposure to the hazardous substance, when measured outside the respirator, at or below the MUC.

(*2*) Employers must not apply MUCs to conditions that are immediately dangerous to life or health (IDLH); instead, they must use respirators listed for IDLH conditions in paragraph (d)(2) of this standard.

(*3*) When the calculated MUC exceeds the IDLH level for a hazardous substance, or the performance limits of the cartridge or canister, then employers must set the maximum MUC at that lower limit.

* * * * *

(n) *Effective date.* Paragraphs (d)(3)(i)(A) and (d)(3)(i)(B) of this section become effective November 22, 2006.

* * * * *

Subpart Z—[Amended]

■ 3. Revise the authority citation for subpart Z of part 1910 to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Orders 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), or 3–2000 (62 FR 50017); and 29 CFR part 1911.

* * * * *

■ 4. Amend § 1910.1001 by:

■ a. Removing Table 1 in paragraph (g)(3);

■ b. Redesignating Table 2 in paragraph (l)(3)(ii) as Table 1;

■ c. Removing the reference to ''Table 2'' in paragraph (l)(3)(ii) and adding ''Table 1'' in its place; and

■ d. Revising paragraphs (g)(2)(ii) and (g)(3).

The revisions read as follows:

§ 1910.1001 Asbestos.

* * * * *

(g) * * *

(2) * * *

(ii) Employers must provide an employee with a tight-fitting, powered air-purifying respirator (PAPR) instead of a negative pressure respirator selected according to paragraph (g)(3) of this standard when the employee chooses to use a PAPR and it provides adequate protection to the employee.

* * * * *

(3) *Respirator selection.* Employers must:

(i) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134; however, employers must not select or use filtering facepiece respirators for protection against asbestos fibers.

(ii) Provide HEPA filters for powered and non-powered air-purifying respirators.

* * * * *

■ 5. In § 1910.1017, remove the table in paragraph (g)(3)(i), remove paragraph (g)(3)(iii), and revise paragraph (g)(3)(i) to read as follows:

§ 1910.1017 Vinyl chloride.

* * * * *

(g) * * *

(3) * * *

(i) Employers must:

(A) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134.

(B) Provide an organic vapor cartridge that has a service life of at least one hour when using a chemical cartridge respirator at vinyl chloride concentrations up to 10 ppm.

(C) Select a canister that has a service life of at least four hours when using a powered air-purifying respirator having a hood, helmet, or full or half facepiece, or a gas mask with a front-or back-mounted canister, at vinyl chloride concentrations up to 25 ppm.

* * * * *

■ 6. In § 1910.1018, remove Tables I and II and paragraph (h)(3)(ii), redesignate paragraph (h) (3)(iii) as paragraph (h)(3)(ii), and revise paragraph (h)(3)(i) to read as follows:

§ 1910.1018 Inorganic arsenic.

* * * * *

(h) * * *

(3) * * *

(i) Employers must:

(A) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134.

(B) Ensure that employees do not use half mask respirators for protection against arsenic trichloride because it is absorbed rapidly through the skin.

(C) Provide HEPA filters for powered and non-powered air-purifying respirators.

(D) Select for employee use:

(*1*) Air-purifying respirators that have a combination HEPA filter with an appropriate gas-sorbent cartridge or canister when the employee's exposure exceeds the permissible exposure level for inorganic arsenic and the relevant limit for other gases.

(*2*) Front-or back-mounted gas masks equipped with HEPA filters and acid gas canisters or any full facepiece supplied-air respirators when the inorganic arsenic concentration is at or below 500 mg/m^3; and half mask air-purifying respirators equipped with HEPA filters and acid gas cartridges when the inorganic arsenic concentration is at or below 100 $\mu g/m^3$.

* * * * *

■ 7. In § 1910.1025, remove Table II in paragraph (f)(2)(ii) and revise paragraphs (f)(3)(i) and (f)(3)(ii) to read as follows:

§ 1910.1025 Lead.

* * * * *

(f) * * *

(3) * * *

(i) Employers must:

(A) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134.

(B) Provide employees with full facepiece respirators instead of half mask respirators for protection against lead aerosols that cause eye or skin irritation at the use concentrations.

(C) Provide HEPA filters for powered and non-powered air-purifying respirators.

(ii) Employers must provide employees with a powered air-purifying respirator (PAPR) instead of a negative pressure respirator selected according to paragraph (f)(3)(i) of this standard when an employee chooses to use a PAPR and it provides adequate protection to the employee as specified by paragraph (f)(3)(i) of this standard.

* * * * *

■ 8. In § 1910.1027, remove Table 2 in paragraph (g)(3)(i) and revise paragraph (g)(3)(i) to read as follows:

§ 1910.1027 Cadmium.

* * * * *

(g) * * *

(3) * * *

(i) Employers must:

(A) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134.

(B) Provide employees with full facepiece respirators when they experience eye irritation.

(C) Provide HEPA filters for powered and non-powered air-purifying respirators.

* * * * *

■ 9. In § 1910.1028, remove Table 1 in paragraph (g)(3)(ii) and revise paragraphs (g)(2)(i) and (g)(3)(i) to read as follows:

§ 1910.1028 Benzene.

* * * * *

(g) * * *

(2) * * *

(i) Employers must implement a respiratory protection program in accordance with 29 CFR 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m).

* * * * *

(3) * * *

(i) Employers must:

(A) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134.

(B) Provide employees with any organic vapor gas mask or any self-contained breathing apparatus with a full facepiece to use for escape.

(C) Use an organic vapor cartridge or canister with powered and non-powered air-purifying respirators, and a chin-style canister with full facepiece gas masks.

(D) Ensure that canisters used with non-powered air-purifying respirators have a minimum service life of four hours when tested at 150 ppm benzene at a flow rate of 64 liters per minute (LPM), a temperature of 25 °C, and a relative humidity of 85%; for canisters used with tight-fitting or loose-fitting powered air-purifying respirators, the flow rates for testing must be 115 LPM and 170 LPM, respectively.

* * * * *

■ 10. In § 1910.1029, remove Table I in paragraph (g)(3) and revise paragraph (g)(3) to read as follows:

§ 1910.1029 Coke oven emissions.

* * * * *

(g) * * *

(3) *Respirator selection.* Employers must select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134; however, employers may use a filtering facepiece respirator only when it functions as a filter respirator for coke oven emissions particulates.

* * * * *

■ 11. In § 1910.1043, remove Table I in paragraph (f)(3)(i) and revise paragraphs (f)(3)(i) and (f)(3)(ii) to read as follows:

§ 1910.1043 Cotton dust.

* * * * *

(f) * * *

(3) * * *

(i) Employers must:

(A) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134; however, employers must not select or use filtering facepieces for protection against cotton dust concentrations greater than five times (5 ×) the PEL.

(B) Provide HEPA filters for powered and non-powered air-purifying respirators used at cotton dust concentrations greater than ten times (10 ×) the PEL.

(ii) Employers must provide an employee with a powered air-purifying respirator (PAPR) instead of a non-powered air-purifying respirator selected according to paragraph (f)(3)(i) of this standard when the employee chooses to use a PAPR and it provides adequate protection to the employee as specified by paragraph (f)(3)(i) of this standard.

* * * * *

■ 12. In § 1910.1044, remove Table 1 in paragraph (h)(3) and revise paragraph (h)(3) to read as follows: § 1910.1044 1,2-Dibromo-3-chloropropane.

* * * * *

(h) * * *

(3) *Respirator selection.* Employers must:

(i) Select, and provide to employees, the appropriate atmosphere-supplying respirator specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134.

(ii) Provide employees with one of the following respirator options to use for entry into, or escape from, unknown DBCP concentrations:

(A) A combination respirator that includes a supplied-air respirator with a full facepiece operated in a pressure-demand or other positive-pressure or continuous-flow mode, as well as an auxiliary self-contained breathing apparatus (SCBA) operated in a pressure-demand or positive-pressure mode.

(B) An SCBA with a full facepiece operated in a pressure-demand or other positive-pressure mode.

* * * * *

■ 13. In § 1910.1045, remove Table I in paragraph (h)(3) and revise paragraphs (h)(2)(i) and (h)(3) to read as follows:

§ 1910.1045 Acrylonitrile.

* * * * *

(h) * * *

(2) * * *

(i) Employers must implement a respiratory protection program in accordance with 29 CFR 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m).

* * * * *

(3) *Respirator selection.* Employers must:

(i) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134.

(ii) For escape, provide employees with any organic vapor respirator or any self-contained breathing apparatus permitted for use under paragraph (h)(3)(i) of this standard.

* * * * *

■ 14. In § 1910.1047, remove Table 1 in paragraph (g)(3) and revise paragraph (g)(3) to read as follows:

§ 1910.1047 Ethylene oxide.

* * * * *

(g) * * *

(3) *Respirator selection.* Employers must:

(i) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134; however, employers must not select or use half masks of any type because EtO may cause eye irritation or injury.

(ii) Equip each air-purifying, full facepiece respirator with a front-or back-mounted canister approved for protection against ethylene oxide.

(iii) For escape, provide employees with any respirator permitted for use under paragraphs (g)(3)(i) and (ii) of this standard.

* * * * *

■ 15. In § 1910.1048, remove Table 1 in paragraph (g)(3)(i) and revise paragraphs (g)(2) and (g)(3) to read as follows:

§ 1910.1048 Formaldehyde.

* * * * *

(g) * * *

(2) *Respirator program.* (i) Employers must implement a respiratory protection program in accordance with 29 CFR 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m).

(ii) When employees use air-purifying respirators with chemical cartridges or canisters that do not contain end-of-service-life indicators approved by the National Institute for Occupational Safety and Health, employers must replace these cartridges or canisters as specified by paragraphs (d)(3)(iii)(B)(1) and (B)(2) of 29 CFR 1910.134, or at the end of the workshift, whichever condition occurs first.

(3) *Respirator selection.* (i) Employers must:

(A) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134.

(B) Equip each air-purifying, full facepiece respirator with a canister or cartridge approved for protection against formaldehyde.

(C) For escape, provide employees with one of the following respirator options: A self-contained breathing apparatus operated in the demand or pressure-demand mode; or a full facepiece respirator having a chin-style, or a front-or back-mounted industrial-size, canister or cartridge approved for protection against formaldehyde.

(ii) Employers may substitute an air-purifying, half mask respirator for an air-purifying, full facepiece respirator when they equip the half mask respirator with a cartridge approved for protection against formaldehyde and provide the affected employee with effective gas-proof goggles.

(iii) Employers must provide employees who have difficulty using negative pressure respirators with powered air-purifying respirators permitted for use under paragraph (g)(3)(i)(A) of this standard and that affords adequate protection against formaldehyde exposures.

* * * * *

■ 16. In § 1910.1050, remove Table 1 in paragraph (h)(3)(i) and revise paragraph (h)(3)(i) to read as follows:

§ 1910.1050 Methylenedianiline.

* * * * *

(h) * * *

(3) * * *

(i) Employers must:

(A) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134.

(B) Provide HEPA filters for powered and non-powered air-purifying respirators.

(C) For escape, provide employees with one of the following respirator options: Any self-contained breathing apparatus with a full facepiece or hood operated in the positive-pressure or continuous-flow mode; or a full facepiece air-purifying respirator.

(D) Provide a combination HEPA filter and organic vapor canister or cartridge with powered or non-powered air-purifying respirators when MDA is in liquid form or used as part of a process requiring heat.

* * * * *

■ 17. In § 1910.1052, remove Table 2 in paragraph (g)(3) and revise paragraph (g)(3) to read as follows:

§ 1910.1052 Methylene chloride.

* * * * *

(g) * * *

(3) *Respirator selection.* Employers must:

(i) Select, and provide to employees, the appropriate atmosphere-supplying respirator specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134; however, employers must not select or use half masks of any type because MC may cause eye irritation or damage.

(ii) For emergency escape, provide employees with one of the following respirator options: A self-contained breathing apparatus operated in the continuous-flow or pressure-demand mode; or a gas mask with an organic vapor canister.

* * * * *

PART 1915—[AMENDED]

■ 18. Revise the authority citation for part 1915 to read as follows:

Authority: Section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (20 U.S.C. 653, 655, and 687); and Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (62 FR 50017), or 5–2002 (67 FR 65008) as applicable.

Sections 1915.120 and 1915.152 of 29 CFR also issued under 29 CFR part 1911.

Subpart Z—[Amended]

■ 19. In § 1915.1001, remove Table 1 in paragraph (h)(2)(iii) and revise paragraph (h)(2) to read as follows:

§ 1915.1001 Asbestos.

* * * * *

(h) * * *

(2) *Respirator selection.* (i) Employers must select, and provide to employees at no cost, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134; however, employers must not select or use filtering facepiece respirators for use against asbestos fibers.

(ii) Employers are to provide HEPA filters for powered and non-powered air-purifying respirators.

(iii) Employers must:

(A) Inform employees that they may require the employer to provide a tight-fitting, powered air-purifying respirator (PAPR) permitted for use under paragraph (h)(2)(i) of this standard instead of a negative pressure respirator.

(B) Provide employees with a tight-fitting PAPR instead of a negative pressure respirator when the employees choose to use a tight-fitting PAPR and it provides them with the required protection against asbestos.

(iv) Employers must provide employees with an air-purifying, half mask respirator, other than a filtering facepiece respirator, whenever the employees perform:

(A) Class II or Class III asbestos work for which no negative exposure assessment is available.

(B) Class III asbestos work involving disturbance of TSI or surfacing ACM or PACM.

(v) Employers must provide employees with:

(A) A tight-fitting, powered air-purifying respirator or a full facepiece, supplied-air respirator operated in the pressure-demand mode and equipped with either HEPA egress cartridges or an auxiliary positive-pressure, self-contained breathing apparatus (SCBA) whenever the employees are in a regulated area performing Class I asbestos work for which a negative exposure assessment is not available and the exposure assessment indicates that the exposure level will be at or below 1 f/cc as an 8-hour time-weighted average (TWA).

(B) A full facepiece, supplied-air respirator operated in the pressure-demand mode and equipped with an auxiliary positive-pressure SCBA whenever the employees are in a regulated area performing Class I asbestos work for which a negative exposure assessment is not available and the exposure assessment indicates that the exposure level will be above 1 f/cc as an 8-hour TWA.

* * * * *

PART 1926—[AMENDED]

Subpart D—[Amended]

■ 20. Revise the authority citation for subpart D of part 1926 to read as follows:

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 *et seq.*); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657); Secretary of Labor's Orders 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (62 FR 50017), or 5.2002 (67 FR 650008); as applicable; and 29 CFR part 11.

Sections 1926.58, 1926.59, 1926.60, and 1926.65 also issued under 5 U.S.C. 553 and 29 CFR part 1911.

Section 1926.62 of 29 CFR also issued under section 1031 of the Housing and Community Development Act of 1992 (42 U.S.C. 4853).

Section 1926.65 of 29 CFR also issued under section 126 of the Superfund Amendments and Reauthorization Act of 1986, as amended (29 U.S.C. 655 note), and 5 U.S.C. 553.

■ 21. In § 1926.60, remove Table 1 and revise paragraph (i)(3)(i) to read as follows:

§ 1926.60 Methylenedianiline.

* * * * *

(i) * * *

(3) * * *

(i) Employers must:

(A) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134.

(B) Provide HEPA filters for powered and non-powered air-purifying respirators.

(C) For escape, provide employees with one of the following respirator options: Any self-contained breathing apparatus with a full facepiece or hood operated in the positive-pressure or continuous-flow mode; or a full facepiece air-purifying respirator.

(D) Provide a combination HEPA filter and organic vapor canister or cartridge with air-purifying respirators when MDA is in liquid form or used as part of a process requiring heat.

* * * * *

■ 22. In § 1926.62, remove Table 1 in paragraph (f)(3)(ii) and revise paragraph (f)(3)(i) to read as follows:

§ 1926.62 Lead.

* * * * *

(f) * * *

(3) * * *

(i) Employers must:

(A) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134.

(B) Provide employees with a full facepiece respirator instead of a half mask respirator for protection against lead aerosols that may cause eye or skin irritation at the use concentrations.

(C) Provide HEPA filters for powered and non-powered air-purifying respirators.

* * * * *

Subpart Z—[Amended]

■ 23. Revise the authority citation for subpart Z of part 1926 to read as follows:

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 *et seq.*); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Orders 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (62 FR 50017), or 5–2002 (67 FR 65008) as applicable; and 29 CFR part 11.

Section 1926.1102 of 29 CFR not issued under 29 U.S.C. 655 or 29 CFR part 1911; also issued under 5 U.S.C. 553.

■ 24. In § 1926.1101, remove Table 1 in paragraph (h)(3)(i) and revise paragraph (h)(3) to read as follows:

§ 1926.1101 Asbestos.

* * * * *

(h) * * *

(3) *Respirator selection.* (i) Employers must:

(A) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134; however, employers must not select or use filtering facepiece respirators for use against asbestos fibers.

(B) Provide HEPA filters for powered and non-powered air-purifying respirators.

(ii) Employers must provide an employee with tight-fitting, powered air-purifying respirator (PAPR) instead of a negative pressure respirator selected according to paragraph (h)(3)(i)(A) of this standard when the employee chooses to use a PAPR and it provides adequate protection to the employee.

(iii) Employers must provide employees with an air-purifying half mask respirator, other than a filtering facepiece respirator, whenever the employees perform:

(A) Class II or Class III asbestos work for which no negative exposure assessment is available.

(B) Class III asbestos work involving disturbance of TSI or surfacing ACM or PACM.

(iv) Employers must provide employees with:

(A) A tight-fitting powered air-purifying respirator or a full facepiece, supplied-air respirator operated in the pressure-demand mode and equipped with either HEPA egress cartridges or an auxiliary positive-pressure, self-contained breathing apparatus (SCBA) whenever the employees are in a regulated area performing Class I asbestos work for which a negative exposure assessment is not available and the exposure assessment indicates that the exposure level will be at or below 1 f/cc as an 8-hour time-weighted average (TWA).

(B) A full facepiece supplied-air respirator operated in the pressure-demand mode and equipped with an auxiliary positive-pressure SCBA whenever the employees are in a regulated area performing Class I asbestos work for which a negative exposure assessment is not available and the exposure assessment indicates that the exposure level will be above 1 f/cc as an 8-hour TWA.

* * * * *

■ 25. In § 1926.1127, remove Table 1 in paragraph (g)(3)(i) and revise paragraph (g)(3)(i) to read as follows:

§ 1926.1127 Cadmium.

* * * * *

(g) * * *

(3) * * *

(i) Employers must:

(A) Select, and provide to employees, the appropriate respirators specified in paragraph (d)(3)(i)(A) of 29 CFR 1910.134.

(B) Provide employees with full facepiece respirators when they experience eye irritation.

(C) Provide HEPA filters for powered and non-powered air-purifying respirators.

* * * * *

[FR Doc. 06–6942 Filed 8–23–06; 8:45 am]

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Federal Register

Thursday,
August 24, 2006

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 10

General Provisions; Revised List of Migratory Birds; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 10

RIN 1018–AB72

General Provisions; Revised List of Migratory Birds

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to revise the List of Migratory Birds by adding numerous species and removing numerous species. Reasons for the proposed changes to the list include correcting previous mistakes including misspellings, adding species based on new evidence of occurrence in the United States or U.S. territories, removing species no longer known to occur within the United States, and changing names based on new taxonomy. The net increase of 140 species (152 added and 12 removed) brings to 972 the total number of species protected by the Migratory Bird Treaty Act (MBTA). We regulate most aspects of the taking, possession, transportation, sale, purchase, barter, exportation, and importation of migratory birds. An accurate and up-to-date list of species protected by the MBTA is essential for regulatory purposes.

DATES: Submit comments on or before October 23, 2006.

ADDRESSES: Submit your comments on this proposal in one of the following ways:

(1) By postal mail to Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Mail Stop 4107, Arlington, VA 22203.

(2) By hand-delivery to U.S. Fish and Wildlife Service, Division of Migratory Bird Management, 4501 North Fairfax Drive, Room 4000, Arlington, VA 22203. You can also examine materials available for public inspection at this address;

(3) By fax to (703) 358–2272; or

(4) By e-mail to *mbtabirdlist@fws.gov.*

FOR FURTHER INFORMATION CONTACT: John L. Trapp, (703) 358–1714.

SUPPLEMENTARY INFORMATION:

What Statutory Authority Does the Service Have for This Rulemaking?

We have statutory authority and responsibility for enforcing the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703–711), the Fish and Wildlife Improvement Act of 1978 (16 U.S.C. 712), and the Fish and Wildlife Act of 1956 (16 U.S.C. 742a–j). The MBTA implements treaties between the United States and four neighboring countries for the protection of migratory birds, as follows:

(1) *Canada:* Convention for the Protection of Migratory Birds, August 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, T.S. No. 628;

(2) *Mexico:* Convention for the Protection of Migratory Birds and Game Mammals, February 7, 1936, United States-United Mexican States (=Mexico), 50 Stat. 1311, T.S. No. 912;

(3) *Japan:* Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, March 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990; and

(4) *Russia:* Convention for the Conservation of Migratory Birds and Their Environment, United States-Union of Soviet Socialist Republics (=Russia), November 26, 1976, 92 Stat. 3110, T.I.A.S. 9073.

What Is the Purpose of This Rulemaking?

Our purpose is to inform the public of the species protected by regulations implementing the MBTA. These regulations are found in Title 50, Code of Federal Regulations (CFR), Parts 10, 20, and 21. We regulate most aspects of the taking, possession, transportation, sale, purchase, barter, exportation, and importation of migratory birds. An accurate and up-to-date list of species protected by the MBTA is essential for regulatory purposes.

Why Is This Amendment to the List of Migratory Birds Necessary?

The proposed amendment is needed to: (1) Add 2 species covered by the Japanese and Russian treaties that were mistakenly omitted from previous lists; (2) add 26 species of accidental or casual occurrence documented prior to April 1985, but not included in prior lists; (3) add 60 species based on new distributional records documenting their occurrence in the United States since April 1985; (4) add 27 species that occur naturally in the United States only in the Pacific island territories of American Samoa, Baker and Howland Islands, Guam, or the Northern Mariana Islands; (5) add 37 species newly recognized as a result of taxonomic changes; (6) remove 11 species not known to occur within the boundaries of the United States; (7) remove 1 species that is now treated as a subspecies; (8) change the common (English) names of 47 species to conform with accepted usage; (9) change the scientific names of 64 species to conform with accepted usage; (10) change the common and scientific names of 7 species to conform with accepted usage; (11) change the scientific names of 4 species in the alphabetical list to conform with accepted usage and to correct inconsistencies between the alphabetical and taxonomic lists; (12) correct errors in the common (English) name of 2 species; (13) correct errors in the scientific names of 3 species in the taxonomic list; and (14) change the status of 1 taxon from protected subspecies to non-protected species (due to lack of natural occurrence in the United States or its territories). In accordance with the Migratory Bird Treaty Reform Act of 2004 (Pub. L. 108–447) (MBTRA), we also reaffirm our determination of March 15, 2005 (70 FR 12710), that the mute swan (Cygnus olor), which was never formally listed in 50 CFR 10.13 but was treated as protected by the MBTA since December 28, 2001, as the result of a court order (*Hill* v. *Norton*, 275 F.3d 98 (D.C. Cir. 2001)), is no longer afforded protection because it is nonnative and human-introduced. See *Fund for Animals* v. *Norton*, 374 F. Supp. 2d 91 (D.D.C. 2005) (denying injunction because of the clear language of the MBTRA), appeal pending.

The List of Migratory Birds (50 CFR 10.13) was last revised on April 5, 1985 (50 FR 13710). In a proposed rule published May 9, 1995 (60 FR 24686), we suggested updating the List of Migratory Birds by adding 20 species, removing 1 species, and revising the common (English) or scientific names of 23 previously listed species to conform to the most recent nomenclature. The proposed amendments were necessitated by five published supplements to the 6th (1983) edition of the American Ornithologists' Union's (AOU's) *Check-list of North American birds*. Knowing that additional amendments would be necessary following the anticipated publication of a 7th edition of the Check-list, we elected to delay publication of a final rule until after the appearance of the revised Check-list. The 1995 proposed rule generated just two public comments, from the American Ornithologists' Union and the Association of Scientific Collections. The comments of those organizations, mostly editorial in nature, are reflected in this document, as appropriate.

Following publication of the 7th edition of the Check-list in July 1998, administrative workloads and staff shortages prevented work on a final rule

until September 2000. A followup proposed rule was deemed necessary because of the 5-year delay since publication of the initial proposed rule, and the many new changes necessitated by the 7th edition of the Check-list. In a second proposed rule published October 12, 2001 (66 FR 52282), we suggested adding 30 species, removing 1 species, and revising the common (English) or scientific names of 78 previously listed species to conform to accepted usage.

Of the 116 letters received on the proposed rule of October 12, 2001, 109 dealt solely with the presumed protective status of the mute swan (Cygnus olor) under the MBTA. Of the remaining seven letters, three provided comments of a general nature (including recommendations for adding or deleting certain species); two expressed general support without offering specific comments; one questioned the legality of extending MBTA protection to species that do not cross State or international boundaries; and one expressed concern about the harvest of MBTA-protected shorebirds in the Caribbean. These comments remain part of the public record and will be incorporated, as appropriate, into the final rule.

Because of the delay since publication of the 2001 proposed rule, plus the many new changes necessitated by six published supplements (AOU 2000, 2002, 2003, 2004, 2005, 2006) to the 7th edition of the Check-list, we are issuing another proposed rule. This will enhance efficiency by allowing the public to review and comment on all of the desired changes that have come to light since publication of the 1995 and 2001 proposed rules.

What Scientific Authorities Are Used To Amend the List of Migratory Birds?

Although bird names (common and scientific) are relatively stable, staying current with standardized usage is necessary to avoid confusion in communications. We here follow the 7th edition of the American Ornithologists' Union's *Check-list of North American birds* (AOU 1998), as amended (AOU 1999, 2000, 2002, 2003, 2004, 2005, and 2006), on matters of taxonomy, nomenclature, and the sequence of species and other higher taxonomic categories (orders, families, subfamilies). For the few species that occur outside the geographic area covered by the Check-list, we follow Monroe and Sibley (1993).

What Criteria Are Used To Identify Individual Species Protected by the MBTA?

A species qualifies for protection under the MBTA by meeting one or more of the following four criteria:

(1) It (a) Belongs to a family or group of species named in the Canadian convention of 1916, as amended in 1996; (b) specimens, photographs, videotape recordings, or audiotape recordings provide convincing evidence of natural occurrence in the United States or its territories; and (c) the documentation of such records has been recognized by the AOU or other competent scientific authorities.

(2) It (a) Belongs to a family of group of species named in the Mexican convention of 1936, as amended in 1972; (b) specimens, photographs, videotape recordings, or audiotape recordings provide convincing evidence of natural occurrence in the United States or its territories; and (c) the documentation of such records has been recognized by the AOU or other competent scientific authorities.

(3) It is a species listed in the annex to the Japanese convention of 1972, as amended.

(4) It is a species listed in the appendix to the Russian convention of 1976.

In accordance with the MBTRA, we have not listed species whose occurrences in the United States are strictly the result of intentional human introduction(s).

How Do the Scientific Names Proposed Here Compare to Those That Appear in the Japanese and Russian Treaties?

The Japanese and Russian treaties list individual species of birds that are covered. For 37 of these species, the scientific (genus or species) name currently recognized by scientific authorities (AOU 1998, 1999; Monroe and Sibley 1993) differs from that which appears in the treaties. The following cross-reference provides a linkage between the scientific names used in this list and those that appear in the annex to the Japanese treaty and the appendix to the Russian treaty. The first name is the modern equivalent proposed here, and the second name is that which appears in one or both of the treaties. These changes modernize the regulatory list without revising either the Japanese or the Russian treaty (indicated by J and R, respectively):

Accipiter gularis (Japanese Sparrowhawk) is listed as Accipiter virgatus (J & R);

Actitis hypoleucos (Common Sandpiper) is listed as Tringa hypoleucos (J & R);

Aethia psittacula (Parakeet Auklet) is listed as Cyclorrhynchus psittacula (R);

Anas americana (American Wigeon) is listed as Mareca americana (J);

Anas clypeata (Northern Shoveler) is listed as Spatula clypeata (J);

Anas penelope (Eurasian Wigeon) is listed as Mareca penelope (J);

Anous minutus (Black Noddy) is listed as Anous tenuirostris (J);

Anthus rubescens (American Pipit) is listed as Anthus spinoletta (J & R);

Branta bernicla (Brant) incorporates Branta nigricans (R);

Calidris alba (Sanderling) is listed as Crocethia alba (J);

Calidris subminuta (Long-toed Stint) is listed as part of Calidris minutilla (J);

Carduelis flammea (Common Redpoll) is listed as Acanthis flammea (J);

Carduelis hornemanni (Hoary Redpoll) is included as part of Carduelis flammea (J), and is listed as Acanthis hornemanni (R);

Charadrius morinellus (Eurasian Dotterel) is listed as Eudromias morinellus (J & R);

Chen caerulescens (Snow Goose) is listed as Anser caerulescens (J);

Chen canagica (Emperor Goose) is listed as Anser canagicus (J), and Philacte canagica (R);

Cygnus columbianus (Tundra Swan) incorporates Cygnus bewickii (R);

Egretta sacra (Pacific Reef-Egret) is listed as Demigretta sacra (J);

Ficedula narcissina (Narcissus Flycatcher) is listed as Muscicapa narcissina (J);

Fratercula cirrhata (Tufted Puffin) is listed as Lunda cirrhata (J & R);

Gallinago gallinago (Common Snipe) is listed as Capella gallinago (R);

Gallinago megala (Swinhoe's Snipe) is listed as Capella megala (R);

Gallinago stenura (Pin-tailed Snipe) is listed as Capella stenura (R);

Heteroscelus brevipes (Gray-tailed Tattler) is included as part of Tringa incana (J);

Heteroscelus incanus (Wandering Tattler) is listed as Tringa incana (J);

Luscinia calliope (Siberian Rubythroat) is listed as Erithacus calliope (J);

Melanitta fusca (White-winged Scoter) incorporates Melanitta deglandi (J);

Mergellus albellus (Smew) is listed as Mergus albellus (J & R);

Milvus migrans (Black Kite) is listed as Milvus korschun (R);

Numenius borealis (Eskimo Curlew) is included as part of Numenius minutus (J);

Phalaropus lobatus (Red-necked Phalarope) is listed as Lobipes lobatus (R);

Phoebastria albatrus (Short-tailed Albatross) is listed as Diomedea albatrus (J & R);

Phoebastria immutabilis (Laysan Albatross) is listed as Diomedea immutabilis (J & R);
Phoebastria nigripes (Black-footed Albatross) is listed as Diomedea nigripes (J & R);
Pterodroma hypoleuca (Bonin Petrel) is listed as Pterodroma leucoptera (R);
Tachycineta bicolor (Tree Swallow) is listed as Iridoprocne bicolor (R); and
Turdus obscurus (Eyebrowed Thrush) is listed as Turdus pallidus (R).

How Do the Proposed Changes Affect the List of Migratory Birds?

The proposed amendments (152 additions, 12 removals, 118 name changes, and 9 corrections) will affect a grand total of 290 species and result in a net addition of 140 species to the List of Migratory Birds, increasing the species total from 832 to 972. Of the 140 species that we propose adding to the list, 37 were previously covered under the MBTA as subspecies of listed species. These amendments can be logically arranged in the following 14 categories:

(1) Add two species that are included in the Appendix of the Russian treaty and in the Annex to the Japanese treaty, respectively; the omission of these species in previous lists was an oversight. These species also qualify for protection under the Canadian and Mexican treaties as members of the families Anatidae and Laridae, respectively:

Duck, Spot-billed, Anas poecilorhyncha; and
Gull, Black-tailed, Larus crassirostris.

(2) Add 26 species based on review and acceptance by AOU (prior to April 1985) of distributional records documenting their occurrence in the United States, Puerto Rico, or the U.S. Virgin Islands. These species belong to families covered by the Canadian and Mexican treaties. They were excluded from the 1985 list because their occurrence was viewed as accidental or casual, a criterion no longer viewed as consistent with the MBTA or its underlying treaties. A species of accidental or casual occurrence is one whose normal range is far enough removed from the United States as to make regular occurrence unlikely or improbable (AOU 1983). For each species, we list the State(s) in which it has been recorded plus the relevant AOU publication(s):

Albatross, Shy, Thalassarche cauta—Washington (AOU 1982, 1983, 1997, 1998);
Albatross, Wandering, Diomedea exulans—California (AOU 1982, 1983, 1998);
Bunting, Blue, Cyanocompsa parellina—Louisiana, Texas (AOU 1982, 1983, 1998);
Bunting, Gray, Emberiza variabilis—Alaska (AOU 1982, 1983, 1998);
Bunting, Little, Emberiza pusilla—Alaska (AOU 1982, 1983, 1998);
Chaffinch, Common, Fringilla coelebs—Maine to Massachusetts (AOU 1982, 1983, 1998);
Crake, Paint-billed, Neocrex erythrops—Louisiana, Texas (AOU 1982, 1983, 1998);
Curlew, Eurasian, Numenius arquata—Massachusetts, New York (AOU 1982, 1983, 1998);
Flycatcher, La Sagra's, Myiarchus sagrae—Alabama, Florida (AOU 1982, 1983, 1998);
Flycatcher, Variegated, Empidonomus varius—Maine, Tennessee (AOU 1982, 1983, 1998);
Gull, Belcher's, Larus belcheri—Florida (AOU 1982, 1983, 1998, 2003);
Hawk, Roadside, Buteo magnirostis—Texas (AOU 1982, 1983, 1998);
Hummingbird, Bumblebee, Atthis heloisa—Arizona (AOU 1982, 1983, 1998);
Martin, Southern, Progne elegans—Florida (AOU 1982, 1983, 1998);
Mockingbird, Bahama, Mimus gundlachii—Florida (AOU 1982, 1983, 1998);
Petrel, Black-winged, Pterodroma nigripennis—Hawaii (AOU 1982, 1983, 1998);
Petrel, Jouanin's, Bulweria fallax—Hawaii (AOU 1982, 1983, 1998);
Pewee, Hispaniolan, Contopus hispaniolensis—Puerto Rico (AOU 1983, 1995, 1998);
Pipit, Tree, Anthus trivialis—Alaska (AOU 1982, 1983, 1995);
Rail, Spotted, Pardirallus maculatus—Pennsylvania, Texas (AOU 1982, 1983, 1998);
Scops-Owl, Oriental, Otus sunia—Alaska (AOU 1982, 1983, 1998);
Shearwater, Streaked, Calonectris leucomelas—California (AOU 1982, 1983, 1998);
Shrike, Brown, Lanius cristatus—Alaska (AOU 1982, 1983, 1998);
Swift, Short-tailed, Chaetura brachyura—U.S. Virgin Islands (AOU 1983, 1998);
Vireo, Thick-billed, Vireo crassirostris—Florida (AOU 1983, 1998); and
Warbler, Fan-tailed, Euthlypis lachrymosa—Arizona (AOU 1982, 1983, 1998).

(3) Add 60 species based on review and acceptance by AOU (since April 1985) of new distributional records documenting their occurrence in the United States, Puerto Rico, or the U.S. Virgin Islands. These species belong to families covered by the Canadian and Mexican treaties and most are considered to be of accidental or casual occurrence. For each species, we list the State(s) in which it has been recorded plus the relevant AOU publication(s):

Albatross, Black-browed, Thalassarche melanophris—Virginia (AOU 2002);
Albatross, Light-mantled, Phoebetria palpebrata—California (AOU 1997, 1998);
Bluetail, Red-flanked, Tarsiger cyanurus—Alaska (AOU 1995, 1998);
Bunting, Pine, Emberiza leucocephalos—Alaska (AOU 1995, 1998);
Bunting, Yellow-breasted, Emberiza aureola—Alaska (AOU 1989, 1998);
Bunting, Yellow-throated, Emberiza elegans—Alaska (AOU 2000);
Carib, Purple-throated, Eulampis jugularis—U.S. Virgin Islands (AOU 1998);
Catbird, Black, Melanoptila glabrirostris—Texas (AOU 1998);
Duck, Muscovy, Cairina moschata—Texas (AOU 1998);
Egret, Little, Egretta garzetta—Massachusetts, New Hampshire, Puerto Rico, Virginia (AOU 1998);
Elaenia, Greenish, Myiopagis viridicata—Texas (AOU 1989, 1998);
Flycatcher, Piratic, Legatus leucophalus—Florida, New Mexico, Texas (AOU 2002);
Flycatcher, Social, Myiozetetes similis—Texas (AOU 2006);
Flycatcher, Tufted, Mitrephanes phaeocercus—Texas (AOU 1998);
Forest-Falcon, Collared, Micrastur semitorquatus—Texas (AOU 1998);
Frog-Hawk, Gray, Accipiter soloensis—Hawaii (AOU 1997, 1998);
Gallinule, Azure, Porphyrio flavirostris—New York (AOU 1991, 1998, 2002);
Goose, Lesser White-fronted, Anser erythropus—Alaska (AOU 1995, 1998);
Gull, Gray-hooded, Larus cirrocephalus—Florida (AOU 2002);
Gull, Kelp, Larus dominicanus—Louisiana, Maryland (AOU 2002);
Gull, Yellow-legged, Larus cachinnans—Maryland (AOU 1993, 1998);
Hawk, Crane, Geranospiza caerulescens—Texas (AOU 1998);
Hobby, Eurasian, Falco subbuteo—Alaska (AOU 1985, 1995, 1998);
Hummingbird, Cinnamon, Amazilia rutila—Arizona, New Mexico (AOU 1998);
Hummingbird, Xantus's, Hylocharis xantusii—California (AOU 1998);
Mango, Green-breasted, Anthracothorax prevostii—Texas (AOU 1998);
Martin, Brown-chested, Progne tapera—Massachusetts (AOU 1985, 1995, 1998);

Mockingbird, Blue, Melanotis caerulescens—Arizona, Texas (AOU 1998);
Murrelet, Long-billed, Brachyramphus perdix—10 States (AOU 1997, 1998);
Nightingale-Thrush, Black-headed, Catharus mexicanus—Texas (AOU 2006);
Nightingale-Thrush, Orange-billed, Catharus aurantiirostris—Texas (AOU 2002);
Owl, Mottled, Ciccaba virgata—Texas (AOU 1989, 1998);
Owl, Stygian, Asio stygius—Texas (AOU 2002);
Petrel, Bermuda, Pterodroma cahow—North Carolina (AOU 1998);
Petrel, Great-winged, Pterodroma macroptera—California (AOU 2004);
Petrel, Stejneger's, Pterodroma longirostris—California, Hawaii (AOU 1989, 1998);
Pewee, Cuban, Contopus caribeaus—Florida (AOU 2004);
Plover, Collared, Charadrius collaris—Texas (AOU 1998);
Pond-Heron, Chinese, Ardeola bacchus—Alaska (AOU 2000);
Reef-Heron, Western, Egretta gularis—Massachusetts (AOU 1985, 1998);
Robin, Siberian Blue, Luscinia cyane—Alaska (AOU 1987, 1998);
Robin, White-throated, Turdus assimilis—Texas (AOU 1998);
Sandpiper, Green, Tringa ochropus—Alaska (AOU 1985, 1998);
Shearwater, Cape Verde, Calonectris edwardsii—North Carolina (AOU 2006);
Silky-flycatcher, Gray, Ptilogonys cinereus—Texas (AOU 1998);
Siskin, Eurasian, Carduelis spinus—Alaska (AOU 1995, 1998);
Stilt, Black-winged, Himantopus himantopus—Alaska (AOU 1985, 1998);
Stonechat, Saxicola torquatus—Alaska (AOU 1987, 1998, 2004);
Storm-Petrel, Black-bellied Fregetta tropica—North Carolina (AOU 2006);
Swallow, Mangrove, Tachycineta albilinea—Florida (AOU 2005);
Swift, Alpine, Apus melba—Puerto Rico (AOU 1998);
Tanager, Flame-colored, Piranga bidentata—Arizona, Texas (AOU 1987, 1998);
Tern, Great Crested, Thalasseus bergii—Hawaii (AOU 1991, 1998, 2006);
Tern, Whiskered, Chlidonias hybrida—Delaware, New Jersey (AOU 1997, 1998, 2003);
Tityra, Masked, Tityra semifasciata—Texas (AOU 1998);
Turtle-Dove, Oriental, Streptopelia orientalis—Alaska (AOU 1991, 1998);
Vireo, Yucatan, Vireo magister—Texas (AOU 1987, 1998);
Wagtail, Citrine, Motacilla citreola—Alabama (AOU 1995, 1998);
Warbler, Crescent-chested, Parula superciliosa—Arizona (AOU 1987, 1998); and
Woodpecker, Great Spotted, Dendrocopos major—Alaska (AOU 1987, 1998).

(4) Add 27 species that belong to families covered by the Canadian and Mexican treaties, but occur naturally in the United States only in the Pacific island territories of American Samoa, Baker and Howland Islands, Guam, or the Northern Mariana Islands (Pratt *et al.* 1987). We also list the territory or territories in which each species is known to occur:

Bittern, Black, Ixobrychus flavicollis (Guam);
Cormorant, Little Pied, Phalacrocorax melanoleucos (Northern Marianas);
Crake, Spotless, Porzana tabuensis (American Samoa);
Crow, Mariana, Corvus kubaryi (Guam, Northern Marianas);
Duck, Pacific Black, Anas superciliosa (American Samoa);
Fruit-Dove, Crimson-crowned, Ptilinopus porphyraceus (American Samoa);
Fruit-Dove, Many-colored, Ptilinopus perousii (American Samoa);
Fruit-Dove, Mariana, Ptilinopus roseicapilla (Guam, Northern Marianas);
Greenshank, Nordmann's, Tringa guttifer (Guam);
Ground-Dove, Friendly, Gallicolumba stairi (American Samoa);
Ground-Dove, White-throated, Gallicolumba xanthonura (American Samoa);
Heron, Gray, Ardea cinerea (Northern Marianas);
Imperial-Pigeon, Pacific, Ducula pacifica (American Samoa);
Kingfisher, Collared, Todirhamphus chloris (American Samoa, Northern Marianas);
Kingfisher, Micronesian, Todirhamphus cinnamominus (Guam);
Oystercatcher, Eurasian, Haematopus ostralegus (Guam);
Petrel, Gould's, Pterodroma leucoptera (American Samoa);
Petrel, Phoenix, Pterodroma alba (Baker and Howland Islands);
Petrel, Tahiti, Pterodroma rostrata (American Samoa);
Rail, Buff-banded, Gallirallus philippensis (American Samoa);
Rail, Guam, Gallirallus owstoni (Guam);
Storm-Petrel, Matsudaira's, Oceanodroma matsudairae (Guam, Northern Marianas);
Storm-Petrel, Polynesian, Nesofregata fuliginosa (American Samoa);
Storm-Petrel, White-bellied, Fregetta grallaria (American Samoa);
Swamphen, Purple, Porphyrio porphyrio (American Samoa);
Swiftlet, Mariana, Aerodramus bartschi (Guam, Northern Marianas); and
Swiftlet, White-rumped, Aerodramus spodiopygius (American Samoa).

(5) Add 37 species because of recent taxonomic changes in which taxa formerly treated as subspecies have been determined to be distinct species. Given that each of these species was formerly treated as subspecies of a listed species, these additions will not change the protective status of any of these taxa, only the names by which they are known. In each case, we reference the AOU publication(s) supporting the change:

Coot, Hawaiian, Fulica alai (formerly treated as subspecies of Fulica americana, American Coot) [AOU 1993, 1998];
Flicker, Gilded, Colaptes chrysoides (formerly treated as subspecies of Colaptes auratus, Northern Flicker) [AOU 1995, 1998];
Flycatcher, Cordilleran, Empidonax occidentalis (formerly treated as subspecies of Empidonax difficilis, Western [=Pacific-slope] Flycatcher) [AOU 1989, 1998];
Gnatcatcher, California, Polioptila californica (formerly treated as subspecies of Polioptila melanura, Black-tailed Gnatcatcher) [AOU 1989, 1998];
Golden-Plover, Pacific, Pluvialis fulva (formerly treated as subspecies of Pluvialis dominica, Lesser [=American] Golden-Plover) [AOU 1993, 1998];
Goose, Cackling, Branta hutchinsii (formerly treated as subspecies of Branta canadensis, Canada Goose) [AOU 2004];
Grebe, Clark's, Aechmophorus clarkii (formerly treated as subspecies of Aechmophorus occidentalis, Western Grebe) [AOU 1985, 1998];
Heron, Green, Butorides virescens (formerly treated as subspecies of Butorides striatus, Green-backed [=Striated] Heron) [AOU 1993, 1998];
Kamao, Myadestes myadestinus (formerly treated as subspecies of Phaeornis obscurus, Hawaiian Thrush [=Omao]) [AOU 1985, 1998];
Kite, White-tailed, Elanus leucurus (formerly treated as subspecies of Elanus caeruleus, Black-shouldered Kite) (AOU 1983, 1993, 1998);
Loon, Pacific, Gavia pacifica (formerly treated as subspecies of Gavia arctica, Arctic Loon) [AOU 1985, 1998];
Magpie, Black-billed, Pica hudsonia (formerly treated as subspecies of Pica pica, Black-billed [=Eurasian] Magpie) [AOU 2000];

Olomao, Myadestes lanaiensis (formerly treated as subspecies of Phaeornis obscurus, Hawaiian Thrush [=Omao]) [AOU 1985, 1998];
Oriole, Bullock's, Icterus bullockii (formerly treated as subspecies of Icterus galbula, Northern [=Baltimore] Oriole) [AOU 1995, 1998];
Petrel, Hawaiian, Pterodroma sandwichensis (formerly treated as subspecies of Pterodroma phaeopygia, Dark-rumped [=Galapagos] Petrel) [AOU 2002];
Petrel, White-necked, Pterodroma cervicalis (formerly treated as subspecies of Pterodroma externa, White-necked [=Juan Fernandez] Petrel) [AOU 1991, 1998];
Pipit, American, Anthus rubescens (formerly treated as subspecies of Anthus spinoletta, Water Pipit (AOU 1989, 1998);
Rosy-Finch, Black, Leucosticte atrata (formerly treated as subspecies of Leucosticte arctoa, Rosy Finch) [AOU 1993, 1998];
Rosy-Finch, Brown-capped, Leucosticte australis (formerly treated as subspecies of Leucosticte arctoa, Rosy Finch) [AOU 1993, 1998];
Rosy-Finch, Gray-crowned, Leucosticte tephrocotis (formerly treated as subspecies of Leucosticte arctoa, Rosy Finch) [AOU 1993, 1998];
Sapsucker, Red-naped, Sphyrapicus nuchalis (formerly treated as subspecies of Sphyrapicus varius, Yellow-bellied Sapsucker) [AOU 1985, 1998];
Scrub-Jay, Island, Aphelocoma insularis (formerly treated as subspecies of Aphelocoma coerulescens, Scrub [=Florida] Jay [=Scrub-Jay]) [AOU 1995, 1998];
Scrub-Jay, Western, Aphelocoma californica (formerly treated as subspecies of Aphelocoma coerulescens, Scrub [=Florida] Jay [=Scrub-Jay]) [AOU 1995, 1998];
Snipe, Wilson's, Gallinago delicata (formerly treated as subspecies of Gallinago gallinago, Common Snipe) [AOU 2002];
Sparrow, Nelson's Sharp-tailed, Ammodramus nelsoni (formerly treated as subspecies of Ammodramus caudacutus, Sharp-tailed [=Saltmarsh Sharp-tailed] Sparrow) [AOU 1995, 1998];
Spindalis, Puerto Rican, Spindalis portoricensis (formerly treated as subspecies of Spindalis zena, Stripe-headed [=Western] Tanager [=Spindalis]) [AOU 2000];
Thrush, Bicknell's, Catharus bicknelli (formerly treated as subspecies of Catharus minimus, Gray-cheeked Thrush) [AOU 1995, 1998];
Titmouse, Black-crested, Baeolophus atricristatus (formerly treated as subspecies of Parus [=Baeolophus] bicolor, Tufted Titmouse) [AOU 2002];
Titmouse, Juniper, Baeolophus ridgwayi (formerly treated as subspecies of Parus Baeolophus] inornatus, Plain [=Oak] Titmouse) [AOU 1997, 1998];
Towhee, California, Pipilo crissalis (formerly treated as subspecies of Pipilo fuscus, Brown Towhee) [AOU 1989, 1998];
Towhee, Spotted, Pipilo maculatus (formerly treated as subspecies of Pipilo erythrophthalmus, Rufous-sided [=Eastern] Towhee) [AOU 1995, 1998];
Vireo, Cassin's, Vireo cassinii (formerly treated as subspecies of Vireo solitarius, Solitary [=Blue-headed] Vireo) [AOU 1997, 1998];
Vireo, Plumbeous, Vireo plumbeus (formerly treated as subspecies of Vireo solitarius, Solitary [=Blue-headed] Vireo) [AOU 1997, 1998];
Vireo, Yellow-green, Vireo flavoviridis (formerly treated as subspecies of Vireo olivaceus, Red-eyed Vireo) [AOU 1987, 1998];
Wagtail, Eastern Yellow, Motacilla tschutschensis (formerly treated as subspecies of Motacilla flava, Yellow Wagtail) [AOU 2004];
Woodpecker, American Three-toed, Picoides dorsalis (formerly treated as subspecies of Picoides tridactylus, Three-toed [=Eurasian Three-toed] Woodpecker) [AOU 2003]; and
Woodpecker, Arizona, Picoides arizonae (formerly treated as subspecies of Picoides stricklandi, Strickland's Woodpecker) [AOU 2000].

(6) Remove 11 species based on revised taxonomic treatments and new distributional evidence confirming that their known geographic ranges lie entirely outside the political boundaries of the United States and its territories. In each case, we reference the AOU publication(s) supporting these changes:

Finch, Rosy, Leucosticte arctoa (AOU 1993, 1998);
Heron, Green-backed (=Striated), Butorides striatus (AOU 1993, 1998);
Kingbird, Loggerhead, Tyrannus caudifasciatus (AOU 2002);
Kite, Black-shouldered, Elanus caeruleus (AOU 1983, 1993, 1998);
Magpie, Black-billed (=Eurasian), Pica pica (AOU 2000);
Noddy, Lesser, Anous tenuirostris (AOU 1998; treated as conspecific with Black Noddy, Anous minutus);
Petrel, Dark-rumped (=Galapagos), Pterodroma phaeopygia (AOU 2002);
Pipit, Water, Anthus spinoletta (AOU 1983, 1989, 1998);
Wagtail, Yellow, Motacilla flava (AOU 2004);
Woodpecker, Strickland's, Picoides stricklandi (AOU 2000); and
Woodpecker, Three-toed (=Eurasian Three-toed), Picoides tridactylis (AOU 2003).

(7) Remove one former species that is now treated as a subspecies:

Wagtail, Black-backed, Motacilla lugens (lugens will remain protected as a subspecies of Motacilla alba, White Wagtail) [AOU 2005].

(8) Revise the common (English) names of 47 species to conform to the most recent nomenclatural treatment. These revisions will not change the protective status of any of these taxa, only the names by which they are known. In each case, we reference the published source(s) for the name change:

Barn-Owl, Common, Tyto alba, will be changed to Owl, Barn (AOU 1989, 1998);
Bittern, Chinese, Ixobrychus sinensis, will be changed to Bittern, Yellow (AOU 1991, 1998);
Crow, Mexican, Corvus imparatus, will be changed to Crow, Tamaulipas (AOU 1997, 1998);
Curlew, Least, Numenius minutus, will be changed to Curlew, Little (AOU 1987, 1998);
Flycatcher, Gray-spotted, Muscicapa griseisticta, will be changed to Flycatcher, Gray-streaked (AOU 2004);
Flycatcher, Western, Empidonax difficilis, will be changed to Flycatcher, Pacific-slope (AOU 1989, 1998);
Golden-Plover, Lesser, Pluvialis dominica, will be changed to Golden-Plover, American (AOU 1993, 1998);
Goose, Ross', Chen rossii, will be changed to Goose, Ross's (AOU 1998);
Gull, Common Black-headed, Larus ridibundus, will be changed to Gull, Black-headed (AOU 1995, 1998);
Gull, Ross', Rhodostethia rosea, will be changed to Gull, Ross's (AOU 1998);
Hawk, Asiatic Sparrow, Accipiter gularis, will be changed to Sparrowhawk, Japanese (Monroe and Sibley 1993);
Hawk, Harris', Parabuteo unicinctus, will be changed to Hawk, Harris's (AOU 1998);
Hawk-Owl, Northern, Surnia ulula, will be changed to Owl, Northern Hawk (AOU 1989, 1998);
Heron, Pacific Reef, Egretta sacra, will be changed to Reef-Egret, Pacific (Monroe and Sibley 1993);
Hoopoe, Upupa epops, will be changed to Hoopoe, Eurasian (AOU 1998);

Jay, Gray-breasted, Aphelocoma ultramarina, will be changed to Jay, Mexican (AOU 1995, 1998);
Jay, Scrub, Aphelocoma coerulescens, will be changed to Scrub-Jay, Florida (AOU 1995, 1998);
Kite, American Swallow-tailed, Elanoides forficatus, will be changed to Kite, Swallow-tailed (AOU 1995, 1998);
Murrelet, Xantus', Synthliboramphus hypoleucus, will be changed to Murrelet, Xantus's (AOU 1998);
Nightjar, Jungle, Caprimulgus indicus, will be changed to Nightjar, Gray (AOU 2004);
Oldsquaw, Clangula hyemalis, will be changed to Duck, Long-tailed (AOU 2000);
Oriole, Black-cowled, Icterus dominicensis, will be changed to Oriole, Greater Antillean (AOU 2000);
Oriole, Northern, Icterus galbula, will be changed to Oriole, Baltimore (AOU 1995, 1998);
Petrel, White-necked, Pterodroma externa, will be changed to Petrel, Juan Fernandez (AOU 1991, 1998);
Plover, Great Sand, Charadrius leschenaultii, will be changed to Sand-Plover, Greater (AOU 2004);
Plover, Mongolian, Charadrius mongolus, will be changed to Sand-Plover, Lesser (AOU 2004);
Reed-Bunting, Common, Emberiza schoeniclus, will be changed to Bunting, Reed (AOU 1995, 1998);
Reed-Bunting, Pallas', Emberiza pallasi, will be changed to Bunting, Pallas's (AOU 1995, 1998);
Sandpiper, Spoonbill, Eurynorhynchus pygmeus, will be changed to Sandpiper, Spoon-billed (AOU 2004);
Skylark, Eurasian, Alauda arvensis, will be changed to Lark, Sky (AOU 1995, 1998);
Sparrow, Harris', Zonotrichia querela, will be changed to Sparrow, Harris's (AOU 1998);
Sparrow, Sharp-tailed, Ammodramus caudacutus, will be changed to Sparrow, Saltmarsh Sharp-tailed (AOU 1995, 1998);
Starling, Ashy, Sturnus cineraceus, will be changed to Starling, White-cheeked (Monroe and Sibley 1993);
Starling, Violet-backed, Sturnus philippensis, will be changed to Starling, Chestnut-cheeked (Monroe and Sibley 1993);
Stint, Rufous-necked, Calidris ruficollis, will be changed to Stint, Red-necked (AOU 1995);
Storm-Petrel, Sooty, Oceanodroma tristrami, will be changed to Storm-Petrel, Tristram's (AOU 1989, 1998);
Swift, Antillean Palm, Tachornis phoenicobia, will be changed to Palm-Swift, Antillean (AOU 1983, 1998);
Tanager, Stripe-headed, Spindalis zena, will be changed to Spindalis, Western (AOU 2000);
Teal, Falcated, Anas falcata, will be changed to Duck, Falcated (AOU 1997, 1998);
Thrush, Eye-browed, Turdus obscurus, will be changed to Thrush, Eyebrowed (AOU 1989, 1998);
Towhee, Brown, Pipilo fuscus, will be changed to Towhee, Canyon (AOU 1989, 1998);
Towhee, Rufous-sided, Pipilo erythrophthalmus, will be changed to Towhee, Eastern (AOU 1995, 1998);
Tree-Pipit, Olive, Anthus hodgsoni, will be changed to Pipit, Olive-backed (AOU 1995, 1998);
Trogon, Eared, Euptilotis neoxenus, will be changed to Quetzel, Eared (AOU 2002);
Vireo, Solitary, Vireo solitarius, will be changed to Vireo, Blue-headed (AOU 1997, 1998);
Warbler, Elfin Woods, Dendroica angelae, will be changed to Warbler, Elfin-woods (AOU 1998); and
Woodpecker, Lewis', Melanerpes lewis, will be changed to Woodpecker, Lewis's (AOU 1998).

(9) Revise the scientific names of 64 species to conform to the most recent nomenclature treatment. These revisions will not change the protective status of any of these taxa, only the names by which they are known. In each case, we reference the AOU publication(s) documenting the name change:

Actitis macularia (Spotted Sandpiper) will be changed to Actitis macularius (AOU 2004);
Ajaia ajaja (Roseate Spoonbill) will be changed to Platalea ajaja (AOU 2002);
Amphispiza quinquestriata (Five-striped Sparrow) will be changed to Aimophila quinquestriata (AOU 1997, 1998);
Casmerodius albus (Great Egret) will be changed to Ardea alba (AOU 1995, 1998);
Catharacta maccormicki (South Polar Skua) will be changed to Stercorarius maccormicki (AOU 2000);
Catharacta skua (Great Skua) will be changed to Stercorarius skua (AOU 2000);
Catoptrophorus semipalmatus (Willet) will be changed to Tringa semipalmata (AOU 2006);
Ceryle torquata (Ringed Kingfisher) will be changed to Ceryle torquatus (AOU 2004);
Columba fasciata (Band-tailed Pigeon) will be changed to Patagioenas fasciata (AOU 2003);
Columba flavirostris (Red-billed Pigeon) will be changed to Patagioenas flavirostris (AOU 2003);
Columba inornata (Plain Pigeon) will be changed to Patagioenas inornata (AOU 2003);
Columba leucocephala (White-crowned Pigeon) will be changed to Patagioenas leucocephala (AOU 2003);
Columba squamosa (Scaly-naped Pigeon) will be changed to Patagioenas squamosa (AOU 2003);
Contopus borealis (Olive-sided Flycatcher) will be changed to Contopus cooperi (AOU 1997, 1998);
Cuculus saturatus (Oriental Cuckoo) will be changed to Cuculus optatus (AOU 2006);
Cyclorrhynchus psittacula (Parakeet Auklet) will be changed to Aethia psittacula (AOU 1997, 1998);
Delichon urbica (Common House-Martin) will be changed to Delichon urbicum (AOU 2004);
Diomedea albatrus (Short-tailed Albatross) will be changed to Phoebastria albatrus (AOU 1997, 1998);
Diomedea chlororhynchos (Yellow-nosed Albatross) will be changed to Thalassarche chlororhynchos (AOU 1997, 1998);
Diomedea immutabilis (Laysan Albatross) will be changed to Phoebastria immutabilis (AOU 1997, 1998);
Diomedea nigripes (Black-footed Albatross) will be changed to Phoebastria nigripes (AOU 1997, 1998);
Guiraca caerulea (Blue Grosbeak) will be changed to Passerina caerulea (AOU 2002);
Heteroscelus brevipes (Gray-tailed Tattler) will be changed to Tringa brevipes (AOU 2006);
Heteroscelus incanus (Wandering Tattler) will be changed to Tringa incana (AOU 2006);
Helmitheros vermivora (Worm-eating Warbler) will be changed to Helmitheros vermivorus (AOU 2004);
Hirundo fulva (Cave Swallow) will be changed to Petrochelidon fulva (AOU 1997, 1998);
Hirundo pyrrhonota (Cliff Swallow) will be changed to Petrochelidon pyrrhonota (AOU 1997, 1998);
Muscicapa narcissina (Narcissus Flycatcher) will be changed to Ficedula narcissina (AOU 1991, 1998);
Nesochen sandvicensis (Hawaiian Goose) will be changed to Branta sandvicensis (AOU 1993, 1998);
Nyctea scandiaca (Snowy Owl) will be changed to Bubo scandiaca (AOU 2003);
Nycticorax goisagi (Japanese Night-Heron) will be changed to Gorsachius goisagi (Monroe and Sibley 1993);

Nycticorax violaceus (Yellow-crowned Night-Heron) will be changed to Nyctanassa violacea (AOU 1998);
Otus asio (Eastern Screech-Owl) will be changed to Megascops asio (AOU 2003);
Otus kennicottii (Western Screech-Owl) will be changed to Megascops kennicottii (AOU 2003);
Otus nudipes (Puerto Rican Screech-Owl) will be changed to Megascops nudipes (AOU 2003);
Otus trichopsis (Whiskered Screech-Owl) will be changed to Megascops trichopsis (AOU 2003);
Oxyura dominica (Masked Duck) will be changed to Nomonyx dominicus (AOU 1997, 1998);
Parus atricapillus (Black-capped Chickadee) will be changed to Poecile atricapillus (AOU 1997, 1998, 2003);
Parus bicolor (Tufted Titmouse) will be changed to Baeolophus bicolor (AOU 1997, 1998);
Parus carolinensis (Carolina Chickadee) will be changed to Poecile carolinensis (AOU 1997, 1998);
Parus gambeli (Mountain Chickadee) will be changed to Poecile gambeli (AOU 1997, 1998);
Parus hudsonicus (Boreal Chickadee) will be changed to Poecile hudsonica (AOU 1997, 1998, 2000);
Parus rufescens (Chestnut-backed Chickadee) will be changed to Poecile rufescens (AOU 1997, 1998);
Parus sclateri (Mexican Chickadee) will be changed to Poecile sclateri (AOU 1997, 1998);
Parus wollweberi (Bridled Titmouse) will be changed to Baeolophus wollweberi (AOU 1997, 1998);
Phalaropus fulicaria (Red Phalarope) will be changed to Phalaropus fulicarius (AOU 2002);
Polyborus plancus (Crested Caracara) will be changed to Caracara cheriway (AOU 1993, 1998, 2000);
Porphyrula martinica (Purple Gallinule) will be changed to Porphyrio martinica (AOU 2002);
Saurothera vieilloti (Puerto Rican Lizard-Cuckoo) will be changed to Coccyzus vielloti (AOU 2006);
Seiurus aurocapillus (Ovenbird) will be changed to Seiurus aurocapilla (AOU 2003);
Sterna albifrons (Little Tern) will be changed to Sternula albifrons (AOU 2006);
Sterna aleutica (Aleutian Tern) will be changed to Onychoprion aleuticus (AOU 2006);
Sterna anaethetus (Bridled Tern) will be changed to Onychoprion anaethetus (AOU 2006);
Sterna antillarum (Least Tern) will be changed to Sternula antillarum (AOU 2006);
Sterna caspia (Caspian Tern) will be changed to Hydroprogne caspia (AOU 2006);
Sterna elegans (Elegant Tern) will be changed to Thalasseus elegans (AOU 2006);
Sterna fuscata (Sooty Tern) will be changed to Onychoprion fuscatus (AOU 2006);
Sterna lunata (Gray-backed Tern) will be changed to Onychoprion lunatus (AOU 2006);
Sterna maxima (Royal Tern) will be changed to Thalasseus maximus (AOU 2006);
Sterna nilotica (Gull-billed Tern) will be changed to Gelochelidon nilotica (AOU 2006);
Sterna sandvicensis (Sandwich Tern) will be changed to Thalasseus sandvicensis (AOU 2006);
Sula bassanus (Northern Gannet) will be changed to Morus bassanus (AOU 1989, 1998);
Tiaris olivacea (Yellow-faced Grassquit) will be changed to Tiaris olivaceus (AOU 2004); and
Toxostoma dorsale (Crissal Thrasher) will be changed to Toxostoma crissale (AOU 1984, 1985, 1998).

(10) Revise the common (English) and scientific names of seven species to conform with the most recent nomenclature treatment. These revisions will not change the protective status of any of these taxa, only the names by which they are known. In each case, we reference the publication(s) supporting the name change:

Cormorant, Olivaceous, Phalacrocorax olivaceus, will be changed to Cormorant, Neotropic, Phalacrocorax brasilianus (AOU 1991, 1998);
Egret, Plumed, Egretta intermedia, will be changed to Egret, Intermediate, Mesophoyx intermedia (Monroe and Sibley 1993);
Night-Heron, Malay, Nycticorax melanolophus, will be changed to Night-Heron, Malayan, Gorsachius melanolophus (Monroe and Sibley 1993);
Thrush, Hawaiian, Phaeornis obscurus, will be changed to Omao, Myadestes obscurus (AOU 1985, 1998);
Thrush, Small Kauai, Phaeornis palmeri, will be changed to Puaiohi, Myadestes palmeri (AOU 1985, 1998);
Tit, Siberian, Parus cinctus, will be changed to Chickadee, Gray-headed, Poecile cincta (AOU 1998, 2000); and
Titmouse, Plain, Parus inornatus, will be changed to Titmouse, Oak, Baeolophus inornatus (AOU 1997, 1998).

(11) Revise incorrect or invalid scientific names of four species in the alphabetical list to reflect the most recent nomenclatural treatment and to correct inconsistencies between the alphabetical and taxonomic lists:

Kittiwake, Black-legged, Larus tridactyla, will be changed to Rissa trydactyla (AOU 1998);
Kittiwake, Red-legged, Larus brevirostris, will be changed to Rissa brevirostris (AOU 1998);
Skimmer, Black, Rhynchops niger, will be changed to Rynchops niger (AOU 1998); and
Thrush, Wood, Hylocichla minima, will be changed to Hylocichla mustelina (AOU 1998).

(12) Revise the common (English) name of two species in the alphabetical and taxonomic lists to correct misspellings:

Bittern, Schrenk's, Ixobrychus eurhythmus, will be changed to Bittern, Schrenck's (Monroe and Sibley 1993); and
Redstart, Slaty-throated, Myioborus miniatus, will be changed to Redstart, Slate-throated (AOU 1998).

(13) Revise the scientific names of three species in the taxonomic list to correct misspellings and inconsistencies between the alphabetical and taxonomic lists:

Sialis currucoides (Mountain Bluebird) will be changed to Sialia currucoides (AOU 1998);
Sialis mexicana (Western Bluebird) will be changed to Sialia mexicana (AOU 1998); and
Sialis sialis (Eastern Bluebird) will be changed to Sialia sialis (AOU 1998).

(14) Change the status of one taxon from protected subspecies to non-protected species (because there is no known natural occurrence of the newly recognized species in the United States or its territories). In accordance with the AOU (1998), the Barbary Falcon is currently treated as a subspecies (pelegrinoides) of the Peregrine Falcon (Falco peregrinus) in 50 CFR 10.13. We propose deferring to the taxonomic treatment of Monroe and Sibley (1993) in recognizing F. peregrinus pelegrinoides as a distinct species, Falco pelegrinoides, the Barbary Falcon. This change will bring our treatment of this taxon into conformity with that adopted by the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), thereby removing an inconsistency between the MBTA (50 CFR 10.13) and CITES (50 CFR 23.23) lists. This simple taxonomic change will not result in the addition or removal of any species from the list:

Falco peregrinus pelegrinoides, a subspecies of the Peregrine Falcon, will be changed to Falco

pelegrinoides, Barbary Falcon (Monroe and Sibley 1993). (The newly recognized Barbary Falcon is not subject to the MBTA because its known geographic range lies entirely outside the political boundaries of the United States and its territories. This action will not change the legal status of any other subspecies of the Peregrine Falcon, all of which will continue to be protected under the MBTA.)

For ease of comparison, the proposed changes are summarized in the following table (numbers reference the categories treated above). Categories that involve name revisions (*i.e.*, 9, 10, and 11) will require removal of the old name (left-hand column) and addition of the new name (right-hand column). To ensure that these two separate actions appear on the same line of the table, we employ brackets to identify old (removed) or new (added) names that are listed in correct alphabetical order elsewhere in the table:

Removed (alphabetically)	Added (alphabetically)
	Albatross, Black-browed, Thalassarche melanophris (3).
Albatross, Black-footed, Diomedea nigripes (9)	Albatross, Black-footed, Phoebastria nigripes (9).
Albatross, Laysan, Diomedea immutabilis (9)	Albatross, Laysan, Phoebastria immutabilis (9).
	Albatross, Light-mantled, Phoebetria palpebrata (3).
Albatross, Short-tailed, Diomedea albatrus (9)	Albatross, Short-tailed, Phoebastria albatrus (9).
	Albatross, Shy, Thalassarche cauta (2).
	Albatross, Wandering, Diomedea exulans (2).
Albatross, Yellow-nosed, Diomedea chlororhynchos (9)	Albatross, Yellow-nosed, Thalassarche chlororhynchos (9).
Auklet, Parakeet, Cyclorrhynchus psittacula (9)	Auklet, Parakeet, Aethia psittacula (9).
Barn-Owl, Common, Tyto alba (8)	[see Owl, Barn].
	Bittern, Black, Ixobrychus flavicollis (4).
Bittern, Chinese, Ixobrychus sinensis (8)	Bittern, Yellow, Ixobrychus sinensis (8).
Bittern, Schrenk's, Ixobrychus eurhythmus (12)	Bittern, Schrenck's, Ixobrychus eurhythmus (12).
Bluebird, Eastern, Sialis sialis (13)	Bluebird, Eastern, Sialia sialis (13).
Bluebird, Mountain, Sialis currucoides (13)	Bluebird, Mountain, Sialia currucoides (13).
Bluebird, Western, Sialis mexicana (13)	Bluebird, Western, Sialia mexicana (13).
	Bluetail, Red-flanked, Tarsiger cyanurus (3).
	Bunting, Blue, Cyanocompsa parellina (2).
	Bunting, Gray, Emberiza variabilis (2).
	Bunting, Little, Emberiza pusilla (2).
[see Reed-Bunting, Pallas']	Bunting, Pallas's, Emberiza pallasi (8).
	Bunting, Pine, Emberiza leucocephalos (3).
[see Reed-Bunting, Common]	Bunting, Reed, Emberiza schoeniculus (8).
	Bunting, Yellow-breasted, Emberiza aureola (3).
	Bunting, Yellow-throated, Emberiza elegans (3).
	Carib, Purple-throated, Eulampis jugularis (3).
Caracara, Crested, Polyborus plancus (9)	Caracara, Crested, Caracara cheriway (9).
	Catbird, Black, Melanoptila glabrirostris (3).
	Chaffinch, Common, Fringilla coelebs (2).
Chickadee, Black-capped, Parus atricapillus (9)	Chickadee, Black-capped, Poecile atricapillus (9).
Chickadee, Boreal, Parus hudsonicus (9)	Chickadee, Boreal, Poecile hudsonica (9).
Chickadee, Carolina, Parus carolinensis (9)	Chickadee, Carolina, Poecile carolinensis (9).
Chickadee, Chestnut-backed, Parus rufescens (9)	Chickadee, Chestnut-backed, Poecile rufescens (9).
[see Tit, Siberian]	Chickadee, Gray-headed, Poecile cincta (10).
Chickadee, Mexican, Parus sclateri (9)	Chickadee, Mexican, Poecile sclateri (9).
Chickadee, Mountain, Parus gambeli (9)	Chickadee, Mountain, Poecile gambeli (9).
	Coot, Hawaiian, Fulica alai (5).
	Cormorant, Little Pied, Phalacrocorax melanoleucos (4).
Cormorant, Olivaceous, Phalacrocorax olivaceus (10)	Cormorant, Neotropic, Phalacrocorax brasilianus (10).
	Crake, Paint-billed, Neocrex erythrops (2).
	Crake, Spotless, Porzana tabuensis (4).
	Crow, Mariana, Corvus kubaryi (4).
Crow, Mexican, Corvus imparatus (8)	Crow, Tamaulipas, Corvus imparatus (8).
Cuckoo, Oriental, Cuculus saturatus (9)	Cuckoo, Oriental, Cuculus optatus (9).
	Curlew, Eurasian, Numenius arquata (2).
Curlew, Least, Numenius minutus (8)	Curlew, Little, Numenius minutus (8).
[see Teal, Falcated]	Duck, Falcated, Anas falcata (8).
[see Oldsquaw]	Duck, Long-tailed, Clangula hyemalis (8).
Duck, Masked, Oxyura dominica (9)	Duck, Masked, Nomonyx dominicus (9).
	Duck, Muscovy, Cairina moschata (3).
	Duck, Pacific Black, Anas superciliosa (4).
	Duck, Spot-billed, Anas poecilorhyncha (1).
Egret, Great, Casmerodius albus (9)	Egret, Great, Ardea alba (9).
Egret, Plumed, Egretta intermedia (10)	Egret, Intermediate, Mesophoyx intermedia (10).
	Egret, Little, Egretta garzetta (3).
	Elaenia, Greenish, Myiopagis viridicata (3).
[Falcon, Barbary, Falco peregrinus pelegrinoides (=Falco pelegrinoides)] (14)..	
Finch, Rosy, Leucosticte arctoa (6).	[see Rosy-Finch]
	Flicker, Gilded, Colaptes chrysoides (5).
	Flycatcher, Cordilleran, Empidonax occidentalis (5).
Flycatcher, Gray-spotted, Muscicapa griseisticta (8)	Flycatcher, Gray-streaked, Muscicapa griseisticta (8).
	Flycatcher, La Sagra's, Myiarchus sagrae (2).

Removed (alphabetically)	Added (alphabetically)
Flycatcher, Narcissus, Muscicapa narcissina (9)	Flycatcher, Narcissus, Ficedula narcissina (9).
Flycatcher, Olive-sided, Contopus borealis (9)	Flycatcher, Olive-sided, Contopus cooperi (9).
Flycatcher, Western, Empidonax difficilis (8)	Flycatcher, Pacific-slope, Empidonax difficilis (8).
	Flycatcher, Piratic, Legatus leucophalus (3).
	Flycatcher, Social, Myiozetetes similes (3).
	Flycatcher, Tufted, Mitrephanes phaeocercus (3).
	Flycatcher, Variegated, Empidonomus varius (2).
	Forest-Falcon, Collared, Micrastur semitorquatus (3).
	Frog-Hawk, Gray, Accipiter soloensis (3).
	Fruit-Dove, Crimson-crowned, Ptilinopus porphyraceus (4).
	Fruit-Dove, Many-colored, Ptilinopus perousii (4).
	Fruit-Dove, Mariana, Ptilinopus roseicapilla (4).
	Gallinule, Azure, Porphyrio flavirostris (3).
Gallinule, Purple, Porphyrula martinica (9)	Gallinule, Purple, Porphyrio martinica (9).
Gannet, Northern, Sula bassanus (9)	Gannet, Northern, Morus bassanus (9).
	Gnatcatcher, California, Polioptila californica (5).
Golden-Plover, Lesser, Pluvialis dominica (8).	
	Golden-Plover, American, Pluvialis dominica (8).
	Golden-Plover, Pacific, Pluvialis fulva (5).
	Goose, Cackling, Branta hutchensii (5).
Goose, Hawaiian, Nesochen sandvicensis (9)	Goose, Hawaiian, Branta sandvicensis (9).
	Goose, Lesser White-fronted, Anser erythropus (3).
Goose, Ross', Chen rossii (8)	Goose, Ross's, Chen rossii (8).
Grassquit, Yellow-faced, Tiaris olivacea (9)	Grassquit, Yellow-faced, Tiaris olivaceus (9).
	Grebe, Clark's, Aechmophorus clarkii (5).
	Greenshank, Nordmann's, Tringa guttifer (4).
Grosbeak, Blue, Guiraca caerulea (9)	Grosbeak, Blue, Passerina caerulea (9).
	Ground-Dove, Friendly, Gallicolumba stairi (4).
	Ground-Dove, White-throated, Gallicolumba xanthonura (4).
	Gull, Belcher's, Larus belcheri (2).
Gull, Common Black-headed, Larus ridibundus (8)	Gull, Black-headed, Larus ridibundus (8).
	Gull, Black-tailed, Larus crassirostris (1).
	Gull, Gray-hooded, Larus cirrocephalus (3).
	Gull, Kelp, Larus dominicanus (3).
Gull, Ross', Rhodostethia rosea (8)	Gull, Ross's, Rhodostethia rosea (8).
	Gull, Yellow-legged, Larus cachinnans (3).
Hawk, Asiatic Sparrow, Accipiter gularis (8)	[see Sparrowhawk, Japanese]
	Hawk, Crane, Geranospiza caerulescens (3).
Hawk, Harris', Parabuteo unicinctus (8)	Hawk, Harris's, Parabuteo unicinctus (8).
	Hawk, Roadside, Buteo magnirostris (2).
Hawk-Owl, Northern, Surnia ulula (8)	[see Owl, Northern Hawk]
	Heron, Gray, Ardea cinerea (4).
	Heron, Green, Butorides virescens (5).
Heron, Green-backed, Butorides striatus (6)	[see Heron, Green].
Heron, Pacific Reef, Egretta sacra (8)	[see Reef-Egret, Pacific].
	Hobby, Eurasian, Falco subbuteo (3).
Hoopoe, Upupa epops (8)	Hoopoe, Eurasian, Upupa epops (8).
House-Martin, Common, Delichon urbica (9)	House-Martin, Common, Delichon urbicum (9).
	Hummingbird, Bumblebee, Atthis heloisa (2).
	Hummingbird, Cinnamon, Amazilia rutila (3).
	Hummingbird, Xantus's, Hylocharis xantusii (3).
	Imperial-Pigeon, Pacific, Ducula pacifica (4).
Jay, Gray-breasted, Aphelocoma ultramarina (8)	Jay, Mexican, Aphelocoma ultramarina (8).
Jay, Scrub, Aphelocoma coerulescens (8)	[see Scrub-Jay, Florida].
	Kamao, Myadestes myadestinus (5).
Kingbird, Loggerhead, Tyrannus caudifasciatus (6)	Kingfisher, Collared, Todirhamphus chloris (4).
	Kingfisher, Micronesian, Todirhamphus cinnamominus (4).
Kingfisher, Ringed, Ceryle torquata (9)	Kingfisher, Ringed, Ceryle torquatus (9).
Kite, American Swallow-tailed, Elanoides forficatus (8)	Kite, Swallow-tailed, Elanoides forficatus (8).
Kite, Black-shouldered, Elanus caeruleus (6)	[see Kite, White-tailed].
	Kite, White-tailed, Elanus leucurus (5).
Kittiwake, Black-legged, Larus tridactyla (11)	Kittiwake, Black-legged, Rissa trydactyla (11).
Kittiwake, Red-legged, Larus brevirostris (11)	Kittiwake, ed-legged, Rissa brevirostris (11).
[see Skylark, Eurasian]	Lark, Sky, Alauda arvensis (8).
Lizard-Cuckoo, Puerto Rican, Saurothera vieilloti (9)	Lizard-Cuckoo, Puerto Rican, Coccyzus vieilloti (9).
	Loon, Pacific, Gavia pacifica (5).
Magpie, Black-billed (=Eurasian), Pica pica (6)	[see Magpie, Black-billed, Pica hudsonia].
	Magpie, Black-billed, Pica hudsonia (5).
	Mango, Green-breasted, Anthracothorax prevostii (3).
	Martin, Brown-chested, Progne tapera (3).
	Martin, Southern, Progne elegans (2).
	Mockingbird, Bahama, Mimus gundlachii (2).
	Mockingbird, Blue, Melanotis caerulescens (3).
	Murrelet, Long-billed, Brachyramphus perdix (3).

Removed (alphabetically)	Added (alphabetically)
Murrelet, Xantus', Synthliboramphus hypoleucus (8)	Murrelet, Xantus's, Synthliboramphus hypoleucus (8).
Night-Heron, Japanese, Nycticorax goisagi (9)	Night-Heron, Japanese, Gorsachius goisagi (9).
Night-Heron, Malay, Nycticorax melanolophus (10)	Night-Heron, Malayan, Gorsachius melanolophus (10).
Night-Heron, Yellow-crowned, Nycticorax violaceus (9)	Night-Heron, Yellow-crowned, Nyctanassa violacea (9).
Nightjar, Jungle, Caprimulgus indicus (8)	Nightjar, Gray, Caprimulgus indicus (8).
	Nightingale-Thrush, Black-headed, Catharus mexicanus (3).
	Nightingale-Thrush, Orange-billed, Catharus aurantiirostris (3).
Noddy, Lesser, Anous tenuirostris (6).	
Oldsquaw, Clangula hyemalis (8)	[see Duck, Long-tailed].
	Olomao, Myadestes lanaiensis (5).
[see Thrush, Hawaiian]	Omao, Myadestes obscurus (10).
Oriole, Northern, Icterus galbula (8)	Oriole, Baltimore, Icterus galbula (8).
	Oriole, Bullock's, Icterus bullockii (5).
Oriole, Black-cowled, Icterus dominicensis (8)	Oriole, Greater Antillean, Icterus dominicensis (8).
Ovenbird, Seiurus aurocapillus (9)	Ovenbird, Seiurus aurocapilla (9).
[see Barn-Owl, Common]	Owl, Barn, Tyto alba (8).
	Owl, Mottled, Ciccaba virgata (3).
[see Hawk-Owl, Northern]	Owl, Northern Hawk, Surnia ulula (8).
Owl, Snowy, Nyctea scandiaca (9)	Owl, Snowy, Bubo scandiaca (9).
	Owl, Stygian, Asio stygius (3).
	Oystercatcher, Eurasian, Haematopus ostralegus (4).
[see Swift, Antillean Palm]	Palm-Swift, Antillean, Tachornis phoenicobia (8).
	Petrel, Bermuda, Pterodroma cahow (3).
	Petrel, Black-winged, Pterodroma nigripennis (2).
Petrel, Dark-rumped, Pterodroma phaeopygia (6)	[see Petrel, Hawaiian]
	Petrel, Gould's, Pterodroma leucoptera (4).
	Petrel, Great-winged, Pterodroma macroptera (3).
	Petrel, Hawaiian, Pterodroma sandwichensis (5).
	Petrel, Jouanin's, Bulweria fallax (2).
Petrel, White-necked, Pterodroma externa (8)	Petrel, Juan Fernandez, Pterodroma externa (8).
	Petrel, Phoenix, Pterodroma alba (4).
	Petrel, Stejneger's, Pterodroma longirostris (3).
	Petrel, Tahiti, Pterodroma rostrata (4).
	Petrel, White-necked, Pterodroma cervicalis (5).
	Pewee, Cuban, Contopus caribeaus (3).
	Pewee, Hispaniolan, Contopus hispaniolensis (2).
Phalarope, Red, Phalaropus fulicaria (9)	Red Phalarope, Phalaropus fulicarius (9).
Pigeon, Band-tailed, Columba fasciata (9)	Pigeon, Band-tailed, Patagioenas fasciata (9).
Pigeon, Plain, Columba inornata (9)	Pigeon, Plain, Patagioenas inornata (9).
Pigeon, Red-billed, Columba flavirostris (9)	Pigeon, Red-billed, Patagioenas flavirostris (9).
Pigeon, Scaly-naped, Columba squamosa (9)	Pigeon, Scaly-naped, Patagioenas squamosa (9).
Pigeon, White-crowned, Columba leucocephala (9)	Pigeon, White-crowned, Patagioenas leucocephala (9).
Pipit, Water, Anthus spinoletta (6)	[see Pipit, American].
	Pipit, American, Anthus rubescens (5).
[see Tree-Pipit, Olive]	Pipit, Olive-backed, Anthus hodgsoni (8).
	Pipit, Tree, Anthus trivialis (2).
	Plover, Collared, Charadrius collaris (3).
Plover, Great Sand, Charadrius leschenaultii (8)	[see Sand-Plover, Greater].
Plover, Mongolian, Charadrius mongolus (8)	[see Sand-Plover, Lesser].
	Pond-Heron, Chinese, Ardeola bacchus (3).
[see Thrush, Small Kauai]	Puaiohi, Myadestes palmeri (10).
[see Trogon, Eared]	Quetzel, Eared, Euptilotis neoxenus (8).
	Rail, Buff-banded, Gallirallus philippensis (4).
	Rail, Guam, Gallirallus owstoni (4).
	Rail, Spotted, Pardirallus maculatus (2).
Redstart, Slaty-throated, Myioborus miniatus (12)	Redstart, Slate-throated, Myioborus miniatus (12).
Reed-Bunting, Common, Emberiza schoeniculus (8)	[see Bunting, Reed].
Reed-Bunting, Pallas', Emberiza pallasi (8)	[see Bunting, Pallas's].
[see Heron, Pacific Reef]	Reef-Egret, Pacific, Egretta sacra (8).
	Reef-Heron, Western, Egretta gularis (3).
	Robin, Siberian Blue, Luscinia cyane (3).
	Robin, White-throated, Turdus assimilis (3).
	Rosy-Finch, Black, Leucosticte atrata (5).
	Rosy-Finch, Brown-capped, Leucosticte australis (5).
	Rosy-Finch, Gray-crowned, Leucosticte tephrocotis (5).
	Sandpiper, Green, Tringa ochropus (3).
Sandpiper, Spoonbill, Eurynorhynchus pygmeus (8)	Sandpiper, Spoon-billed, Eurynorhynchus pygmeus (8).
Sandpiper, Spotted, Actitis macularia (9)	Sandpiper, Spotted, Actitis macularius (9).
[see Plover, Great Sand]	Sand-Plover, Greater, Charadrius leschenaultii (8).
[see Plover, Mongolian]	Sand-Plover, Lesser, Charadrius mongolus (8).
	Sapsucker, Red-naped, Sphyrapicus nuchalis (5).
	Scops-Owl, Oriental, Otus sunia (2).
Screech-Owl, Eastern, Otus asio (9)	Screech-Owl, Eastern, Megascops asio (9).
Screech-Owl, Puerto Rican, Otus nudipes (9)	Screech-Owl, Puerto Rican, Megascops nudipes (9).

Removed (alphabetically)	Added (alphabetically)
Screech-Owl, Western, Otus kennicottii (9)	Screech-Owl, Western, Megascops kennicottii (9).
Screech-Owl, Whiskered, Otus trichopsis (9)	Screech-Owl, Whiskered, Megascops trichopsis (9).
[see Jay, Scrub]	Scrub-Jay, Florida, Aphelocoma coerulescens (8).
	Scrub-Jay, Island, Aphelocoma insularis (5).
	Scrub-Jay, Western, Aphelocoma californica (5).
	Shearwater, Cape Verde, Calonectris edwardsii (3).
	Shearwater, Streaked, Calonectris leucomelas (2).
	Shrike, Brown, Lanius cristatus (2).
	Silky-flycatcher, Gray, Ptilogonys cinereus (3).
	Siskin, Eurasian, Carduelis spinus (3).
Skimmer, Black, Rhynchops niger (11)	Skimmer, Black, Rynchops niger (11).
Skua, Great, Catharacta skua (9)	Skua, Great, Stercorarius skua (9).
Skua, South Polar, Catharacta maccormicki (9)	Skua, South Polar, Stercorarius maccormicki (9).
Skylark, Eurasian, Alauda arvensis (8)	[see Lark, Sky].
	Snipe, Wilson's, Gallinago delicata (5).
Sparrow, Five-striped, Amphispiza quinquestriata (9)	Sparrow, Five-striped, Aimophila quinquestriata (9).
Sparrow, Harris', Zonotrichia querula (8)	Sparrow, Harris's, Zonotrichia querula (8).
	Sparrow, Nelson's Sharp-tailed, Ammodramus nelsoni (5).
Sparrow, Sharp-tailed, Ammodramus caudacutus (8)	Sparrow, Saltmarsh Sharp-tailed, Ammodramus caudacutus (8).
[see Hawk, Asiatic Sparrow]	Sparrowhawk, Japanese, Accipiter gularis (8).
	Spindalis, Puerto Rican, Spindalis portoricensis (5).
[see Tanager, Stripe-headed]	Spindalis, Western, Spindalis zena (8).
Spoonbill, Roseate, Ajaia ajaja (9)	Spoonbill, Roseate, Platalea ajaja (9).
Starling, Violet-backed, Sturnus philippensis (8)	Starling, Chestnut-cheeked, Sturnus philippensis (8).
Starling, Ashy, Sturnus cineraceus (8)	Starling, White-cheeked, Sturnus cineraceus (8).
	Stilt, Black-winged, Himantopus himantopus (3).
Stint, Rufous-necked, Calidris ruficollis (8)	Stint, Red-necked, Calidris ruficollis (8).
	Stonechat, Saxicola torquatus (3).
	Storm-Petrel, Black-bellied, Fregetta tropica (3).
	Storm-Petrel, Matsudaira's, Oceanodroma matsudairae (4).
	Storm-Petrel, Polynesian, Nesofregata fuliginosa (4).
Storm-Petrel, Sooty, Oceanodroma tristrami (8)	Storm-Petrel, Tristram's, Oceanodroma tristrami (8).
	Storm-Petrel, White-bellied, Fregetta grallaria (4).
Swallow, Cave, Hirundo fulva (9)	Swallow, Cave, Petrochelidon fulva (9).
Swallow, Cliff, Hirundo pyrrhonota (9)	Swallow, Cliff, Petrochelidon pyrrhonota (9).
	Swallow, Mangrove, Tachycineta albilinea (3).
	Swamphen, Purple, Porphyrio porphyrio (4).
	Swift, Alpine, Apus melba (3).
Swift, Antillean Palm, Tachornis phoenicobia (8)	[see Palm-Swift, Antillean].
	Swift, Short-tailed, Chaetura brachyura (2).
Tanager, Stripe-headed, Spindalis zena (8).	[see Spindalis, Western].
	Swiftlet, Mariana, Aerodramus bartschi (4).
	Swiftlet, White-rumped, Aerodramus spodiopygius (4).
	Tanager, Flame-colored, Piranga bidentata (3).
Tattler, Gray-tailed, Heteroscelus brevipes (9)	Tattler, Gray-tailed, Tringa brevipes (9).
Tattler, Wandering, Heteroscelus incanus (9)	Tattler, Wandering, Tringa incana (9).
Teal, Falcated, Anas falcata (8)	[see Duck, Falcated].
Tern, Aleutian, Sterna aleutica (9)	Tern, Aleutian, Onychoprion aleuticus (9).
Tern, Bridled, Sterna anaethetus (9)	Tern, Bridled, Onychoprion anaethetus (9).
Tern, Caspian, Sterna caspia (9)	Tern, Caspian, Hydroprogne caspia (9).
Tern, Elegant, Sterna elegans (9)	Tern, Elegant, Thalasseus elegans (9).
Tern, Gray-backed, Sterna lunata (9)	Tern, Gray-backed, Onychoprion lunatus (9).
	Tern, Great Crested, Thalasseus bergii (3).
Tern, Gull-billed, Sterna nilotica (9)	Tern, Gull-billed, Gelochelidon nilotica (9).
Tern, Least, Sterna antillarum (9)	Tern, Least, Sternula antillarum (9).
Tern, Little, Sterna albifrons (9)	Tern, Little, Sternula albifrons (9).
Tern, Royal, Sterna maxima (9)	Tern, Royal, Thalasseus maximus (9).
Tern, Sandwich, Sterna sandvicensis (9)	Tern, Sandwich, Thalasseus sandvicensis (9).
Tern, Sooty, Sterna fuscata (9)	Tern, Sooty, Onychoprion fuscatus (9).
	Tern, Whiskered, Chlidonias hybrida (3).
Thrasher, Crissal, Toxostoma dorsale (9)	Thrasher, Crissal, Toxostoma crissale (9).
	Thrush, Bicknell's, Catharus bicknelli (5).
Thrush, Eye-browed, Turdus obscurus (8)	Thrush, Eyebrowed, Turdus obscurus (8).
Thrush, Hawaiian, Phaeornis obscurus (10)	[see Omao].
Thrush, Small Kauai, Phaeornis palmeri (10)	[see Puaiohi].
Thrush, Wood, Hylocichla minima (11)	Thrush, Wood, Hylocichla mustelina (11).
Tit, Siberian, Parus cinctus (10)	[see Chickadee, Gray-headed].
	Titmouse, Black-crested, Baeolophus atricristatus (5).
Titmouse, Bridled, Parus wollweberi (9)	Titmouse, Bridled, Baeolophus wollweberi (9).
	Titmouse, Juniper, Baeolophus ridgwayi (5).
Titmouse, Plain, Parus inornatus (10)	Titmouse, Oak, Baeolophus inornatus (10).
Titmouse, Tufted, Parus bicolor (9)	Titmouse, Tufted, Baeolophus bicolor (9).
	Tityra, Masked, Tityra semifasciata (3).
	Towhee, California, Pipilo crissalis (5).

Removed (alphabetically)	Added (alphabetically)
Towhee, Brown, Pipilo fuscus (8)	Towhee, Canyon, Pipilo fuscus (8).
Towhee, Rufous-sided, Pipilo erythrophthalmus (8)	Towhee, Eastern, Pipilo erythrophthalmus (8).
	Towhee, Spotted, Pipilo maculatus (5).
Tree-Pipit, Olive, Anthus hodgsoni (8)	[see Pipit, Olive-backed].
Trogon, Eared, Euptilotis neoxenus (8)	[see Quetzel, Eared].
	Turtle-Dove, Oriental, Streptopelia orientalis (3).
Vireo, Solitary, Vireo solitarius (8)	Vireo, Blue-headed, Vireo solitarius (8).
	Vireo, Cassin's, Vireo cassinii (5).
	Vireo, Plumbeous, Vireo plumbeus (5).
	Vireo, Thick-billed, Vireo crassirostris (2).
	Vireo, Yellow-green, Vireo flavoviridis (5).
	Vireo, Yucatan, Vireo magister (3).
Wagtail, Black-backed, Motacilla lugens (7)	Wagtail, Citrine, Motacilla citreola (3).
Wagtail, Yellow, Motacilla flava (6)	[see Wagtail, Eastern Yellow].
	Wagtail, Eastern Yellow, Motacilla tschutschensis (5).
	Warbler, Crescent-chested, Parula superciliosa (3).
Warbler, Elfin Woods, Dendroica angelae (8)	Warbler, Elfin-woods, Dendroica angelae (8).
	Warbler, Fan-tailed, Euthlypis lachrymosa (2).
Warbler, Worm-eating, Helmitheros vermivora (9)	Warbler, Worm-eating, Helmitheros vermivorus (9).
Willet, Catoptrophorus semipalmatus (9)	Willet, Tringa semipalmata (9).
	Woodpecker, American Three-toed, Picoides dorsalis (5).
	Woodpecker, Arizona, Picoides arizonae (5).
	Woodpecker, Great Spotted, Dendrocopos major (3).
Woodpecker, Lewis', Melanerpes lewis (8)	Woodpecker, Lewis's, Melanerpes lewis (8).
Woodpecker, Strickland's, Picoides stricklandi (6)	[see Woodpecker, Arizona].
Woodpecker, Three-toed, Picoides tridactylis (6)	[see Woodpecker, American Three-toed].

How Do the Changes Proposed Here Differ From Those Discussed in the 2001 Proposed Rule?

We propose adding another 85 species (88 species in the current proposed rule versus 3 species in the 2001 proposed rule) based on documented evidence of their occurrence in the United States, Puerto Rico, or the U.S. Virgin Islands. We propose adding 28 species (28 versus 0) that belong to families covered by the Canadian and Mexican treaties that occur naturally in the United States only in the Pacific island territories of American Samoa, Baker and Howland Islands, Guam, or the Northern Mariana Islands. We propose adding an additional 11 species (37 versus 26) because of recent taxonomic changes in which taxa formerly treated as subspecies have been elevated to the status of full species. We propose removing an additional 11 species (12 versus 1) based on revised taxonomic treatments and new distributional information. We propose changing the common and/or scientific names of an additional 25 species (103 versus 78). We propose correcting errors in the common or scientific names of an additional 8 species (9 versus 1).

How Is the List of Migratory Birds Organized?

The species are listed in two formats to suit the needs of different segments of the public: alphabetically in 50 CFR 10.13(c)(1) and taxonomically in 50 CFR 10.13(c)(2). In the alphabetical listing, species are listed by common (English) group names, with the scientific name of each species following the English group name. This format, which is similar to that used in modern telephone directories, will be most useful to members of the lay public. In the taxonomic listing, species are listed in phylogenetic sequence by scientific name, with the English name following the scientific name. To help clarify species relationships, we also list the higher-level taxonomic categories of Order, Family, and Subfamily. This format, which follows the sequence adopted by the AOU (1998, 2004), will be most useful to ornithologists and other scientists.

What Species Are Not Protected by the Migratory Bird Treaty Act?

The MBTA does not apply to species that fall into any of the following three categories:

(1) Nonnative species introduced into the United States or its territories by means of intentional or unintentional human assistance that belong to families or groups covered by the Canadian, Mexican, or Russian treaties, in accordance with the MBTRA. See 70 FR 12710 (March 15, 2005) for a partial list of nonnative human-introduced bird species in this category.

(2) Nonnative human-introduced species that belong to families or groups not covered by the Canadian, Mexican, or Russian treaties, including Tinamidae (tinamous), Cracidae (chachalacas), Megapodiidae (megapodes), Phasianidae (grouse, ptarmigan, and turkeys), Turnicidae (buttonquails), Odontophoridae (New World quail), Pteroclididae (sandgrouse), Psittacidae (parrots), Dicruridae (drongos), Rhamphastidae (toucans), Musophagidae (turacos), Bucerotidae (hornbills), Bucorvidae (ground-hornbills), Pycnonotidae (bulbuls), Pittidae (pittas), Irenidae (fairy-bluebirds), Timaliidae (wrentits), Zosteropidae (white-eyes), Sturnidae (starlings; except as listed in the Japanese treaty), Passeridae (Old World sparrows), Ploceidae (weavers), Estrildidae (estrildid finches), and numerous other families not currently represented in the United States or its territories.

(3) Native species that belong to families or groups represented in the United States, but which are not expressly mentioned by the Canadian, Mexican, or Russian treaties, including the Megapodiidae (megapodes), Phasianidae (grouse, ptarmigan, and turkeys), Odontophoridae (New World quail), Burhinidae (thick-knees), Glareolidae (pratincoles), Psittacidae (parrots), Todidae (todies), Meliphagidae (honeyeaters), Monarchidae (monarchs), Timaliidae (wrentits), Coerebidae (bananaquits), and Drepanidinae (Hawaiian honeycreepers).

Partial lists of the species included in categories 2 and 3 are available at *http://migratorybirds.fws.gov/issues/nonnative/MBTA-Protected&NonprotectedSpecies.htm.*

Does This Rule Comply With NEPA?

Given that the proposed revision of 50 CFR 10.13 is strictly administrative in nature and does not constitute a Federal action in the context of NEPA it is categorically excluded from further NEPA requirements, as provided by Department of the Interior Manual 516 DM 2, Appendix 1.10.

Does This Rule Comply With the Endangered Species Act?

Yes. Eighty of the species on the List of Migratory Birds are also designated as endangered or threatened in all or some portion of their U.S. range under provisions of the Endangered Species Act of 1973 (16 U.S.C. 1531, *et seq.;* see 50 CFR 17.11). No legal complications arise from the dual listing since the two lists are developed under separate authorities and for different purposes. Because the proposed rule is strictly administrative in nature, it does not require ESA consultation.

Does This Rule Affect Energy Supplies, Distribution, or Use?

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly effect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because this rule is only making revisions to existing regulations that are strictly administrative in nature, it is not a significant regulatory action under Executive Order 12866 and is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations/notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain unnecessary technical language or jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the proposed rule in the Supplementary Information section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make the proposed rule easier to understand?

Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You may e-mail your comments to the following address: *Execsec@ios.doi.gov.*

What About Other Required Determinations?

Because the revision to the List of Migratory Birds merely re-describes the birds already protected by Federal treaties with Canada, Japan, Mexico, and Russia, we determined that this document does not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

This document has not been reviewed by the Office of Management and Budget under E.O. 12866. In accordance with the criteria in Executive Order 12866, this rule is not a significant regulatory action.

This rule is not a major rule under the terms of 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act.

The rule does not contain information collection requirements that must be approved by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

We find and certify, in compliance with the requirements of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*), that the rule is not a significant regulatory action and will not impose a cost of $100 million or more in any given year on local or State government or private entities.

As noted above, the rule will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment under Executive Order 13132.

We have determined that these regulations meet the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988 for civil justice reform.

This rule does not have significant takings implications for private property, as defined in Executive Order 12630. A takings implication assessment is not required because migratory birds are a Federally managed resource under laws implementing international treaties and are not personal property.

Regarding Government-to-Government relationships with Tribes (59 FR 22951) and Executive Order 13175, these revisions to existing regulations are purely administrative in nature. They will have no effect on Federally recognized Tribes or Tribal trust resources.

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Public Comments Invited

We invite interested parties to submit written comments or suggestions regarding the draft revised list of migratory birds protected by the MBTA by any one of the means identified in the **ADDRESSES** section. Duplicate submissions are discouraged. The complete file for this notice will be available for public inspection during normal business hours, by appointment, at the location identified in the **ADDRESSES** section.

E-mail comments should be submitted as an ASCII file with ''Revised List of Migratory Birds'' in the subject line. Avoid the use of special characters and any form of encryption.

While all comments will be considered, we encourage reviewers to focus on the following questions:

(1) Do the five criteria used to identify individual species protected by the MBTA accurately reflect the language and intentions of the MBTA and the underlying conventions? If not, what changes would you recommend?

(2) Have we included any species that doesn't meet any of the criteria for protection under the MBTA? Please be specific, and provide as much detail as possible.

(3) Have we omitted any species that should be protected by the MBTA because they meet one or more of the specified criteria?

Following review and consideration of the comments, we will publish a final list in the **Federal Register**.

Author

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List of Subjects in 50 CFR Part 10

Exports, Fish, Imports, Law enforcement, Plants, Transportation, Wildlife.

Regulation Promulgation

For the reasons discussed in the preamble, we propose to amend title 50, chapter I, subchapter B, part 10 of the Code of Federal Regulations, as follows:

PART 10—[AMENDED]

1. The authority citation for part 10 continues to read as follows:

Authority: 18 U.S.C. 42; 16 U.S.C. 703–712; 16 U.S.C. 668a-d; 19 U.S.C. 1202; 16 U.S.C. 1531–1543; 16 U.S.C. 1361–1384, 1401–1407; 16 U.S.C. 742a–742j–l; 16 U.S.C. 3371–3378.

2. Revise § 10.13 to read as follows:

§ 10.13 List of Migratory Birds.

(a) *What is the legal authority for this list?* The Migratory Bird Treaty Act (MBTA) in 16 U.S.C. 703–711, the Fish and Wildlife Improvement Act of 1978, 16 U.S.C. 712, and 16 U.S.C. 742a–j. The MBTA implements treaties between the United States and four neighboring countries for the protection of migratory birds, as follows:

(1) Canada: Convention for the Protection of Migratory Birds, August 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, T.S. No. 628;

(2) Mexico: Convention for the Protection of Migratory Birds and Game Mammals, February 7, 1936, United States-United Mexican States (=Mexico), 50 Stat. 1311, T.S. No. 912;

(3) Japan: Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, March 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990; and

(4) Russia: Convention for the Conservation of Migratory Birds and Their Environment, United States-Union of Soviet Socialist Republics (=Russia), November 26, 1976, 92 Stat. 3110, T.I.A.S. 9073, 16 U.S.C. 703, 712.

(b) *What is the purpose of this list?* The purpose is to inform the public of the species protected by regulations designed to enforce the terms of the MBTA. These regulations, found in parts 10, 20, and 21 of this chapter, cover most aspects of the taking, possession, transportation, sale, purchase, barter, exportation, and importation of migratory birds.

(c) *What species are protected as migratory birds?* Species protected as migratory birds are listed in two formats to suit the varying needs of the user: alphabetically in paragraph (c)(1) of this section and taxonomically in paragraph (c)(2) of this section. Taxonomy and nomenclature generally follow the 7th edition of the American Ornithologists' Union's *Check-list of North American birds* (1998, as amended through 2004); for species not treated by the AOU *Check-list,* we follow Monroe and Sibley's *A World Checklist of Birds* (1993).

(1) *Alphabetical listing.* Species are listed alphabetically by common (English) group names, with the scientific name of each species following the common name. It is possible that alphabetical listing by common group names may create confusion in those few instances in which the common (English) name of a species has changed. The species formerly known as the Falcated Teal, for example, is now known as the Falcated Duck. To prevent confusion, the alphabetical list has two entries for Falcated Duck: ''DUCK, Falcated;'' and ''[TEAL, Falcated (see DUCK, Falcated)]''. Other potential ambiguities are treated in the same way.

ACCENTOR, Siberian, *Prunella montanella*
ALBATROSS, Black-browed, *Thalassarche melanophris*
Black-footed, *Phoebastria nigripes*
Laysan, *Phoebastria immutabilis*
Light-mantled, *Phoebetria palpebrata*
Short-tailed, *Phoebastria albatrus*
Shy, *Thalassarche cauta*
Wandering, *Diomedea exulans*
Yellow-nosed, *Thalassarche chlororhynchos*
ANHINGA, *Anhinga anhinga*
ANI, Groove-billed, *Crotophaga sulcirostris*
Smooth-billed, *Crotophaga ani*
AUKLET, Cassin's, *Ptychoramphus aleuticus*
Crested, *Aethia cristatella*
Least, *Aethia pusilla*
Parakeet, *Aethia psittacula*
Rhinoceros, *Cerorhinca monocerata*
Whiskered, *Aethia pygmaea*
AVOCET, American, *Recurvirostra americana*
[BARN-OWL, Common (see OWL, Barn)].
BEARDLESS-TYRANNULET, Northern, *Camptostoma imberbe*
BECARD, Rose-throated, *Pachyramphus aglaiae*
BITTERN, American, *Botaurus lentiginosus*
Black, *Ixobrychus flavicollis*
[Chinese (see Yellow)]
Least, *Ixobrychus exilis*
Schrenck's, *Ixobrychus eurhythmus*
Yellow, *Ixobrychus sinensis*
BLACK-HAWK, Common, *Buteogallus anthracinus*
BLACKBIRD, Brewer's, *Euphagus cyanocephalus*
Red-winged, *Agelaius phoeniceus*
Rusty, *Euphagus carolinus*
Tawny-shouldered, *Agelaius humeralis*
Tricolored, *Agelaius tricolor*
Yellow-headed, *Xanthocephalus xanthocephalus*
Yellow-shouldered, *Agelaius xanthomus*
BLUEBIRD, Eastern, *Sialia sialis*
Mountain, *Sialia currucoides*
Western, *Sialia mexicana*
BLUETAIL, Red-flanked, *Tarsiger cyanurus*
BLUETHROAT, *Luscinia svecica*
BOBOLINK, *Dolichonyx oryzivorus*
BOOBY, Blue-footed, *Sula nebouxii*
Brown, *Sula leucogaster*
Masked, *Sula dactylatra*
Red-footed, *Sula sula*
BRAMBLING, *Fringilla montifringilla*
BRANT, *Branta bernicla*
BUFFLEHEAD, *Bucephala albeola*
BULLFINCH, Eurasian, *Pyrrhula pyrrhula*
Puerto Rican, *Loxigilla portoricensis*
BUNTING, Blue, *Cyanocompsa parellina*
Gray, *Emberiza variabilis*
Indigo, *Passerina cyanea*
Little, *Emberiza pusilla*
Lark, *Calamospiza melanocorys*
Lazuli, *Passerina amoena*
McKay's, *Plectrophenax hyperboreus*
Painted, *Passerina ciris*
Pallas's, *Emberiza pallasi*
Pine, *Emberiza leucocephalos*
Reed, *Emberiza schoeniculus*
Rustic, *Emberiza rustica*
Snow, *Plectrophenax nivalis*
Varied, *Passerina versicolor*
Yellow-breasted, *Emberiza aureola*
Yellow-throated, *Emberiza elegans*
BUSHTIT, *Psaltriparus minimus*
CANVASBACK, *Aythya valisineria*
CARACARA, Crested, *Caracara cheriway*
CARDINAL, Northern, *Cardinalis cardinalis*
CARIB, Green-throated, *Eulampis holosericeus*
Purple-throated, *Eulampis jugularis*
CATBIRD, Black, *Melanoptila glabrirostris*
Gray, *Dumetella carolinensis*
CHAFFINCH, Common, *Fringilla coelebs*
CHAT, Yellow-breasted, *Icteria virens*
CHICKADEE, Black-capped, *Poecile atricapillus*
Boreal, *Poecile hudsonica*
Carolina, *Poecile carolinensis*
Chestnut-backed, *Poecile rufescens*
Gray-headed, *Poecile cincta*
Mexican, *Poecile sclateri*
Mountain, *Poecile gambeli*
CHUCK-WILL'S-WIDOW, *Caprimulgus carolinensis*
CONDOR, California, *Gymnogyps californianus*
COOT, American, *Fulica americana*
Caribbean, *Fulica caribaea*
Eurasian, *Fulica atra*
Hawaiian, *Fulica alai*
CORMORANT, Brandt's, *Phalacrocorax penicillatus*
Double-crested, *Phalacrocorax auritus*
Great, *Phalacrocorax carbo*
Little Pied, *Phalacrocorax melanoleucos*
Neotropic, *Phalacrocorax brasilianus*
[Olivaceous (see Neotropic)]
Pelagic, *Phalacrocorax pelagicus*
Red-faced, *Phalacrocorax urile*
COWBIRD, Bronzed, *Molothrus aeneus*
Brown-headed, *Molothrus ater*
Shiny, *Molothrus bonariensis*
CRAKE, Corn, *Crex crex*
Paint-billed, *Neocrex erythrops*
Spotless, *Porzana tabuensis*
Yellow-breasted, *Porzana flaviventer*
CRANE, Common, *Grus grus*
Sandhill, *Grus canadensis*
Whooping, *Grus americana*
CREEPER, Brown, *Certhia americana*
CROSSBILL, Red, *Loxia curvirostra*
White-winged, *Loxia leucoptera*
CROW, American, *Corvus brachyrhynchos*
Fish, *Corvus ossifragus*
Hawaiian, *Corvus hawaiiensis*
Mariana, *Corvus kubaryi*
[Mexican (see Tamaulipas)]
Northwestern, *Corvus caurinus*
Tamaulipas, *Corvus imparatus*
White-necked, *Corvus leucognaphalus*
CUCKOO, Black-billed, *Coccyzus erythropthalmus*
Common, *Cuculus canorus*
Mangrove, *Coccyzus minor*
Oriental, *Cuculus optatus*
Yellow-billed, *Coccyzus americanus*
CURLEW, Bristle-thighed, *Numenius tahitiensis*
Eskimo, *Numenius borealis*
Eurasian, *Numenius arquata*
Far Eastern, *Numenius madagascariensis*
[Least (see Little)]
Little, *Numenius minutus*
Long-billed, *Numenius americanus*
DICKCISSEL, *Spiza americana*
DIPPER, American, *Cinclus mexicanus*
DOTTEREL, Eurasian, *Charadrius morinellus*
DOVE, Inca, *Columbina inca*
Mourning, *Zenaida macroura*
White-tipped, *Leptotila verreauxi*
White-winged, *Zenaida asiatica*
Zenaida, *Zenaida aurita*

DOVEKIE, *Alle alle*
DOWITCHER, Long-billed, *Limnodromus scolopaceus*
Short-billed, *Limnodromus griseus*
DUCK, American Black, *Anas rubripes*
Falcated, *Anas falcata*
Harlequin, *Histrionicus histrionicus*
Hawaiian, *Anas wyvilliana*
Laysan, *Anas laysanensis*
Long-tailed, *Clangula hyemalis*
Masked, *Nomonyx dominicus*
Mottled, *Anas fulvigula*
Muscovy, *Cairina moschata*
Pacific Black, *Anas superciliosa*
Ring-necked, *Aythya collaris*
Ruddy, *Oxyura jamaicensis*
Spot-billed, *Anas poecilorhyncha*
Tufted, *Aythya fuligula*
Wood, *Aix sponsa*
DUNLIN, *Calidris alpina*
EAGLE, Bald, *Haliaeetus leucocephalus*
Golden, *Aquila chrysaetos*
White-tailed, *Haliaeetus albicilla*
EGRET, Cattle, *Bubulcus ibis*
Chinese, *Egretta eulophotes*
Great, *Ardea alba*
Intermediate, *Mesophoyx intermedia*
Little, *Egretta garzetta*
[Plumed (see Intermediate)]
Reddish, *Egretta rufescens*
Snowy, *Egretta thula*
EIDER, Common, *Somateria mollissima*
King, *Somateria spectabilis*
Spectacled, *Somateria fischeri*
Steller's, *Polysticta stelleri*
ELAENIA, Caribbean, *Elaenia martinica*
Greenish, *Myiopagis viridicata*
EMERALD, Puerto Rican, *Chlorostilbon maugaeus*
EUPHONIA, Antillean, *Euphonia musica*
FALCON, Aplomado, *Falco femoralis*
Peregrine, *Falco peregrinus*
Prairie, *Falco mexicanus*
FIELDFARE, *Turdus pilaris*
FINCH, Cassin's, *Carpodacus cassinii*
House, *Carpodacus mexicanus*
Purple, *Carpodacus purpureus*
[Rosy (see ROSY-FINCH)]
FLAMINGO, Greater, *Phoenicopterus ruber*
FLICKER, Gilded, *Colaptes chrysoides*
Northern, *Colaptes auratus*
FLYCATCHER, Acadian, *Empidonax virescens*
Alder, *Empidonax alnorum*
Ash-throated, *Myiarchus cinerascens*
Brown-crested, *Myiarchus tyrannulus*
Buff-breasted, *Empidonax fulvifrons*
Cordilleran, *Empidonax occidentalis*
Dusky, *Empidonax oberholseri*
Dusky-capped, *Myiarchus tuberculifer*
Fork-tailed, *Tyrannus savana*
Gray, *Empidonax wrightii*
[Gray-spotted (see Gray-streaked)]
Gray-streaked, *Muscicapa griseisticta*
Great Crested, *Myiarchus crinitus*
Hammond's, *Empidonax hammondii*
La Sagra's, *Myiarchus sagrae*
Least, *Empidonax minimus*
Narcissus, *Ficedula narcissina*
Nutting's, *Myiarchus nuttingi*
Olive-sided, *Contopus cooperi*
Pacific-slope, *Empidonax difficilis*
Piratic, *Legatus leucophalus*
Puerto Rican, *Myiarchus antillarum*
Scissor-tailed, *Tyrannus forficatus*
Social, *Myiozetetes similis*
Sulphur-bellied, *Myiodynastes luteiventris*
Tufted, *Mitrephanes phaeocercus*
Variegated, *Empidonomus varius*
Vermilion, *Pyrocephalus rubinus*
[Western (see Cordilleran and Pacific-slope)]
Willow, *Empidonax traillii*
Yellow-bellied, *Empidonax flaviventris*
FOREST-FALCON, Collared, *Micrastur semitorquatus*
FRIGATEBIRD, Great, *Fregata minor*
Lesser, *Fregata ariel*
Magnificent, *Fregata magnificens*
FROG-HAWK, Gray, *Accipiter soloensis*
FRUIT-DOVE, Crimson-crowned, *Ptilinopus porphyraceus*
Many-colored, *Ptilinopus perousii*
Mariana, *Ptilinopus roseicapilla*
FULMAR, Northern, *Fulmarus glacialis*
GADWALL, *Anas strepera*
GALLINULE, Azure, *Porphyrio flavirostris*
Purple, *Porphyrio martinica*
GANNET, Northern, *Morus bassanus*
GARGANEY, *Anas querquedula*
GNATCATCHER, Black-capped, *Polioptila nigriceps*
Black-tailed, *Polioptila melanura*
Blue-gray, *Polioptila caerulea*
California, *Polioptila californica*
GODWIT, Bar-tailed, *Limosa lapponica*
Black-tailed, *Limosa limosa*
Hudsonian, *Limosa haemastica*
Marbled, *Limosa fedoa*
GOLDEN-PLOVER, American, *Pluvialis dominica*
[Lesser (see American)]
Pacific, *Pluvialis fulva*
GOLDENEYE, Barrow's, *Bucephala islandica*
Common, *Bucephala clangula*
GOLDFINCH, American, *Carduelis tristis*
Lawrence's, *Carduelis lawrencei*
Lesser, *Carduelis psaltria*
GOOSE, Barnacle, *Branta leucopsis*
Bean, *Anser fabalis*
Cackling, *Branta hutchinsii*
Canada, *Branta canadensis*
Emperor, *Chen canagica*
Greater White-fronted, *Anser albifrons*
Hawaiian, *Branta sandvicensis*
Lesser White-fronted, *Anser erythropus*
Ross's, *Chen rossii*
Snow, *Chen caerulescens*
GOSHAWK, Northern, *Accipiter gentilis*
GRACKLE, Boat-tailed, *Quiscalus major*
Common, *Quiscalus quiscula*
Great-tailed, *Quiscalus mexicanus*
Greater Antillean, *Quiscalus niger*
GRASSHOPPER-WARBLER, Middendorff's, *Locustella ochotensis*
GRASSQUIT, Black-faced, *Tiaris bicolor*
Yellow-faced, *Tiaris olivaceus*
GREBE, Clark's, *Aechmophorus clarkii*
Eared, *Podiceps nigricollis*
Horned, *Podiceps auritus*
Least, *Tachybaptus dominicus*
Pied-billed, *Podilymbus podiceps*
Red-necked, *Podiceps grisegena*
Western, *Aechmophorus occidentalis*
GREENFINCH, Oriental, *Carduelis sinica*
GREENSHANK, Common, *Tringa nebularia*
Nordmann's, *Tringa guttifer*
GROSBEAK, Black-headed, *Pheucticus melanocephalus*
Blue, *Passerina caerulea*
Crimson-collared, *Rhodothraupis celaeno*
Evening, *Coccothraustes vespertinus*
Pine, *Pinicola enucleator*
Rose-breasted, *Pheucticus ludovicianus*
Yellow, *Pheucticus chrysopeplus*
GROUND-DOVE, Common, *Columbina passerina*
Friendly, *Gallicolumba stairi*
Ruddy, *Columbina talpacoti*
White-throated, *Gallicolumba xanthonura*
GUILLEMOT, Black, *Cepphus grylle*
Pigeon, *Cepphus columba*
GULL, Belcher's, *Larus belcheri*
Black-headed, *Larus ridibundus*
Black-tailed, *Larus crassirostris*
Bonaparte's, *Larus philadelphia*
California, *Larus californicus*
[Common Black-headed (see Black-headed)]
Franklin's, *Larus pipixcan*
Glaucous, *Larus hyperboreus*
Glaucous-winged, *Larus glaucescens*
Gray-hooded, *Larus cirrocephalus*
Great Black-backed, *Larus marinus*
Heermann's, *Larus heermanni*
Herring, *Larus argentatus*
Iceland, *Larus glaucoides*
Ivory, *Pagophila eburnea*
Kelp, *Larus dominicanus*
Laughing, *Larus atricilla*
Lesser Black-backed, *Larus fuscus*
Little, *Larus minutus*
Mew, *Larus canus*
Ring-billed, *Larus delawarensis*
Ross's, *Rhodostethia rosea*
Sabine's, *Xema sabini*
Slaty-backed, *Larus schistisagus*
Thayer's, *Larus thayeri*
Western, *Larus occidentalis*
Yellow-footed, *Larus livens*
Yellow-legged, *Larus cachinnans*
GYRFALCON, *Falco rusticolus*
HARRIER, Northern, *Circus cyaneus*
HAWFINCH, *Coccothraustes coccothraustes*

HAWK, [Asiatic Sparrow (see SPARROWHAWK, Japanese)]
Broad-winged, *Buteo platypterus*
Cooper's, *Accipiter cooperii*
Crane, *Geranospiza caerulescens*
Ferruginous, *Buteo regalis*
Gray, *Buteo nitidus*
Harris's, *Parabuteo unicinctus*
Hawaiian, *Buteo solitarius*
Red-shouldered, *Buteo lineatus*
Red-tailed, *Buteo jamaicensis*
Roadside, *Buteo magnirostris*
Rough-legged, *Buteo lagopus*
Sharp-shinned, *Accipiter striatus*
Short-tailed, *Buteo brachyurus*
Swainson's, *Buteo swainsoni*
White-tailed, *Buteo albicaudatus*
Zone-tailed, *Buteo albonotatus*
HAWK-CUCKOO, Hodgson's, *Cuculus fugax*
[HAWK-OWL, Northern (see OWL, Northern Hawk)]
HERON, Gray, *Ardea cinerea*
Great Blue, *Ardea herodias*
Green, *Butorides virescens*
[Green-backed (see Green)]
Little Blue, *Egretta caerulea*
[Pacific Reef (see REEF-EGRET, Pacific)]
Tricolored, *Egretta tricolor*
HOBBY, Eurasian, *Falco subbuteo*
HOOPOE, Eurasian, *Upupa epops*
HOUSE-MARTIN, Common, *Delichon urbicum*
HUMMINGBIRD, Allen's, *Selasphorus sasin*
Anna's, *Calypte anna*
Antillean Crested, *Orthorhynchus cristatus*
Berylline, *Amazilia beryllina*
Black-chinned, *Archilochus alexandri*
Blue-throated, *Lampornis clemenciae*
Broad-billed, *Cynanthus latirostris*
Broad-tailed, *Selasphorus platycercus*
Buff-bellied, *Amazilia yucatanensis*
Bumblebee, *Atthis heloisa*
Calliope, *Stellula calliope*
Cinnamon, *Amazilia rutila*
Costa's, *Calypte costae*
Lucifer, *Calothorax lucifer*
Magnificent, *Eugenes fulgens*
Ruby-throated, *Archilochus colubris*
Rufous, *Selasphorus rufus*
Violet-crowned, *Amazilia violiceps*
White-eared, *Hylocharis leucotis*
Xantus's, *Hylocharis xantusii*
IBIS, Glossy, *Plegadis falcinellus*
Scarlet, *Eudocimus ruber*
White, *Eudocimus albus*
White-faced, *Plegadis chihi*
IMPERIAL-PIGEON, Pacific, *Ducula pacifica*
JABIRU, *Jabiru mycteria*
JACANA, Northern, *Jacana spinosa*
JAEGER, Long-tailed, *Stercorarius longicaudus*
Parasitic, *Stercorarius parasiticus*
Pomarine, *Stercorarius pomarinus*
JAY, Blue, *Cyanocitta cristata*
Brown, *Cyanocorax morio*
Gray, *Perisoreus canadensis*
[Gray-breasted (see Mexican)]
Green, *Cyanocorax yncas*
Mexican, *Aphelocoma ultramarina*
Pinyon, *Gymnorhinus cyanocephalus*
[Scrub (see SCRUB-JAY)]
Steller's, *Cyanocitta stelleri*
JUNCO, Dark-eyed, *Junco hyemalis*
Yellow-eyed, *Junco phaeonotus*
KAMAO, *Myadestes myadestinus*
KESTREL, American, *Falco sparverius*
Eurasian, *Falco tinnunculus*
KILLDEER, *Charadrius vociferus*
KINGBIRD, Cassin's, *Tyrannus vociferans*
Couch's, *Tyrannus couchii*
Eastern, *Tyrannus tyrannus*
Gray, *Tyrannus dominicensis*
Thick-billed, *Tyrannus crassirostris*
Tropical, *Tyrannus melancholicus*
Western, *Tyrannus verticalis*
KINGFISHER, Belted, *Ceryle alcyon*
Collared, *Todirhamphus chloris*
Green, *Chloroceryle americana*
Micronesian, *Todirhamphus cinnamominus*
Ringed, *Ceryle torquatus*
KINGLET, Golden-crowned, *Regulus satrapa*
Ruby-crowned, *Regulus calendula*
KISKADEE, Great, *Pitangus sulphuratus*
KITE, [American Swallow-tailed (see Swallow-tailed)]
Black, *Milvus migrans*
[Black-shouldered (see White-tailed)]
Hook-billed, *Chondrohierax uncinatus*
Mississippi, *Ictinia mississippiensis*
Snail, *Rostrhamus sociabilis*
Swallow-tailed, *Elanoides forficatus*
White-tailed, *Elanus leucurus*
KITTIWAKE, Black-legged, *Rissa tridactyla*
Red-legged, *Rissa brevirostris*
KNOT, Great, *Calidris tenuirostris*
Red, *Calidris canutus*
LAPWING, Northern, *Vanellus vanellus*
LARK, Horned, *Eremophila alpestris*
Sky, *Alauda arvensis*
LIMPKIN, *Aramus guarauna*
LIZARD-CUCKOO, Puerto Rican, *Coccyzus vieilloti*
LONGSPUR, Chestnut-collared, *Calcarius ornatus*
Lapland, *Calcarius lapponicus*
McCown's, *Calcarius mccownii*
Smith's, *Calcarius pictus*
LOON, Arctic, *Gavia arctica*
Common, *Gavia immer*
Pacific, *Gavia pacifica*
Red-throated, *Gavia stellata*
Yellow-billed, *Gavia adamsii*
MAGPIE, Black-billed, *Pica hudsonia*
Yellow-billed, *Pica nuttalli*
MALLARD, *Anas platyrhynchos*
MANGO, Antillean, *Anthracothorax dominicus*
Green, *Anthracothorax viridis*
Green-breasted, *Anthracothorax prevostii*
MARTIN, Brown-chested, *Progne tapera*
Caribbean, *Progne dominicensis*
Cuban, *Progne cryptoleuca*
Gray-breasted, *Progne chalybea*
Purple, *Progne subis*
Progne elegans
MEADOWLARK, Eastern, *Sturnella magna*
Western, *Sturnella neglecta*
MERGANSER, Common, *Mergus merganser*
Hooded, *Lophodytes cucullatus*
Red-breasted, *Mergus serrator*
MERLIN, *Falco columbarius*
MOCKINGBIRD, Bahama, *Mimus gundlachii*
Blue, *Melanotis caerulescens*
Northern, *Mimus polyglottos*
MOORHEN, Common, *Gallinula chloropus*
MURRE, Common, *Uria aalge*
Thick-billed, *Uria lomvia*
MURRELET, Ancient, *Synthliboramphus antiquus*
Craveri's, *Synthliboramphus craveri*
Kittlitz's, *Brachyramphus brevirostris*
Long-billed, *Brachyramphus perdix*
Marbled, *Brachyramphus marmoratus*
Xantus's, *Synthliboramphus hypoleucus*
NEEDLETAIL, White-throated, *Hirundapus caudacutus*
NIGHT-HERON, Black-crowned, *Nycticorax nycticorax*
Japanese, *Gorsachius goisagi*
[Malay (see Malayan)]
Malayan, *Gorsachius melanolophus*
Yellow-crowned, *Nyctanassa violacea*
NIGHTHAWK, Antillean, *Chordeiles gundlachii*
Common, *Chordeiles minor*
Lesser, *Chordeiles acutipennis*
NIGHTINGALE-THRUSH, Black-headed, *Catharus mexicanus*
Orange-billed, *Catharus aurantiirostris*
NIGHTJAR, Buff-collared, *Caprimulgus ridgwayi*
Gray, *Caprimulgus indicus*
[Jungle (see Gray)]
Puerto Rican, *Caprimulgus noctitherus*
NODDY, Black, *Anous minutus*
Blue-gray, *Procelsterna cerulea*
Brown, *Anous stolidus*
[Lesser (see Black)]
NUTCRACKER, Clark's, *Nucifraga columbiana*
NUTHATCH, Brown-headed, *Sitta pusilla*
Pygmy, *Sitta pygmaea*
Red-breasted, *Sitta canadensis*
White-breasted, *Sitta carolinensis*
[OLDSQUAW (see DUCK, Long-tailed)]
OLOMAO, *Myadestes lanaiensis*
OMAO, *Myadestes obscurus*
ORIOLE, Altamira, *Icterus gularis*

Audubon's, *Icterus graduacauda*
Baltimore, *Icterus galbula*
[Black-cowled (see Greater Antillean)]
Black-vented, *Icterus wagleri*
Bullock's, *Icterus bullockii*
Greater Antillean, *Icterus dominicensis*
Hooded, *Icterus cucullatus*
[Northern (see Baltimore and Bullock's)]
Orchard, *Icterus spurius*
Scott's, *Icterus parisorum*
Streak-backed, *Icterus pustulatus*
OSPREY, *Pandion haliaetus*
OVENBIRD, *Seiurus aurocapilla*
OWL, Barn, *Tyto alba*
Barred, *Strix varia*
Boreal, *Aegolius funereus*
Burrowing, *Athene cunicularia*
Elf, *Micrathene whitneyi*
Flammulated, *Otus flammeolus*
Great Gray, *Strix nebulosa*
Great Horned, *Bubo virginianus*
Long-eared, *Asio otus*
Mottled, *Ciccaba virgata*
Northern Hawk, *Surnia ulula*
Northern Saw-whet, *Aegolius acadicus*
Short-eared, *Asio flammeus*
Snowy, *Bubo scandiaca*
Spotted, *Strix occidentalis*
Stygian, *Asio stygius*
OYSTERCATCHER, American, *Haematopus palliatus*
Black, *Haematopus bachmani*
Eurasian, *Haematopus ostralegus*
PALM-SWIFT, Antillean, *Tachornis phoenicobia*
PARULA, Northern, *Parula americana*
Tropical, *Parula pitiayumi*
PAURAQUE, Common, *Nyctidromus albicollis*
PELICAN, American White, *Pelecanus erythrorhynchos*
Brown, *Pelecanus occidentalis*
PETREL, Bermuda, *Pterodroma cahow*
Black-capped, *Pterodroma hasitata*
Black-winged, *Pterodroma nigripennis*
Bonin, *Pterodroma hypoleuca*
Bulwer's, *Bulweria bulwerii*
Cook's, *Pterodroma cookii*
[Dark-rumped (see Hawaiian)]
Gould's, *Pterodroma leucoptera*
Great-winged, *Pterodroma macroptera*
Hawaiian, *Pterodroma sandwichensis*
Herald, *Pterodroma arminjoniana*
Jouanin's, *Bulweria fallax*
Juan Fernandez, *Pterodroma externa*
Kermadec, *Pterodroma neglecta*
Mottled, *Pterodroma inexpectata*
Murphy's, *Pterodroma ultima*
Phoenix, *Pterodroma alba*
Stejneger's, *Pterodroma longirostris*
Tahiti, *Pterodroma rostrata*
White-necked, *Pterodroma cervicalis*
[White-necked, *Pterodroma externa* (see Petrel, Juan Fernandez)]
PEWEE, Cuban, *Contopus caribeaus*
Greater, *Contopus pertinax*
Hispaniolan, *Contopus hispaniolensis*
Lesser Antillean, *Contopus latirostris*
PHAINOPEPLA, *Phainopepla nitens*
PHALAROPE, Red, *Phalaropus fulicarius*
Red-necked, *Phalaropus lobatus*
Wilson's, *Phalaropus tricolor*
PHOEBE, Black, *Sayornis nigricans*
Eastern, *Sayornis phoebe*
Say's, *Sayornis saya*
PIGEON, Band-tailed, *Patagioenas fasciata*
Plain, *Patagioenas inornata*
Red-billed, *Patagioenas flavirostris*
Scaly-naped, *Patagioenas squamosa*
White-crowned, *Patagioenas leucocephala*
PINTAIL, Northern, *Anas acuta*
White-cheeked, *Anas bahamensis*
PIPIT, American, *Anthus rubescens*
Olive-backed, *Anthus hodgsoni*
Pechora, *Anthus gustavi*
Red-throated, *Anthus cervinus*
Sprague's, *Anthus spragueii*
Tree, *Anthus trivialis*
[Water (see American)]
PLOVER, Black-bellied, *Pluvialis squatarola*
Collared, *Charadrius collaris*
Common Ringed, *Charadrius hiaticula*
[Great Sand (see Sand-Plover, Greater)]
Little Ringed, *Charadrius dubius*
[Mongolian (see Sand-Plover, Lesser)]
Mountain, *Charadrius montanus*
Piping, *Charadrius melodus*
Semipalmated, *Charadrius semipalmatus*
Snowy, *Charadrius alexandrinus*
Wilson's, *Charadrius wilsonia*
POCHARD, Baer's, *Aythya baeri*
Common, *Aythya ferina*
POND–HERON, Chinese, *Ardeola bacchus*
POORWILL, Common, *Phalaenoptilus nuttallii*
PUAIOHI, *Myadestes palmeri*
PUFFIN, Atlantic, *Fratercula arctica*
Horned, *Fratercula corniculata*
Tufted, *Fratercula cirrhata*
PYGMY–OWL, Ferruginous, *Glaucidium brasilianum*
Northern, *Glaucidium gnoma*
PYRRHULOXIA, *Cardinalis sinuatus*
QUAIL–DOVE, *Bridled, Geotrygon mystacea*
Key West, *Geotrygon chrysia*
Ruddy, *Geotrygon montana*
QUETZEL, Eared, *Euptilotis neoxenus*
RAIL, Black *Laterallus jamaicensis*
Buff-banded, *Gallirallus philippensis*
Clapper, *Rallus longirostris*
Guam, *Gallirallus owstoni*
King, *Rallus elegans*
Spotted, *Pardirallus maculatus*
Virginia, *Rallus limicola*
Yellow, *Coturnicops noveboracensis*
RAVEN, Chihuahuan, *Corvus cryptoleucus*
Common, *Corvus corax*
RAZORBILL, *Alca torda*
REDHEAD, *Aythya americana*
REDPOLL, Common, *Carduelis flammea*
Hoary, *Carduelis hornemanni*
REDSHANK, Spotted, *Tringa erythropus*
REDSTART, American, *Setophaga ruticilla*
Painted, *Myioborus pictus*
Slate-throated, *Myioborus miniatus*
[REED–BUNTING, Common (see BUNTING, Reed)]
[Pallas' (see BUNTING, Pallas's)]
REEF–EGRET, Pacific, *Egretta sacra*
REEF–HERON, Western, *Egretta gularis*
ROADRUNNER, Greater, *Geococcyx californianus*
ROBIN, American, *Turdus migratorius*
Clay-colored, *Turdus grayi*
Rufous-backed, *Turdus rufopalliatus*
Siberian Blue, *Luscinia cyane*
White-throated, *Turdus assimilis*
ROSEFINCH, Common, *Carpodacus erythrinus*
ROSY–FINCH, Black, *Leucosticte atrata*
Brown-capped, *Leucosticte australis*
Gray-crowned, *Leucosticte tephrocotis*
[ROUGH–WINGED SWALLOW, Northern (see SWALLOW, Northern Rough-winged)]
RUBYTHROAT, *Siberian, Luscinia calliope*
RUFF, *Philomachus pugnax*
SANDERLING,*Calidris alba*
SANDPIPER, Baird's, *Calidris bairdii*
Broad-billed, *Limicola falcinellus*
Buff-breasted, *Tryngites subruficollis*
Common, *Actitis hypoleucos*
Curlew, *Calidris ferruginea*
Green, *Tringa ochropus*
Least, *Calidris minutilla*
Marsh, *Tringa stagnatilis*
Pectoral, *Calidris melanotos*
Purple, *Calidris maritima*
Rock, *Calidris ptilocnemis*
Semipalmated, *Calidris pusilla*
Sharp-tailed, *Calidris acuminata*
Solitary, *Tringa solitaria*
[Spoonbill (see Spoon-billed)]
Spoon-billed, *Eurynorhynchus pygmeus*
Spotted, *Actitis macularius*
Stilt, *Calidris himantopus*
Terek, *Xenus cinereus*
Upland, *Bartramia longicauda*
Western, *Calidris mauri*
White-rumped, *Calidris fuscicollis*
Wood, *Tringa glareola*
SAND–PLOVER, Greater, *Charadrius leschenaultii*
Lesser, *Charadrius mongolus*
SAPSUCKER, Red-breasted, *Sphyrapicus ruber*
Red-naped, *Sphyrapicus nuchalis*
Williamson's, *Sphyrapicus thyroideus*
Yellow-bellied, *Sphyrapicus varius*
SCAUP, Greater, *Aythya marila*

Lesser, *Aythya affinis*
SCOPS-OWL, Oriental, *Otus sunia*
SCOTER, Black, *Melanitta nigra*
Surf, *Melanitta perspicillata*
White-winged, *Melanitta fusca*
SCREECH-OWL, Eastern, *Megascops asio*
Puerto Rican, *Megascops nudipes*
Western, *Megascops kennicottii*
Whiskered, *Megascops trichopsis*
SCRUB-JAY, Florida, *Aphelocoma coerulescens*
Island, *Aphelocoma insularis*
Western, *Aphelocoma californica*
SEA-EAGLE, Steller's, *Haliaeetus pelagicus*
SEEDEATER, White-collared, *Sporophila torqueola*
SHEARWATER, Audubon's, *Puffinus lherminieri*
Black-vented, *Puffinus opisthomelas*
Buller's, *Puffinus bulleri*
Cape Verde, *Calonectris edwardsii*
Christmas, *Puffinus nativitatis*
Cory's, *Calonectris diomedea*
Flesh-footed, *Puffinus carneipes*
Greater, *Puffinus gravis*
Little *Puffinus assimilis*
Manx, *Puffinus puffinus*
Pink-footed, *Puffinus creatopus*
Short-tailed, *Puffinus tenuirostris*
Sooty, *Puffinus griseus*
Streaked, *Calonectris leucomelas*
Townsend's, *Puffinus auricularis*
Wedge-tailed, *Puffinus pacificus*
SHOVELER, Northern, *Anas clypeata*
SHRIKE, Brown, *Lanius cristatus*
Loggerhead, *Lanius ludovicianus*
Northern, *Lanius excubitor*
SILKY-FLYCATCHER, Gray, *Ptilogonys cinereus*
SISKIN, Eurasian, *Carduelis spinus*
Pine, *Carduelis pinus*
SKIMMER, Black, *Rynchops niger*
[SKYLARK, Eurasian (see LARK, Sky)]
SKUA, Great, *Stercorarius skua*
South Polar, *Stercorarius maccormicki*
SMEW, *Mergellus albellus*
SNIPE, Common, *Gallinago gallinago* (restricted to Alaska; also see SNIPE, Wilson's)
Jack, *Lymnocryptes minimus*
Pin-tailed, *Gallinago stenura*
Swinhoe's, *Gallinago megala*
Wilson's, *Gallinago delicata* (the ''common'' snipe hunted in most of the U.S.)
SOLITAIRE, Townsend's, *Myadestes townsendi*
SORA, *Porzana carolina*
SPARROW, American Tree, *Spizella arborea*
Bachman's, *Aimophila aestivalis*
Baird's, *Ammodramus bairdii*
Black-chinned, *Spizella atrogularis*
Black-throated, *Amphispiza bilineata*
Botteri's, *Aimophila botterii*
Brewer's, *Spizella breweri*
Cassin's, *Aimophila cassinii*
Chipping, *Spizella passerina*
Clay-colored, *Spizella pallida*
Field, *Spizella pusilla*
Five-striped, A*imophila quinquestriata*
Fox, *Passerella iliaca*
Golden-crowned, *Zonotrichia atricapilla*
Grasshopper, *Ammodramus savannarum*
Harris's, *Zonotrichia querula*
Henslow's, *Ammodramus henslowii*
Lark, *Chondestes grammacus*
Le Conte's, *Ammodramus leconteii*
Lincoln's, *Melospiza lincolnii*
Nelson's Sharp-tailed, *Ammodramus nelsoni*
Olive, *Arremonops rufivirgatus*
Rufous-crowned, *Aimophila ruficeps*
Rufous-winged, *Aimophila carpalis*
Sage, *Amphispiza belli*
Saltmarsh Sharp-tailed, *Ammodramus caudacutus*
Savannah, *Passerculus sandwichensis*
Seaside, *Ammodramus maritimus*
[Sharp-tailed (see Nelson's Sharp-tailed and Saltmarsh Sharp-tailed)]
Song, *Melospiza melodia*
Swamp, *Melospiza georgiana*
Vesper, *Pooecetes gramineus*
White-crowned, *Zonotrichia leucophrys*
White-throated, *Zonotrichia albicollis*
Worthen's, *Spizella wortheni*
SPARROWHAWK, Japanese, *Accipiter gularis*
SPINDALIS, Puerto Rican, *Spindalis portoricensis*
Western, *Spindalis zena*
SPOONBILL, Roseate, *Platalea ajaja*
STARLING, [Ashy (see White-cheeked)]
Chestnut-cheeked, *Sturnus philippensis*
[Violet-backed (see Chestnut-cheeked)]
White-cheeked, *Sturnus cineraceus*
STARTHROAT, Plain-capped, *Heliomaster constantii*
STILT, Black-necked, *Himantopus mexicanus*
Black-winged, *Himantopus himantopus*
STINT, Little, *Calidris minuta*
Long-toed, *Calidris subminuta*
Red-necked, *Calidris ruficollis*
[Rufous-necked (see Red-necked)]
Temminck's, *Calidris temminckii*
STONECHAT, *Saxicola torquatus*
STORK, Wood, *Mycteria americana*
STORM-PETREL, Ashy, *Oceanodroma homochroa*
Band-rumped, *Oceanodroma castro*
Black, *Oceanodroma melania*
Black-bellied, *Fregetta tropica*
Fork-tailed, *Oceanodroma furcata*
Leach's, *Oceanodroma leucorhoa*
Least, *Oceanodroma microsoma*
Matsudaira's, *Oceanodroma matsudairae*
Polynesian, *Nesofregata fuliginosa*
[Sooty (see Tristram's)]
Tristram's, *Oceanodroma tristrami*
Wedge-rumped, *Oceanodroma tethys*
White-faced, *Pelagodroma marina*
White-bellied, *Fregetta grallaria*
Wilson's, *Oceanites oceanicus*
SURFBIRD, *Aphriza virgata*
SWALLOW, Bahama, *Tachycineta cyaneoviridis*
Bank, *Riparia riparia*
Barn, *Hirundo rustica*
Cave, *Petrochelidon fulva*
Cliff, *Petrochelidon pyrrhonota*
Mangrove, *Tachycineta albilinea*
Northern Rough-winged, *Stelgidopteryx serripennis*
Tree, *Tachycineta bicolor*
Violet-green, *Tachycineta thalassina*
SWAMPHEN, Purple, *Porphyrio porphyrio*
SWAN, Trumpeter, *Cygnus buccinator*
Tundra, *Cygnus columbianus*
Whooper, *Cygnus cygnus*
SWIFT, Alpine, *Apus melba*
[Antillean Palm (see PALM-SWIFT, Antillean)]
Black, *Cypseloides niger*
Chimney, *Chaetura pelagica*
Common, *Apus apus*
Fork-tailed, *Apus pacificus*
Short-tailed, *Chaetura brachyura*
Vaux's, *Chaetura vauxi*
White-collared, *Streptoprocne zonaris*
White-throated, *Aeronautes saxatalis*
SWIFTLET, Mariana, *Aerodramus bartschi*
White-rumped, *Aerodramus spodiopygius*
TANAGER, Flame-colored, *Piranga bidentata*
Hepatic, *Piranga flava*
Puerto Rican, *Neospingus speculiferus*
Scarlet, *Piranga olivacea*
[Stripe-headed Tanager (see SPINDALIS, Puerto Rican and Western)]
Summer, *Piranga rubra*
Western, *Piranga ludoviciana*
TATTLER, Gray-tailed, *Tringa brevipes*
Wandering, *Tringa incana*
TEAL, Baikal, *Anas formosa*
Blue-winged, *Anas discors*
Cinnamon, *Anas cyanoptera*
[Falcated (see DUCK, Falcated)]
Green-winged, *Anas crecca*
TERN, Aleutian, *Onychoprion aleuticus*
Arctic, *Sterna paradisaea*
Black, *Chlidonias niger*
Black-naped, *Sterna sumatrana*
Bridled, *Onychoprion anaethetus*
Caspian, *Hydroprogne caspia*
Common, *Sterna hirundo*
Elegant, *Thalasseus elegans*
Forster's, *Sterna forsteri*
Gray-backed, *Onychoprion lunatus*
Great Crested, *Thalasseus bergii*
Gull-billed, *Gelochelidon nilotica*

Least, *Sternula antillarum*
Little, *Sternula albifrons*
Roseate, *Sterna dougallii*
Royal, *Thalleseus maximus*
Sandwich, *Thalleseus sandvicensis*
Sooty, *Onychoprion fuscatus*
Whiskered, *Chlidonias hybrida*
White, *Gygis alba*
White-winged, *Chlidonias leucopterus*
THRASHER, Bendire's, *Toxostoma bendirei*
Brown, *Toxostoma rufum*
California, *Toxostoma redivivum*
Crissal, *Toxostoma crissale*
Curve-billed, *Toxostoma curvirostre*
Le Conte's, *Toxostoma lecontei*
Long-billed, *Toxostoma longirostre*
Pearly-eyed, *Margarops fuscatus*
Sage, *Oreoscoptes montanus*
THRUSH, Aztec, *Ridgwayia pinicola*
Bicknell's, *Catharus bicknelli*
Blue Rock, *Monticola solitarius*
Dusky, *Turdus naumanni*
Eyebrowed, *Turdus obscurus*
Gray-cheeked, *Catharus minimus*
[Hawaiian (see KAMAO, OLOMAO, and OMAO)]
Hermit, *Catharus guttatus*
Red-legged, *Turdus plumbeus*
[Small Kauai (see PUAIOHI)]
Swainson's, *Catharus ustulatus*
Varied, *Ixoreus naevius*
Wood, *Hylocichla mustelina*
[TIT, Siberian (see CHICKADEE, Gray-headed)]
TITMOUSE, Black-crested, *Baeolophus atricristatus*
Bridled, *Baeolophus wollweberi*
Juniper, *Baeolophus ridgwayi*
Oak, *Baeolophus inornatus*
[Plain (see Juniper and Oak)]
Tufted, *Baeolophus bicolor*
TITYRA, Masked, *Tityra semifasciata*
TOWHEE, Abert's, *Pipilo aberti*
[Brown (see California and Canyon)]
California, *Pipilo crissalis*
Canyon, *Pipilo fuscus*
Eastern, *Pipilo erythrophthalmus*
Green-tailed, *Pipilo chlorurus*
[Rufous-sided (see Eastern and Spotted)]
Spotted, *Pipilo maculatus*
[TREE-PIPIT, Olive (see PIPIT, Olive-backed)]
TROGON, [Eared (see QUETZEL, Eared)]
Elegant, *Trogon elegans*
TROPICBIRD, Red-billed, *Phaethon aethereus*
Red-tailed, *Phaethon rubricauda*
White-tailed, *Phaethon lepturus*
TURNSTONE, Black, *Arenaria melanocephala*
Ruddy, *Arenaria interpres*
TURTLE-DOVE, Oriental, *Streptopelia orientalis*
VEERY, *Catharus fuscescens*
VERDIN, *Auriparus flaviceps*
VIOLET-EAR, Green, *Colibri thalassinus*
VIREO, Bell's, *Vireo bellii*
Black-capped, *Vireo atricapillus*
Black-whiskered, *Vireo altiloquus*
Blue-headed, *Vireo solitarius*
Cassin's, *Vireo cassinii*
Gray, *Vireo vicinior*
Hutton's, *Vireo huttoni*
Philadelphia, *Vireo philadelphicus*
Plumbeous, *Vireo plumbeus*
Puerto Rican, *Vireo latimeri*
Red-eyed, *Vireo olivaceus*
[Solitary (see Blue-headed, Cassin's, and Plumbeous)]
Thick-billed, *Vireo crassirostris*
Warbling, *Vireo gilvus*
White-eyed, *Vireo griseus*
Yellow-green, *Vireo flavoviridis*
Yellow-throated, *Vireo flavifrons*
Yucatan, *Vireo magister*
VULTURE, Black, *Coragyps atratus*
Turkey, *Cathartes aura*
WAGTAIL, [Black-backed (see White)]
Citrine, *Motacilla citreola*
Eastern Yellow, *Motacilla tschutschensis*
Gray, *Motacilla cinerea*
White, *Motacilla alba*
[Yellow (see Eastern Yellow)]
WARBLER, Adelaide's, *Dendroica adelaidae*
Arctic, *Phylloscopus borealis*
Bachman's, *Vermivora bachmanii*
Bay-breasted, *Dendroica castanea*
Black-and-white, *Mniotilta varia*
Black-throated Blue, *Dendroica caerulescens*
Black-throated Gray, *Dendroica nigrescens*
Black-throated Green, *Dendroica virens*
Blackburnian, *Dendroica fusca*
Blackpoll, *Dendroica striata*
Blue-winged, *Vermivora pinus*
Canada, *Wilsonia canadensis*
Cape May, *Dendroica tigrina*
Cerulean, *Dendroica cerulea*
Chestnut-sided, *Dendroica pensylvanica*
Colima, *Vermivora crissalis*
Connecticut, *Oporornis agilis*
Crescent-chested, *Parula superciliosa*
Elfin-woods, *Dendroica angelae*
Fan-tailed, *Euthlypis lachrymosa*
Golden-cheeked, *Dendroica chrysoparia*
Golden-crowned, *Basileuterus culicivorus*
Golden-winged, *Vermivora chrysoptera*
Grace's, *Dendroica graciae*
Hermit, *Dendroica occidentalis*
Hooded, *Wilsonia citrina*
Kentucky, *Oporornis formosus*
Kirtland's, *Dendroica kirtlandii*
Lucy's, *Vermivora luciae*
MacGillivray's, *Oporornis tolmiei*
Magnolia, *Dendroica magnolia*
Mourning, *Oporornis philadelphia*
Nashville, *Vermivora ruficapilla*
Olive, *Peucedramus taeniatus*
Orange-crowned, *Vermivora celata*
Palm, *Dendroica palmarum*
Pine, *Dendroica pinus*
Prairie, *Dendroica discolor*
Prothonotary, *Protonotaria citrea*
Red-faced, *Cardellina rubrifrons*
Rufous-capped, *Basileuterus rufifrons*
Swainson's, *Limnothlypis swainsonii*
Tennessee, *Vermivora peregrina*
Townsend's, *Dendroica townsendi*
Virginia's, *Vermivora virginiae*
Willow, *Phylloscopus trochilus*
Wilson's, *Wilsonia pusilla*
Worm-eating, *Helmitheros vermivorus*
Yellow, *Dendroica petechia*
Yellow-rumped, *Dendroica coronata*
Yellow-throated, *Dendroica dominica*
WATERTHRUSH, Louisiana, *Seiurus motacilla*
Northern, *Seiurus noveboracensis*
WAXWING, Bohemian, *Bombycilla garrulus*
Cedar, *Bombycilla cedrorum*
WHEATEAR, Northern, *Oenanthe oenanthe*
WHIMBREL, *Numenius phaeopus*
WHIP-POOR-WILL, *Caprimulgus vociferus*
WHISTLING-DUCK, Black-bellied, *Dendrocygna autumnalis*
Fulvous, *Dendrocygna bicolor*
West Indian, *Dendrocygna arborea*
WIGEON, American, *Anas americana*
Eurasian, *Anas penelope*
WILLET, *Tringa semipalmata*
WOOD-PEWEE, Eastern, *Contopus virens*
Western, *Contopus sordidulus*
WOODCOCK, American, *Scolopax minor*
Eurasian, *Scolopax rusticola*
WOODPECKER, Acorn, *Melanerpes formicivorus*
American Three-toed, *Picoides dorsalis*
Arizona, *Picoides arizonae*
Black-backed, *Picoides arcticus*
Downy, *Picoides pubescens*
Gila, *Melanerpes uropygialis*
Golden-fronted, *Melanerpes aurifrons*
Great Spotted, *Dendrocopos major*
Hairy, *Picoides villosus*
Ivory-billed, *Campephilus principalis*
Ladder-backed, *Picoides scalaris*
Lewis's, *Melanerpes lewis*
Nuttall's, *Picoides nuttallii*
Pileated, *Dryocopus pileatus*
Puerto Rican, *Melanerpes portoricensis*
Red-bellied, *Melanerpes carolinus*
Red-cockaded, *Picoides borealis*
Red-headed, *Melanerpes erythrocephalus*
[Strickland's (see Arizona)]
[Three-toed (see American Three-toed)]
White-headed, *Picoides albolarvatus*

WOODSTAR, Bahama, *Calliphlox evelynae*
WREN, Bewick's *Thryomanes bewickii*
Cactus, *Campylorhynchus brunneicapillus*
Canyon, *Catherpes mexicanus*
Carolina, *Thryothorus ludovicianus*
House, *Troglodytes aedon*
Marsh, *Cistothorus palustris*
Rock, *Salpinctes obsoletus*
Sedge, *Cistothorus platensis*
Winter, *Troglodytes troglodytes*
WRYNECK, Eurasian, *Jynx torquilla*
YELLOWLEGS, Greater, *Tringa melanoleuca*
Lesser, *Tringa flavipes*
YELLOWTHROAT, Common, *Geothlypis trichas*
Gray-crowned, *Geothlypis poliocephala*

(2) *Taxonomic listing.* Species are listed in phylogenetic sequence by scientific name, with the common (English) name following the scientific name. To help clarify species relationships, we also list the higher-level taxonomic categories of Order, Family, and Subfamily.

Order ANSERIFORMES
Family ANATIDAE
Subfamily DENDROCYGNINAE
Dendrocygna autumnalis, Black-bellied Whistling-Duck
Dendrocygna arborea, West Indian Whistling-Duck
Dendrocygna bicolor, Fulvous Whistling-Duck
Subfamily ANSERINAE
Anser fabalis, Bean Goose
Anser albifrons, Greater White-fronted Goose
Anser erythropus, Lesser White-fronted Goose
Chen canagica, Emperor Goose
Chen caerulescens, Snow Goose
Chen rossii, Ross's Goose
Branta bernicla, Brant
Branta leucopsis, Barnacle Goose
Branta hutchinsii, Cackling Goose
Branta canadensis, Canada Goose
Branta sandvicensis, Hawaiian Goose
Cygnus buccinator, Trumpeter Swan
Cygnus columbianus, Tundra Swan
Cygnus cygnus, Whooper Swan
Subfamily ANATINAE
Cairina moschata, Muscovy Duck
Aix sponsa, Wood Duck
Anas strepera, Gadwall
Anas falcata, Falcated Duck
Anas penelope, Eurasian Wigeon
Anas americana, American Wigeon
Anas rubripes, American Black Duck
Anas platyrhynchos, Mallard
Anas fulvigula, Mottled Duck
Anas wyvilliana, Hawaiian Duck
Anas laysanensis, Laysan Duck
Anas poecilorhyncha, Spot-billed Duck
Anas superciliosa, Pacific Black Duck
Anas discors, Blue-winged Teal
Anas cyanoptera, Cinnamon Teal
Anas clypeata, Northern Shoveler
Anas bahamensis, White-cheeked Pintail
Anas acuta, Northern Pintail
Anas querquedula, Garganey
Anas formosa, Baikal Teal
Anas crecca, Green-winged Teal
Aythya valisineria, Canvasback
Aythya americana, Redhead
Aythya ferina, Common Pochard
Aythya baeri, Baer's Pochard
Aythya collaris, Ring-necked Duck
Aythya fuligula, Tufted Duck
Aythya marila, Greater Scaup
Aythya affinis, Lesser Scaup
Polysticta stelleri, Steller's Eider
Somateria fischeri, Spectacled Eider
Somateria spectabilis, King Eider
Somateria mollissima, Common Eider
Histrionicus histrionicus, Harlequin Duck
Melanitta perspicillata, Surf Scoter
Melanitta fusca, White-winged Scoter
Melanitta nigra, Black Scoter
Clangula hyemalis, Long-tailed Duck
Bucephala albeola, Bufflehead
Bucephala clangula, Common Goldeneye
Bucephala islandica, Barrow's Goldeneye
Mergellus albellus, Smew
Lophodytes cucullatus, Hooded Merganser
Mergus merganser, Common Merganser
Mergus serrator, Red-breasted Merganser
Nomonyx dominicus, Masked Duck
Oxyura jamaicensis, Ruddy Duck
Order GAVIIFORMES
Family GAVIIDAE
Gavia stellata, Red-throated Loon
Gavia arctica, Arctic Loon
Gavia pacifica, Pacific Loon
Gavia immer, Common Loon
Gavia adamsii, Yellow-billed Loon
Order PODICIPEDIFORMES
Family PODICIPEDIDAE
Tachybaptus dominicus, Least Grebe
Podilymbus podiceps, Pied-billed Grebe
Podiceps auritus, Horned Grebe
Podiceps grisegena, Red-necked Grebe
Podiceps nigricollis, Eared Grebe
Aechmophorus occidentalis, Western Grebe
Aechmophorus clarkii, Clark's Grebe
Order PROCELLARIIFORMES
Family DIOMEDEIDAE
Thalassarche chlororhynchos, Yellow-nosed Albatross
Thalassarche cauta, Shy Albatross
Thalassarche melanophris, Black-browed Albatross
Phoebetria palpebrata, Light-mantled Albatross
Diomedea exulans, Wandering Albatross
Phoebastria immutabilis, Laysan Albatross
Phoebastria nigripes, Black-footed Albatross
Phoebastria albatrus, Short-tailed Albatross
Family PROCELLARIIDAE
Fulmarus glacialis, Northern Fulmar
Pterodroma macroptera, Great-winged Petrel
Pterodroma neglecta, Kermadec Petrel
Pterodroma arminjoniana, Herald Petrel
Pterodroma ultima, Murphy's Petrel
Pterodroma inexpectata, Mottled Petrel
Pterodroma cahow, Bermuda Petrel
Pterodroma hasitata, Black-capped Petrel
Pterodroma externa, Juan Fernandez Petrel
Pterodroma sandwichensis, Hawaiian Petrel
Pterodroma cervicalis, White-necked Petrel
Pterodroma hypoleuca, Bonin Petrel
Pterodroma nigripennis, Black-winged Petrel
Pterodroma cookii, Cook's Petrel
Pterodroma longirostris, Stejneger's Petrel
Pterodroma alba, Phoenix Petrel
Pterodroma leucoptera, Gould's Petrel
Pterodroma rostrata, Tahiti Petrel
Bulweria bulwerii, Bulwer's Petrel
Bulweria fallax, Jouanin's Petrel
Calonectris leucomelas, Streaked Shearwater
Calonectris diomedea, Cory's Shearwater
Calonectris edwardsii, Cape Verde Shearwater
Puffinus creatopus, Pink-footed Shearwater
Puffinus carneipes, Flesh-footed Shearwater
Puffinus gravis, Greater Shearwater
Puffinus pacificus, Wedge-tailed Shearwater
Puffinus bulleri, Buller's Shearwater
Puffinus griseus, Sooty Shearwater
Puffinus tenuirostris, Short-tailed Shearwater
Puffinus nativitatis, Christmas Shearwater
Puffinus puffinus, Manx Shearwater
Puffinus auricularis, Townsend's Shearwater
Puffinus opisthomelas, Black-vented Shearwater
Puffinus lherminieri, Audubon's Shearwater
Puffinus assimilis, Little Shearwater
Family HYDROBATIDAE
Oceanites oceanicus, Wilson's Storm-

Petrel
Pelagodroma marina, White-faced Storm-Petrel
Fregetta tropica, Black-bellied Storm-Petrel
Fregetta grallaria, White-bellied Storm-Petrel
Nesofregetta fuiginosa, Polynesian Storm-Petrel
Oceanodroma furcata, Fork-tailed Storcm-Petrel
Oceanodroma leucorhoa, Leach's Storm-Petrel
Oceanodroma homochroa, Ashy Storm-Petrel
Oceanodroma castro, Band-rumped Storm-Petrel
Oceanodroma tethys, Wedge-rumped Storm-Petrel
Oceanodroma matsudairae, Matsudaira's Storm-Petrel
Oceanodroma melania, Black Storm-Petrel
Oceanodroma tristrami, Tristram's Storm-Petrel
Oceanodroma microsoma, Least Storm-Petrel

Order PELECANIFORMES
Family PHAETHONTIDAE
Phaethon lepturus, White-tailed Tropicbird
Phaethon aethereus, Red-billed Tropicbird
Phaethon rubricauda, Red-tailed Tropicbird

Family SULIDAE
Sula dactylatra, Masked Booby
Sula nebouxii, Blue-footed Booby
Sula leucogaster, Brown Booby
Sula sula, Red-footed Booby
Morus bassanus, Northern Gannet

Family PELECANIDAE
Pelecanus erythrorhynchos, American White Pelican
Pelecanus occidentalis, Brown Pelican

Family PHALACROCORACIDAE
Phalacrocorax melanoleucos, Little Pied Cormorant.
Phalacrocorax penicillatus, Brandt's Cormorant
Phalacrocorax brasilianus, Neotropic Cormorant
Phalacrocorax auritus, Double-crested Cormorant
Phalacrocorax carbo, Great Cormorant
Phalacrocorax urile, Red-faced Cormorant
Phalacrocorax pelagicus, Pelagic Cormorant

Family ANHINGIDAE
Anhinga anhinga, Anhinga

Family FREGATIDAE
Fregata magnificens, Magnificent Frigatebird
Fregata minor, Great Frigatebird
Fregata ariel, Lesser Frigatebird

Order CICONIIFORMES
Family ARDEIDAE
Botaurus lentiginosus, American Bittern
Ixobrychus sinensis, Yellow Bittern
Ixobrychus exilis, Least Bittern
Ixobrychus eurhythmus, Schrenck's Bittern
Ixobrychus flavicollis, Black Bittern
Ardea cinerea, Gray Heron
Ardea herodias, Great Blue Heron
Ardea alba, Great Egret
Mesophoyx intermedia, Intermediate Egret
Egretta eulophotes, Chinese Egret
Egretta garzetta, Little Egret
Egretta sacra, Pacific Reef-Egret
Egretta gularis, Western Reef-Heron
Egretta thula, Snowy Egret
Egretta caerulea, Little Blue Heron
Egretta tricolor, Tricolored Heron
Egretta rufescens, Reddish Egret
Bubulcus ibis, Cattle Egret
Ardeola bacchus, Chinese Pond-Heron
Butorides virescens, Green Heron
Nycticorax nycticorax, Black-crowned Night-Heron
Nyctanassa violacea, Yellow-crowned Night-Heron
Gorsachius goisagi, Japanese Night-Heron
Gorsachius melanolophus, Malayan Night-Heron

Family THRESKIORNITHIDAE
Subfamily THRESKIORNITHINAE
Eudocimus albus, White Ibis
Eudocimus ruber, Scarlet Ibis
Plegadis falcinellus, Glossy Ibis
Plegadis chihi, White-faced Ibis

Subfamily PLATALEINAE
Platalea ajaja, Roseate Spoonbill

Family CICONIIDAE
Jabiru mycteria, Jabiru
Mycteria americana, Wood Stork

Family CATHARTIDAE
Coragyps atratus, Black Vulture
Cathartes aura, Turkey Vulture
Gymnogyps californianus, California Condor

Order PHOENICOPTERIFORMES
Family PHOENICOPTERIDAE
Phoenicopterus ruber, Greater Flamingo

Order FALCONIFORMES
Family ACCIPITRIDAE
Subfamily PANDIONINAE
Pandion haliaetus, Osprey

Subfamily ACCIPITRINAE
Chondrohierax uncinatus, Hook-billed Kite
Elanoides forficatus, Swallow-tailed Kite
Elanus leucurus, White-tailed Kite
Rostrhamus sociabilis, Snail Kite
Ictinia mississippiensis, Mississippi Kite
Milvus migrans, Black Kite
Haliaeetus leucocephalus, Bald Eagle
Haliaeetus albicilla, White-tailed Eagle
Haliaeetus pelagicus, Steller's Sea-Eagle
Circus cyaneus, Northern Harrier
Accipiter soloensis, Gray Frog-Hawk
Accipiter gularis, Japanese Sparrowhawk
Accipiter striatus, Sharp-shinned Hawk
Accipiter cooperii, Cooper's Hawk
Accipiter gentilis, Northern Goshawk
Geranospiza caerulescens, Crane Hawk
Buteogallus anthracinus, Common Black-Hawk
Parabuteo unicinctus, Harris's Hawk
Buteo magnirostris, Roadside Hawk
Buteo lineatus, Red-shouldered Hawk
Buteo platypterus, Broad-winged Hawk
Buteo nitidus, Gray Hawk
Buteo brachyurus, Short-tailed Hawk
Buteo swainsoni, Swainson's Hawk
Buteo albicaudatus, White-tailed Hawk
Buteo albonotatus, Zone-tailed Hawk
Buteo solitarius, Hawaiian Hawk
Buteo jamaicensis, Red-tailed Hawk
Buteo regalis, Ferruginous Hawk
Buteo lagopus, Rough-legged Hawk
Aquila chrysaetos, Golden Eagle

Family FALCONIDAE
Subfamily MICRASTURINAE
Micrastur semitorquatus, Collared Forest-Falcon

Subfamily CARACARINAE
Caracara cheriway, Crested Caracara

Subfamily FALCONINAE
Falco tinnunculus, Eurasian Kestrel
Falco sparverius, American Kestrel
Falco columbarius, Merlin
Falco subbuteo, Eurasian Hobby
Falco femoralis, Aplomado Falcon
Falco rusticolus, Gyrfalcon
Falco peregrinus, Peregrine Falcon
Falco mexicanus, Prairie Falcon

Order GRUIFORMES
Family RALLIDAE
Coturnicops noveboracensis, Yellow Rail
Laterallus jamaicensis, Black Rail
Gallirallus philippensis, Buff-banded Rail
Gallirallus owstoni, Guam Rail
Crex crex, Corn Crake
Rallus longirostris, Clapper Rail
Rallus elegans, King Rail
Rallus limicola, Virginia Rail
Porzana carolina, Sora
Porzana tabuensis, Spotless Crake
Porzana flaviventer, Yellow-breasted Crake
Neocrex erythrops, Paint-billed Crake
Pardirallus maculatus, Spotted Rail
Porphyrio martinica, Purple Gallinule

Porphyrio porphyrio, Purple Swamphen
Porphyrio flavirostris, Azure Gallinule
Gallinula chloropus, Common Moorhen
Fulica atra, Eurasian Coot
Fulica alai, Hawaiian Coot
Fulica americana, American Coot
Fulica caribaea, Caribbean Coot

Family ARAMIDAE
Aramus guarauna, Limpkin

Family GRUIDAE
Grus canadensis, Sandhill Crane
Grus grus, Common Crane
Grus americana, Whooping Crane

Order CHARADRIIFORMES
Family CHARADRIIDAE
Subfamily VANELLINAE
Vanellus vanellus, Northern Lapwing

Subfamily CHARADRIINAE
Pluvialis squatarola, Black-bellied Plover
Pluvialis dominica, American Golden-Plover
Pluvialis fulva, Pacific Golden-Plover
Charadrius mongolus, Lesser Sand-Plover
Charadrius leschenaultii, Greater Sand-Plover
Charadrius collaris, Collared Plover
Charadrius alexandrinus, Snowy Plover
Charadrius wilsonia, Wilson's Plover
Charadrius hiaticula, Common Ringed Plover
Charadrius semipalmatus, Semipalmated Plover
Charadrius melodus, Piping Plover
Charadrius dubius, Little Ringed Plover
Charadrius vociferus, Killdeer
Charadrius montanus, Mountain Plover
Charadrius morinellus, Eurasian Dotterel

Family HAEMATOPODIDAE
Haematopus ostralegus, Eurasian Oystercatcher
Haematopus palliatus, American Oystercatcher
Haematopus bachmani, Black Oystercatcher

Family RECURVIROSTRIDAE
Himantopus himantopus, Black-winged Stilt
Himantopus mexicanus, Black-necked Stilt
Recurvirostra americana, American Avocet

Family JACANIDAE
Jacana spinosa, Northern Jacana

Family SCOLOPACIDAE
Subfamily SCOLOPACINAE
Xenus cinereus, Terek Sandpiper
Actitis hypoleucos, Common Sandpiper
Actitis macularius, Spotted Sandpiper
Tringa ochropus, Green Sandpiper
Tringa solitaria, Solitary Sandpiper
Tringa brevipes, Gray-tailed Tattler
Tringa incana, Wandering Tattler
Tringa erythropus, Spotted Redshank
Tringa melanoleuca, Greater Yellowlegs
Tringa nebularia, Common Greenshank
Tringa guttifer, Nordmann's Greenshank
Tringa semipalmata, Willet
Tringa flavipes, Lesser Yellowlegs
Tringa stagnatilis, Marsh Sandpiper
Tringa glareola, Wood Sandpiper
Bartramia longicauda, Upland Sandpiper
Numenius minutus, Little Curlew
Numenius borealis, Eskimo Curlew
Numenius phaeopus, Whimbrel
Numenius tahitiensis, Bristle-thighed Curlew
Numenius madagascariensis, Far Eastern Curlew
Numenius arquata, Eurasian Curlew
Numenius americanus, Long-billed Curlew
Limosa limosa, Black-tailed Godwit
Limosa haemastica, Hudsonian Godwit
Limosa lapponica, Bar-tailed Godwit
Limosa fedoa, Marbled Godwit
Arenaria interpres, Ruddy Turnstone
Arenaria melanocephala, Black Turnstone
Aphriza virgata, Surfbird
Calidris tenuirostris, Great Knot
Calidris canutus, Red Knot
Calidris alba, Sanderling
Calidris pusilla, Semipalmated Sandpiper
Calidris mauri, Western Sandpiper
Calidris ruficollis, Red-necked Stint
Calidris minuta, Little Stint
Calidris temminckii, Temminck's Stint
Calidris subminuta, Long-toed Stint
Calidris minutilla, Least Sandpiper
Calidris fuscicollis, White-rumped Sandpiper
Calidris bairdii, Baird's Sandpiper
Calidris melanotos, Pectoral Sandpiper
Calidris acuminata, Sharp-tailed Sandpiper
Calidris maritima, Purple Sandpiper
Calidris ptilocnemis, Rock Sandpiper
Calidris alpina, Dunlin
Calidris ferruginea, Curlew Sandpiper
Calidris himantopus, Stilt Sandpiper
Eurynorhynchus pygmeus, Spoon-billed Sandpiper
Limicola falcinellus, Broad-billed Sandpiper
Tryngites subruficollis, Buff-breasted Sandpiper
Philomachus pugnax, Ruff
Limnodromus griseus, Short-billed Dowitcher
Limnodromus scolopaceus, Long-billed Dowitcher
Lymnocryptes minimus, Jack Snipe
Gallinago delicata, Wilson's Snipe (the ''common'' snipe hunted in most of the U.S.)
Gallinago gallinago, Common Snipe (restricted to Alaska; also see Gallinago delicata)
Gallinago stenura, Pin-tailed Snipe
Gallinago megala, Swinhoe's Snipe
Scolopax rusticola, Eurasian Woodcock
Scolopax minor, American Woodcock

Subfamily PHALAROPODINAE
Phalaropus tricolor, Wilson's Phalarope
Phalaropus lobatus, Red-necked Phalarope
Phalaropus fulicarius, Red Phalarope

Family LARIDAE
Subfamily LARINAE
Larus atricilla, Laughing Gull
Larus pipixcan, Franklin's Gull
Larus minutus, Little Gull
Larus ridibundus, Black-headed Gull
Larus philadelphia, Bonaparte's Gull
Larus heermanni, Heermann's Gull
Larus cirrocephalus, Gray-hooded Gull
Larus belcheri, Belcher's Gull
Larus crassirostris, Black-tailed Gull
Larus canus, Mew Gull
Larus delawarensis, Ring-billed Gull
Larus californicus, California Gull
Larus argentatus, Herring Gull
Larus cachinnans, Yellow-legged Gull
Larus thayeri, Thayer's Gull
Larus glaucoides, Iceland Gull
Larus fuscus, Lesser Black-backed Gull
Larus schistisagus, Slaty-backed Gull
Larus livens, Yellow-footed Gull
Larus occidentalis, Western Gull
Larus glaucescens, Glaucous-winged Gull
Larus hyperboreus, Glaucous Gull
Larus marinus, Great Black-backed Gull
Larus dominicanus, Kelp Gull
Xema sabini, Sabine's Gull
Rissa tridactyla, Black-legged Kittiwake
Rissa brevirostris, Red-legged Kittiwake
Rhodostethia rosea, Ross's Gull
Pagophila eburnea, Ivory Gull

Subfamily STERNINAE
Anous stolidus, Brown Noddy
Anous minutus, Black Noddy
Procelsterna cerulea, Blue-gray Noddy
Gygis alba, White Tern
Onychoprion fuscatus, Sooty Tern
Onychoprion lunatus, Gray-backed Tern
Onychoprion anaethetus, Bridled Tern

Onychoprion aleuticus, Aleutian Tern
Sternula albifrons, Little Tern
Sternula antillarum, Least Tern
Gelochelidon nilotica, Gull-billed Tern
Hydroprogne caspia, Caspian Tern
Chlidonias niger, Black Tern
Chlidonias leucopterus, White-winged Tern
Chlidonias hybridus, Whiskered Tern
Sterna dougallii, Roseate Tern
Sterna hirundo, Common Tern
Sterna paradisaea, Arctic Tern
Sterna forsteri, Forster's Tern
Sterna sumatrana, Black-naped Tern
Thalasseus maximus, Royal Tern
Thalasseus bergii, Great Crested Tern
Thalasseus sandvicensis, Sandwich Tern
Thalasseus elegans, Elegant Tern

Subfamily RYNCHOPINAE
Rynchops niger, Black Skimmer

Family STERCORARIIDAE
Stercorarius skua, Great Skua
Stercorarius maccormicki, South Polar Skua
Stercorarius pomarinus, Pomarine Jaeger
Stercorarius parasiticus, Parasitic Jaeger
Stercorarius longicaudus, Long-tailed Jaeger

Family ALCIDAE
Alle alle, Dovekie
Uria aalge, Common Murre
Uria lomvia, Thick-billed Murre
Alca torda, Razorbill
Cepphus grylle, Black Guillemot
Cepphus columba, Pigeon Guillemot
Brachyramphus perdix, Long-billed Murrelet
Brachyramphus marmoratus, Marbled Murrelet
Brachyramphus brevirostris, Kittlitz's Murrelet
Synthliboramphus hypoleucus, Xantus's Murrelet
Synthliboramphus craveri, Craveri's Murrelet
Synthliboramphus antiquus, Ancient Murrelet
Ptychoramphus aleuticus, Cassin's Auklet
Aethia psittacula, Parakeet Auklet
Aethia pusilla, Least Auklet
Aethia pygmaea, Whiskered Auklet
Aethia cristatella, Crested Auklet
Cerorhinca monocerata, Rhinoceros Auklet
Fratercula arctica, Atlantic Puffin
Fratercula corniculata, Horned Puffin
Fratercula cirrhata, Tufted Puffin

Order COLUMBIFORMES
Family COLUMBIDAE
Patagioenas squamosa, Scaly-naped Pigeon
Patagioenas leucocephala, White-crowned Pigeon
Patagioenas flavirostris, Red-billed Pigeon
Patagioenas inornata, Plain Pigeon
Patagioenas fasciata, Band-tailed Pigeon
Streptopelia orientalis, Oriental Turtle-Dove
Zenaida asiatica, White-winged Dove
Zenaida aurita, Zenaida Dove
Zenaida macroura, Mourning Dove
Columbina inca, Inca Dove
Columbina passerina, Common Ground-Dove
Columbina talpacoti, Ruddy Ground-Dove
Leptotila verreauxi, White-tipped Dove
Geotrygon chrysia, Key West Quail-Dove
Geotrygon mystacea, Bridled Quail-Dove
Geotrygon montana, Ruddy Quail-Dove
Gallicolumba xanthonura, White-throated Ground-Dove
Gallicolumba stairi, Friendly Ground-Dove
Ptilinopus perousii, Many-colored Fruit-Dove
Ptilinopus roseicapilla, Mariana Fruit-Dove
Ptilinopus porphyraceus, Crimson-crowned Fruit-Dove
Ducula pacifica, Pacific Imperial-Pigeon

Order CUCULIFORMES
Family CUCULIDAE
Subfamily CUCULINAE
Cuculus canorus, Common Cuckoo
Cuculus optatus, Oriental Cuckoo
Cuculus fugax, Hodgson's Hawk-Cuckoo
Coccyzus americanus, Yellow-billed Cuckoo
Coccyzus minor, Mangrove Cuckoo
Coccyzus erythropthalmus, Black-billed Cuckoo
Coccyzus vieilloti, Puerto Rican Lizard-Cuckoo

Subfamily NEOMORPHINAE
Geococcyx californianus, Greater Roadrunner

Subfamily CROTOPHAGINAE
Crotophaga ani, Smooth-billed Ani
Crotophaga sulcirostris, Groove-billed Ani

Order STRIGIFORMES
Family TYTONIDAE
Tyto alba, Barn Owl

Family STRIGIDAE
Otus flammeolus, Flammulated Owl
Otus sunia, Oriental Scops-Owl
Megascops kennicottii, Western Screech-Owl
Megascops asio, Eastern Screech-Owl
Megascops trichopsis, Whiskered Screech-Owl
Megascops nudipes, Puerto Rican Screech-Owl
Bubo virginianus, Great Horned Owl
Bubo scandiaca, Snowy Owl
Surnia ulula, Northern Hawk Owl
Glaucidium gnoma, Northern Pygmy-Owl
Glaucidium brasilianum, Ferruginous Pygmy-Owl
Micrathene whitneyi, Elf Owl
Athene cunicularia, Burrowing Owl
Ciccaba virgata, Mottled Owl
Strix occidentalis, Spotted Owl
Strix varia, Barred Owl
Strix nebulosa, Great Gray Owl
Asio otus, Long-eared Owl
Asio stygius, Stygian Owl
Asio flammeus, Short-eared Owl
Aegolius funereus, Boreal Owl
Aegolius acadicus, Northern Saw-whet Owl

Order CAPRIMULGIFORMES
Family CAPRIMULGIDAE
Subfamily CHORDEILINAE
Chordeiles acutipennis, Lesser Nighthawk
Chordeiles minor, Common Nighthawk
Chordeiles gundlachii, Antillean Nighthawk

Subfamily CAPIMULGINAE
Nyctidromus albicollis, Common Pauraque
Phalaenoptilus nuttallii, Common Poorwill
Caprimulgus carolinensis, Chuck-will's-widow
Caprimulgus ridgwayi, Buff-collared Nightjar
Caprimulgus vociferus, Whip-poor-will
Caprimulgus noctitherus, Puerto Rican Nightjar
Caprimulgus indicus, Gray Nightjar

Order APODIFORMES
Family APODIDAE
Subfamily CYPSELOIDINAE
Cpseloides niger, Black Swift
Streptoprocne zonaris, White-collared Swift

Subfamily CHAETURINAE
Chaetura pelagica, Chimney Swift
Chaetura vauxi, Vaux's Swift
Chaetura brachyura, Short-tailed Swift
Hirundapus caudacutus, White-throated Needletail
Aerodramus spodiopygius, White-rumped Swiftlet
Aerodramus bartschi, Mariana Swiftlet

Subfamily APODINAE
Apus apus, Common Swift
Apus pacificus, Fork-tailed Swift
Apus melba, Alpine Swift
Aeronautes saxatalis, White-throated Swift
Tachornis phoenicobia, Antillean Palm-Swift

Family TROCHILIDAE
Subfamily TROCHILINAE
Colibri thalassinus, Green Violet-ear
Anthracothorax prevostii, Green-breasted Mango
Anthracothorax dominicus, Antillean Mango
Anthracothorax viridis, Green Mango
Eulampis jugularis, Purple-throated Carib
Eulampis holosericeus, Green-throated Carib
Orthorhynchus cristatus, Antillean Crested Hummingbird
Chlorostilbon maugaeus, Puerto Rican Emerald
Cynanthus latirostris, Broad-billed Hummingbird
Hylocharis leucotis, White-eared Hummingbird
Hylocharis xantusii, Xantus's Hummingbird
Amazilia beryllina, Berylline Hummingbird
Amazilia yucatanensis, Buff-bellied Hummingbird
Amazilia rutila, Cinnamon Hummingbird
Amazilia violiceps, Violet-crowned Hummingbird
Lampornis clemenciae, Blue-throated Hummingbird
Eugenes fulgens, Magnificent Hummingbird
Heliomaster constantii, Plain-capped Starthroat
Calliphlox evelynae, Bahama Woodstar
Calothorax lucifer, Lucifer Hummingbird
Archilochus colubris, Ruby-throated Hummingbird
Archilochus alexandri, Black-chinned Hummingbird
Calypte anna, Anna's Hummingbird
Calypte costae, Costa's Hummingbird
Stellula calliope, Calliope Hummingbird
Atthis heloisa, Bumblebee Hummingbird
Selasphorus platycercus, Broad-tailed Hummingbird
Selasphorus rufus, Rufous Hummingbird
Selasphorus sasin, Allen's Hummingbird
Order TROGONIFORMES
Family TROGONIDAE
Subfamily TROGONINAE
Trogon elegans, Elegant Trogon
Euptilotis neoxenus, Eared Quetzel
Order UPUPIFORMES
Family UPUPIDAE
Upupa epops, Eurasian Hoopoe
Order CORACIIFORMES
Family ALCEDINIDAE
Subfamily HALCYONINAE
Todirhamphus cinnamominus, Micronesian Kingfisher
Todirhamphus chloris, Collared Kingfisher
Subfamily CERYLINAE
Ceryle torquatus, Ringed Kingfisher
Ceryle alcyon, Belted Kingfisher
Chloroceryle americana, Green Kingfisher
Order PICIFORMES
Family PICIDAE
Subfamily JYNGINAE
Jynx torquilla, Eurasian Wryneck
Subfamily PICINAE
Melanerpes lewis, Lewis's Woodpecker
Melanerpes portoricensis, Puerto Rican Woodpecker
Melanerpes erythrocephalus, Red-headed Woodpecker
Melanerpes formicivorus, Acorn Woodpecker
Melanerpes uropygialis, Gila Woodpecker
Melanerpes aurifrons, Golden-fronted Woodpecker
Melanerpes carolinus, Red-bellied Woodpecker
Sphyrapicus thyroideus, Williamson's Sapsucker
Sphyrapicus varius, Yellow-bellied Sapsucker
Sphyrapicus nuchalis, Red-naped Sapsucker
Sphyrapicus ruber, Red-breasted Sapsucker
Dendrocopos major, Great Spotted Woodpecker
Picoides scalaris, Ladder-backed Woodpecker
Picoides nuttallii, Nuttall's Woodpecker
Picoides pubescens, Downy Woodpecker
Picoides villosus, Hairy Woodpecker
Picoides arizonae, Arizona Woodpecker
Picoides borealis, Red-cockaded Woodpecker
Picoides albolarvatus, White-headed Woodpecker
Picoides dorsalis, American Three-toed Woodpecker
Picoides arcticus, Black-backed Woodpecker
Colaptes auratus, Northern Flicker
Colaptes chrysoides, Gilded Flicker
Dryocopus pileatus, Pileated Woodpecker
Campephilus principalis, Ivory-billed Woodpecker
Order PASSERIFORMES
Family TYRANNIDAE
Subfamily ELAENIINAE
Camptostoma imberbe, Northern Beardless-Tyrannulet
Myiopagis viridicata, Greenish Elaenia
Elaenia martinica, Caribbean Elaenia
Subfamily FLUVICOLINAE
Mitrephanes phaeocercus, Tufted Flycatcher
Contopus cooperi, Olive-sided Flycatcher
Contopus pertinax, Greater Pewee
Contopus sordidulus, Western Wood-Pewee
Contopus virens, Eastern Wood-Pewee
Contopus caribeaus, Cuban Pewee
Contopus hispaniolensis, Hispaniolan Pewee
Contopus latirostris, Lesser Antillean Pewee
Empidonax flaviventris, Yellow-bellied Flycatcher
Empidonax virescens, Acadian Flycatcher
Empidonax alnorum, Alder Flycatcher
Empidonax traillii, Willow Flycatcher
Empidonax minimus, Least Flycatcher
Empidonax hammondii, Hammond's Flycatcher
Empidonax wrightii, Gray Flycatcher
Empidonax oberholseri, Dusky Flycatcher
Empidonax difficilis, Pacific-slope Flycatcher
Empidonax occidentalis, Cordilleran Flycatcher
Empidonax fulvifrons, Buff-breasted Flycatcher
Sayornis nigricans, Black Phoebe
Sayornis phoebe, Eastern Phoebe
Sayornis saya, Say's Phoebe
Pyrocephalus rubinus, Vermilion Flycatcher
Subfamily TYRANNINAE
Myiarchus tuberculifer, Dusky-capped Flycatcher
Myiarchus cinerascens, Ash-throated Flycatcher
Myiarchus nuttingi, Nutting's Flycatcher
Myiarchus crinitus, Great Crested Flycatcher
Myiarchus tyrannulus, Brown-crested Flycatcher
Myiarchus sagrae, La Sagra's Flycatcher
Myiarchus antillarum, Puerto Rican Flycatcher
Pitangus sulphuratus, Great Kiskadee
Myiozetetes similes, Social Flycatcher
Myiodynastes luteiventris, Sulphur-bellied Flycatcher
Legatus leucophalus, Piratic Flycatcher
Empidonomus varius, Variegated Flycatcher
Tyrannus melancholicus, Tropical Kingbird
Tyrannus couchii, Couch's Kingbird
Tyrannus vociferans, Cassin's Kingbird
Tyrannus crassirostris, Thick-billed

Kingbird
Tyrannus verticalis, Western Kingbird
Tyrannus tyrannus, Eastern Kingbird
Tyrannus dominicensis, Gray Kingbird
Tyrannus forficatus, Scissor-tailed Flycatcher
Tyrannus savana, Fork-tailed Flycatcher
Pachyramphus aglaiae, Rose-throated Becard
Tityra semifasciata, Masked Tityra

Family LANIIDAE
Lanius cristatus, Brown Shrike
Lanius ludovicianus, Loggerhead Shrike
Lanius excubitor, Northern Shrike

Family VIREONIDAE
Vireo griseus, White-eyed Vireo
Vireo crassirostris, Thick-billed Vireo
Vireo latimeri, Puerto Rican Vireo
Vireo bellii, Bell's Vireo
Vireo atricapillus, Black-capped Vireo
Vireo vicinior, Gray Vireo
Vireo flavifrons, Yellow-throated Vireo
Vireo plumbeus, Plumbeous Vireo
Vireo cassinii, Cassin's Vireo
Vireo solitarius, Blue-headed Vireo
Vireo huttoni, Hutton's Vireo
Vireo gilvus, Warbling Vireo
Vireo philadelphicus, Philadelphia Vireo
Vireo olivaceus, Red-eyed Vireo
Vireo flavoviridis, Yellow-green Vireo
Vireo altiloquus, Black-whiskered Vireo
Vireo magister, Yucatan Vireo

Family CORVIDAE
Perisoreus canadensis, Gray Jay
Cyanocitta stelleri, Steller's Jay
Cyanocitta cristata, Blue Jay
Cyanocorax yncas, Green Jay
Cyanocorax morio, Brown Jay
Aphelocoma coerulescens, Florida Scrub-Jay
Aphelocoma insularis, Island Scrub-Jay
Aphelocoma californica, Western Scrub-Jay
Aphelocoma ultramarina, Mexican Jay
Gymnorhinus cyanocephalus, Pinyon Jay
Nucifraga columbiana, Clark's Nutcracker
Pica hudsonia, Black-billed Magpie
Pica nuttalli, Yellow-billed Magpie
Corvus kubaryi, Mariana Crow
Corvus brachyrhynchos, American Crow
Corvus caurinus, Northwestern Crow
Corvus leucognaphalus, White-necked Crow
Corvus imparatus, Tamaulipas Crow
Corvus ossifragus, Fish Crow
Corvus hawaiiensis, Hawaiian Crow
Corvus cryptoleucus, Chihuahuan Raven
Corvus corax, Common Raven

Family ALAUDIDAE
Alauda arvensis, Sky Lark
Eremophila alpestris, Horned Lark

Family HIRUNDINIDAE
Subfamily HIRUNDININAE
Progne subis, Purple Martin
Progne cryptoleuca, Cuban Martin
Progne dominicensis, Caribbean Martin
Progne chalybea, Gray-breasted Martin
Progne elegans, Southern Martin
Progne tapera, Brown-chested Martin
Tachycineta bicolor, Tree Swallow
Tachycineta albilinea, Mangrove Swallow
Tachycineta thalassina, Violet-green Swallow
Tachycineta cyaneoviridis, Bahama Swallow
Stelgidopteryx serripennis, Northern Rough-winged Swallow
Riparia riparia, Bank Swallow
Petrochelidon pyrrhonota, Cliff Swallow
Petrochelidon fulva, Cave Swallow
Hirundo rustica, Barn Swallow
Delichon urbicum, Common House-Martin

Family PARIDAE
Poecile carolinensis, Carolina Chickadee
Poecile atricapillus, Black-capped Chickadee
Poecile gambeli, Mountain Chickadee
Poecile sclateri, Mexican Chickadee
Poecile rufescens, Chestnut-backed Chickadee
Poecile hudsonica, Boreal Chickadee
Poecile cincta, Gray-headed Chickadee
Baeolophus wollweberi, Bridled Titmouse
Baeolophus inornatus, Oak Titmouse
Baeolophus ridgwayi, Juniper Titmouse
Baeolophus bicolor, Tufted Titmouse
Baeolophus atricristatus, Black-crested Titmouse

Family REMIZIDAE
Auriparus flaviceps, Verdin

Family AEGITHALIDAE
Psaltriparus minimus, Bushtit

Family SITTIDAE
Subfamily SITTINAE
Sitta canadensis, Red-breasted Nuthatch
Sitta carolinensis, White-breasted Nuthatch
Sitta pygmaea, Pygmy Nuthatch
Sitta pusilla, Brown-headed Nuthatch

Family CERTHIIDAE
Subfamily CERTHIINAE
Certhia americana, Brown Creeper

Family TROGLODYTIDAE
Campylorhynchus brunneicapillus, Cactus Wren
Salpinctes obsoletus, Rock Wren
Catherpes mexicanus, Canyon Wren
Thryothorus ludovicianus, Carolina Wren
Thryomanes bewickii, Bewick's Wren
Troglodytes aedon, House Wren
Troglodytes troglodytes, Winter Wren
Cistothorus platensis, Sedge Wren
Cistothorus palustris, Marsh Wren

Family CINCLIDAE
Cinclus mexicanus, American Dipper

Family REGULIDAE
Regulus satrapa, Golden-crowned Kinglet
Regulus calendula, Ruby-crowned Kinglet

Family SYLVIIDAE
Subfamily SYLVIINAE
Locustella ochotensis, Middendorff's Grasshopper-Warbler
Phylloscopus borealis, Arctic Warbler
Phylloscopus trochilus, Willow Warbler
Sylvia curruca, Lesser Whitethroat

Subfamily POLIOPTILINAE
Polioptila caerulea, Blue-gray Gnatcatcher
Polioptila californica, California Gnatcatcher
Polioptila melanura, Black-tailed Gnatcatcher
Polioptila nigriceps, Black-capped Gnatcatcher

Family MUSCICAPIDAE
Muscicapa griseisticta, Gray-streaked Flycatcher

Family TURDIDAE
Luscinia calliope, Siberian Rubythroat
Luscinia svecica, Bluethroat
Luscinia cyane, Siberian Blue Robin
Monticola solitarius, Blue Rock Thrush
Tarsiger cyanurus, Red-flanked Bluetail
Oenanthe oenanthe, Northern Wheatear
Saxicola torquatus, Stonechat
Sialia sialis, Eastern Bluebird
Sialia mexicana, Western Bluebird
Sialia currucoides, Mountain Bluebird
Myadestes townsendi, Townsend's Solitaire
Myadestes myadestinus, Kamao
Myadestes lanaiensis, Olomao
Myadestes obscurus, Omao
Myadestes palmeri, Puaiohi
Catharus aurantiirostris, Orange-billed Nightingale-Thrush
Catharus mexicanus, Black-headed Nightingale-Thrush
Catharus fuscescens, Veery
Catharus minimus, Gray-cheeked Thrush
Catharus bicknelli, Bicknell's Thrush

Catharus ustulatus, Swainson's Thrush
Catharus guttatus, Hermit Thrush
Hylocichla mustelina, Wood Thrush
Turdus obscurus, Eyebrowed Thrush
Turdus naumanni, Dusky Thrush
Turdus pilaris, Fieldfare
Turdus grayi, Clay-colored Robin
Turdus assimilis, White-throated Robin
Turdus rufopalliatus, Rufous-backed Robin
Turdus migratorius, American Robin
Turdus plumbeus, Red-legged Thrush
Ixoreus naevius, Varied Thrush
Ridgwayia pinicola, Aztec Thrush

Family MIMIDAE
Dumetella carolinensis, Gray Catbird
Melanoptila glabrirostris, Black Catbird
Mimus polyglottos, Northern Mockingbird
Mimus gundlachii, Bahama Mockingbird
Oreoscoptes montanus, Sage Thrasher
Toxostoma rufum, Brown Thrasher
Toxostoma longirostre, Long-billed Thrasher
Toxostoma bendirei, Bendire's Thrasher
Toxostoma curvirostre, Curve-billed Thrasher
Toxostoma redivivum, California Thrasher
Toxostoma crissale, Crissal Thrasher
Toxostoma lecontei, Le Conte's Thrasher
Melanotis caerulescens, Blue Mockingbird
Margarops fuscatus, Pearly-eyed Thrasher

Family STURNIDAE
Sturnus philippensis, Chestnut-cheeked Starling
Sturnus cineraceus, White-cheeked Starling

Family PRUNELLIDAE
Prunella montanella, Siberian Accentor

Family MOTACILLIDAE
Motacilla tschutschensis, Eastern Yellow Wagtail
Motacilla citreola, Citrine Wagtail
Motacilla cinerea, Gray Wagtail
Motacilla alba, White Wagtail
Anthus trivialis, Tree Pipit
Anthus hodgsoni, Olive-backed Pipit
Anthus gustavi, Pechora Pipit
Anthus cervinus, Red-throated Pipit
Anthus rubescens, American Pipit
Anthus spragueii, Sprague's Pipit

Family BOMBYCILLIDAE
Bombycilla garrulus, Bohemian Waxwing
Bombycilla cedrorum, Cedar Waxwing

Family PTILOGONATIDAE
Ptilogonys cinereus, Gray Silky-flycatcher
Phainopepla nitens, Phainopepla

Family PEUCEDRAMIDAE
Peucedramus taeniatus, Olive Warbler

Family PARULIDAE
Vermivora bachmanii, Bachman's Warbler
Vermivora pinus, Blue-winged Warbler
Vermivora chrysoptera, Golden-winged Warbler
Vermivora peregrina, Tennessee Warbler
Vermivora celata, Orange-crowned Warbler
Vermivora ruficapilla, Nashville Warbler
Vermivora virginiae, Virginia's Warbler
Vermivora crissalis, Colima Warbler
Vermivora luciae, Lucy's Warbler
Parula superciliosa, Crescent-chested Warbler
Parula americana, Northern Parula
Parula pitiayumi, Tropical Parula
Dendroica petechia, Yellow Warbler
Dendroica pensylvanica, Chestnut-sided Warbler
Dendroica magnolia, Magnolia Warbler
Dendroica tigrina, Cape May Warbler
Dendroica caerulescens, Black-throated Blue Warbler
Dendroica coronata, Yellow-rumped Warbler
Dendroica nigrescens, Black-throated Gray Warbler
Dendroica chrysoparia, Golden-cheeked Warbler
Dendroica virens, Black-throated Green Warbler
Dendroica townsendi, Townsend's Warbler
Dendroica occidentalis, Hermit Warbler
Dendroica fusca, Blackburnian Warbler
Dendroica dominica, Yellow-throated Warbler
Dendroica graciae, Grace's Warbler
Dendroica adelaidae, Adelaide's Warbler
Dendroica pinus, Pine Warbler
Dendroica kirtlandii, Kirtland's Warbler
Dendroica discolor, Prairie Warbler
Dendroica palmarum, Palm Warbler
Dendroica castanea, Bay-breasted Warbler
Dendroica striata, Blackpoll Warbler
Dendroica cerulea, Cerulean Warbler
Dendroica angelae, Elfin-woods Warbler
Mniotilta varia, Black-and-white Warbler
Setophaga ruticilla, American Redstart
Protonotaria citrea, Prothonotary Warbler
Helmitheros vermivorus, Worm-eating Warbler
Limnothlypis swainsonii, Swainson's Warbler
Seiurus aurocapilla, Ovenbird
Seiurus noveboracensis, Northern Waterthrush
Seiurus motacilla, Louisiana Waterthrush
Oporornis formosus, Kentucky Warbler
Oporornis agilis, Connecticut Warbler
Oporornis philadelphia, Mourning Warbler
Oporornis tolmiei, MacGillivray's Warbler
Geothlypis trichas, Common Yellowthroat
Geothlypis poliocephala, Gray-crowned Yellowthroat
Wilsonia citrina, Hooded Warbler
Wilsonia pusilla, Wilson's Warbler
Wilsonia canadensis, Canada Warbler
Cardellina rubrifrons, Red-faced Warbler
Myioborus pictus, Painted Redstart
Myioborus miniatus, Slate-throated Redstart
Euthlypis lachrymosa, Fan-tailed Warbler
Basileuterus culicivorus, Golden-crowned Warbler
Basileuterus rufifrons, Rufous-capped Warbler
Icteria virens, Yellow-breasted Chat

Family THRAUPIDAE
Neospingus speculiferus, Puerto Rican Tanager
Piranga flava, Hepatic Tanager
Piranga rubra, Summer Tanager
Piranga olivacea, Scarlet Tanager
Piranga ludoviciana, Western Tanager
Piranga bidentata, Flame-colored Tanager
Spindalis zena, Western Spindalis
Spindalis portoricensis, Puerto Rican Spindalis
Euphonia musica, Antillean Euphonia

Family EMBERIZIDAE
Sporophila torqueola, White-collared Seedeater
Tiaris olivacea, Yellow-faced Grassquit
Tiaris bicolor, Black-faced Grassquit
Loxigilla portoricensis, Puerto Rican Bullfinch
Arremonops rufivirgatus, Olive Sparrow
Pipilo chlorurus, Green-tailed Towhee
Pipilo maculatus, Spotted Towhee
Pipilo erythrophthalmus, Eastern Towhee
Pipilo fuscus, Canyon Towhee
Pipilo crissalis, California Towhee
Pipilo aberti, Abert's Towhee

Aimophila carpalis, Rufous-winged Sparrow
Aimophila cassinii, Cassin's Sparrow
Aimophila aestivalis, Bachman's Sparrow
Aimophila botterii, Botteri's Sparrow
Aimophila ruficeps, Rufous-crowned Sparrow
Aimophila quinquestriata, Five-striped Sparrow
Spizella arborea, American Tree Sparrow
Spizella passerina, Chipping Sparrow
Spizella pallida, Clay-colored Sparrow
Spizella breweri, Brewer's Sparrow
Spizella pusilla, Field Sparrow
Spizella wortheni, Worthen's Sparrow
Spizella atrogularis, Black-chinned Sparrow
Pooecetes gramineus, Vesper Sparrow
Chondestes grammacus, Lark Sparrow
Amphispiza bilineata, Black-throated Sparrow
Amphispiza belli, Sage Sparrow
Calamospiza melanocorys, Lark Bunting
Passerculus sandwichensis, Savannah Sparrow
Ammodramus savannarum, Grasshopper Sparrow
Ammodramus bairdii, Baird's Sparrow
Ammodramus henslowii, Henslow's Sparrow
Ammodramus leconteii, Le Conte's Sparrow
Ammodramus nelsoni, Nelson's Sharp-tailed Sparrow
Ammodramus caudacutus, Saltmarsh Sharp-tailed Sparrow
Ammodramus maritimus, Seaside Sparrow
Passerella iliaca, Fox Sparrow
Melospiza melodia, Song Sparrow
Melospiza lincolnii, Lincoln's Sparrow
Melospiza georgiana, Swamp Sparrow
Zonotrichia albicollis, White-throated Sparrow
Zonotrichia querula, Harris's Sparrow
Zonotrichia leucophrys, White-crowned Sparrow
Zonotrichia atricapilla, Golden-crowned Sparrow
Junco hyemalis, Dark-eyed Junco
Junco phaeonotus, Yellow-eyed Junco
Calcarius mccownii, McCown's Longspur
Calcarius lapponicus, Lapland Longspur
Calcarius pictus, Smith's Longspur
Calcarius ornatus, Chestnut-collared Longspur
Emberiza leucocephalos, Pine Bunting
Emberiza pusilla, Little Bunting
Emberiza rustica, Rustic Bunting
Emberiza elegans, Yellow-throated Bunting
Emberiza aureola, Yellow-breasted Bunting
Emberiza variabilis, Gray Bunting
Emberiza pallasi, Pallas's Bunting
Emberiza schoeniculus, Reed Bunting
Plectrophenax nivalis, Snow Bunting
Plectrophenax hyperboreus, McKay's Bunting

Family CARDINALIDAE
Rhodothraupis celaeno, Crimson-collared Grosbeak
Cardinalis cardinalis, Northern Cardinal
Cardinalis sinuatus, Pyrrhuloxia
Pheucticus chrysopeplus, Yellow Grosbeak
Pheucticus ludovicianus, Rose-breasted Grosbeak
Pheucticus melanocephalus, Black-headed Grosbeak
Cyanocompsa parellina, Blue Bunting
Passerina caerulea, Blue Grosbeak
Passerina amoena, Lazuli Bunting
Passerina cyanea, Indigo Bunting
Passerina versicolor, Varied Bunting
Passerina ciris, Painted Bunting
Spiza americana, Dickcissel

Family ICTERIDAE
Dolichonyx oryzivorus, Bobolink
Agelaius phoeniceus, Red-winged Blackbird
Agelaius tricolor, Tricolored Blackbird
Agelaius humeralis, Tawny-shouldered Blackbird
Agelaius xanthomus, Yellow-shouldered Blackbird
Sturnella magna, Eastern Meadowlark
Sturnella neglecta, Western Meadowlark
Xanthocephalus xanthocephalus, Yellow-headed Blackbird
Euphagus carolinus, Rusty Blackbird
Euphagus cyanocephalus, Brewer's Blackbird
Quiscalus quiscula, Common Grackle
Quiscalus major, Boat-tailed Grackle
Quiscalus mexicanus, Great-tailed Grackle
Quiscalus niger, Greater Antillean Grackle
Molothrus bonariensis, Shiny Cowbird
Molothrus aeneus, Bronzed Cowbird
Molothrus ater, Brown-headed Cowbird
Icterus wagleri, Black-vented Oriole
Icterus dominicensis, Greater Antillean Oriole
Icterus spurius, Orchard Oriole
Icterus cucullatus, Hooded Oriole
Icterus pustulatus, Streak-backed Oriole
Icterus bullockii, Bullock's Oriole
Icterus gularis, Altamira Oriole
Icterus graduacauda, Audubon's Oriole
Icterus galbula, Baltimore Oriole
Icterus parisorum, Scott's Oriole

Family FRINGILLIDAE
Subfamily FRINGILLINAE
Fringilla coelebs, Common Chaffinch
Fringilla montifringilla, Brambling

Subfamily CARDUELINAE
Leucosticte tephrocotis, Gray-crowned Rosy-Finch
Leucosticte atrata, Black Rosy-Finch
Leucosticte australis, Brown-capped Rosy-Finch
Pinicola enucleator, Pine Grosbeak
Carpodacus erythrinus, Common Rosefinch
Carpodacus purpureus, Purple Finch
Carpodacus cassinii, Cassin's Finch
Carpodacus mexicanus, House Finch
Loxia curvirostra, Red Crossbill
Loxia leucoptera, White-winged Crossbill
Carduelis flammea, Common Redpoll
Carduelis hornemanni, Hoary Redpoll
Carduelis spinus, Eurasian Siskin
Carduelis pinus, Pine Siskin
Carduelis psaltria, Lesser Goldfinch
Carduelis lawrencei, Lawrence's Goldfinch
Carduelis tristis, American Goldfinch
Carduelis sinica, Oriental Greenfinch
Pyrrhula pyrrhula, Eurasian Bullfinch
Coccothraustes vespertinus, Evening Grosbeak
Coccothraustes coccothraustes, Hawfinch

Dated: August 8, 2006.

David M. Verhey,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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Federal Register

Thursday,
August 24, 2006

Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; Proposed Frameworks for Late-Season Migratory Bird Hunting Regulations; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

RIN 1018–AU42

Migratory Bird Hunting; Proposed Frameworks for Late-Season Migratory Bird Hunting Regulations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; supplemental.

SUMMARY: The Fish and Wildlife Service (hereinafter Service or we) is proposing to establish the 2006–07 late-season hunting regulations for certain migratory game birds. We annually prescribe frameworks, or outer limits, for dates and times when hunting may occur and the number of birds that may be taken and possessed in late seasons. These frameworks are necessary to allow State selections of seasons and limits and to allow recreational harvest at levels compatible with population and habitat conditions.

DATES: You must submit comments on the proposed migratory bird hunting late-season frameworks by September 5, 2006.

ADDRESSES: Send your comments on the proposals to the Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms MBSP–4107–ARLSQ, 1849 C Street, NW., Washington, DC 20240. All comments received, including names and addresses, will become part of the public record. You may inspect comments during normal business hours at the Service's office in room 4107, Arlington Square Building, 4501 N. Fairfax Drive, Arlington, Virginia.

FOR FURTHER INFORMATION CONTACT: Brian Millsap, Chief, or Ron W. Kokel, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, (703) 358–1714.

SUPPLEMENTARY INFORMATION:

Regulations Schedule for 2006

On April 11, 2006, we published in the **Federal Register** (71 FR 18562) a proposal to amend 50 CFR part 20. The proposal provided a background and overview of the migratory bird hunting regulations process, and dealt with the establishment of seasons, limits, proposed regulatory alternatives for the 2006–07 duck hunting season, and other regulations for hunting migratory game birds under §§ 20.101 through 20.107, 20.109, and 20.110 of subpart K. Major steps in the 2006–07 regulatory cycle relating to open public meetings and **Federal Register** notifications were also identified in the April 11 proposed rule.

On May 30, 2006, we published in the **Federal Register** (71 FR 30786) a second document providing supplemental proposals for early- and late-season migratory bird hunting regulations and the regulatory alternatives for the 2006–07 duck hunting season. The May 30 supplement also provided detailed information on the 2006–07 regulatory schedule and announced the Service Migratory Bird Regulations Committee (SRC) and Flyway Council meetings.

On June 21 and 22, we held open meetings with the Flyway Council Consultants, at which the participants reviewed information on the current status of migratory shore and upland game birds and developed recommendations for the 2006–07 regulations for these species plus regulations for migratory game birds in Alaska, Puerto Rico, and the Virgin Islands; special September waterfowl seasons in designated States; special sea duck seasons in the Atlantic Flyway; and extended falconry seasons. In addition, we reviewed and discussed preliminary information on the status of waterfowl as it relates to the development and selection of the regulatory packages for the 2006–07 regular waterfowl seasons. On July 28, 2006, we published in the **Federal Register** (71 FR 43008) a third document specifically dealing with the proposed frameworks for early-season regulations. In late August, we will publish a rulemaking establishing final frameworks for early-season migratory bird hunting regulations for the 2006–07 season.

On July 26–27, 2006, we held open meetings with the Flyway Council Consultants, at which the participants reviewed the status of waterfowl and developed recommendations for the 2006–07 regulations for these species. This document deals specifically with proposed frameworks for the late-season migratory bird hunting regulations. It will lead to final frameworks from which States may select season dates, shooting hours, areas, and limits.

We have considered all pertinent comments received through July 31, 2006, in developing this document. In addition, new proposals for certain late-season regulations are provided for public comment. The comment period is specified above under **DATES**. We will publish final regulatory frameworks for late-season migratory game bird hunting in the **Federal Register** on or around September 20, 2006.

Population Status and Harvest

The following paragraphs provide a brief summary of information on the status and harvest of waterfowl excerpted from various reports. For more detailed information on methodologies and results, you may obtain complete copies of the various reports at the address indicated under **ADDRESSES** or from our Web site at *http://migratorybirds.fws.gov.*

Status of Ducks

Federal, provincial, and State agencies conduct surveys each spring to estimate the size of breeding populations and to evaluate the conditions of the habitats. These surveys are conducted using fixed-wing aircraft and helicopters and encompass principal breeding areas of North America, and cover over 2.0 million square miles. The Traditional survey area comprises Alaska, Canada, and the northcentral United States, and includes approximately 1.3 million square miles. The Eastern survey area includes parts of Ontario, Quebec, Labrador, Newfoundland, Nova Scotia, Prince Edward Island, New Brunswick, New York, and Maine, an area of approximately 0.7 million square miles.

Breeding Ground Conditions

Despite a very warm winter, breeding waterfowl habitat quality in the United States and Canada is slightly better this year than last year. Improvements in Canadian and U.S. prairie habitats were primarily due to average to above-average precipitation, warm spring temperatures, and carry-over effects from the good summer conditions of 2005. Improved habitat conditions were reflected in the higher number of ponds counted in Prairie Canada this year compared to last year. The 2006 estimate of ponds in Prairie Canada was 4.4 ± 0.2 million ponds, a 13 percent increase from last year's estimate of 3.9 ± 0.2 million ponds, and 32 percent above the 1955–2005 average. Habitat conditions on the U.S prairies were more variable than those on the Canadian prairies. The 2006 pond estimate for the northcentral United States (1.6 ± 0.1 million) was similar to last year's estimate and the long-term average. The total pond estimate (Prairie Canada and United States combined) was 6.1 ± 0.2 million ponds. This was 13 percent greater than last year's estimate of 5.4 ± 0.2 million and 26 percent higher than the long-term average of 4.8 ± 0.1 million ponds.

In the Eastern Survey Area (strata 51–72), spring-like conditions also arrived early with an early ice break-up and

relatively mild temperatures. Biologists reported that habitat conditions were generally good across most of the survey area.

Breeding Population Status

In the Waterfowl Breeding Population and Habitat Survey traditional survey area (strata 1–18, 20–50, and 75–77), the total duck population estimate was 36.2 ± 0.6 [SE] million birds. This was 14 percent greater than last year's estimate of 31.7 ± 0.6 million birds and 9 percent above the 1955–2005 long-term average. Mallard (*Anas platyrhynchos*) abundance was 7.3 ± 0.2 million birds, which was similar to last year's estimate of 6.8 ± 0.3 million birds and to the long-term average. Blue-winged teal (A. *discors*) abundance was 5.9 ± 0.3 million birds. This value was 28 percent greater than last year's estimate of 4.6 ± 0.2 million birds and 30 percent above the long-term average. The estimated abundance of green-winged teal (A. *crecca;* 2.6 ± 0.2 million) was 20 percent greater than last year and 39 percent above the long-term average. The estimated number of gadwall (A. *strepera;* 2.8 ± 0.2 million) was 30 percent greater than last year and was 67 percent above the long-term average, and the estimated number of redheads (*Aythya americana;* 0.9 ± 0.1 million) increased 55 percent relative to 2005 and was 47 percent above the long-term average. The canvasback estimate (A. *valisineria;* 0.7 ± 0.1 million) was 33 percent higher than last year's and was 23 percent higher than the long-term average. The Northern shoveler (*Anas clypeata;* 3.7 ± 0.2 million) estimate was similar to last year's, and 69 percent above the long-term average. Although estimates for most species increased relative to last year's and were greater than their long-term averages, American wigeon (A. *americana;* 2.2 ± 0.1 million) and scaup (*Aythya affinis* and A. *marila* combined; 3.2 ± 0.2 million) estimates were unchanged relative to 2005, but remained 17 percent and 37 percent below their long-term averages, respectively. The estimate for scaup was a record low for the second consecutive year. The Northern pintail (*Anas acuta;* 3.4 ± 0.2 million) estimate was 18 percent below its 1955–2005 average, although this year's estimate was 32 percent greater than that of last year.

The eastern survey area was restratified in 2005, and is now composed of strata 51–72. Mergansers (red-breasted [*Mergus serrator*], common [M. *merganser*], and hooded [*Lophodytes cucullatus;*]), mallards, American black ducks (A. *rubripes*), Ringnecked ducks (*Aythya collaris*), goldeneyes (common [*Bucephala clangula*] and Barrow's [B. *islandica*]) and green-winged teal were all similar to their 2005 estimates. American wigeon (−51 percent) and buffleheads ([B. albeola], −58 percent) were lower than their 2005 estimates. None of the species in the eastern survey area differed from long-term averages.

Fall Flight Estimate

The mid-continent mallard population is composed of mallards from the traditional survey area, Michigan, Minnesota, and Wisconsin, and is 7.9 ± 0.2 million. This is similar to the 2005 estimate of 7.5 ± 0.3 million. The projected mallard fall flight index was 9.8 ± 0.1 million, similar to the 2005 estimate of 9.3 ± 0.1 million birds. These indices were based on revised mid-continent mallard population models, and therefore, differ from those previously published.

See section 1.A. Harvest Strategy Considerations for further discussion of the implications of this information for this year's selection of the appropriate hunting regulations.

Status of Geese and Swans

We provide information on the population status and productivity of North American Canada geese (*Branta canadensis*), brant (B. *bernicla*), snow geese (*Chen caerulescens*), Ross' geese (C. *rossii*), emperor geese (C. *canagica*), white-fronted geese (*Anser albifrons*), and tundra swans (*Cygnus columbianus*). In 2006, the timing of spring snowmelt in important goose and swan nesting areas in most of the Arctic and subarctic was earlier than average. Delayed nesting phenology or reduced nesting effort was indicated for only Alaska's Yukon Delta, other coastal areas of Alaska, and near the Mackenzie River Delta in the western Canadian Arctic. Primary abundance indices in 2006 increased from 2005 levels for 13 goose populations and decreased for 11 goose populations. Primary abundance indices in 2006 for both populations of tundra swans increased from 2005 levels. The Mississippi Flyway Giant and the Atlantic Canada goose populations, the Western Arctic/Wrangel Island snow goose population, and the Pacific white-fronted goose population displayed significant positive trends during the most recent 10-year period. The Short Grass Prairie Canada goose and the Mid-continent light goose populations showed significant negative 10-year trends. The forecast for the production of geese and swans in North America in 2006 is generally favorable and improved from that of 2005.

Waterfowl Harvest and Hunter Activity

During the 2005–06 hunting season, both duck and goose harvest increased from the previous year. U.S. hunters harvested 12,510,800 ducks in 2005–06, compared to 12,385,700 in 2004–05, and they harvested 3,660,700 geese, compared to 3,200,400 geese taken in 2004–05. The five most commonly harvested duck species were mallard (4,466,927), green-winged teal (1,500,479), gadwall (1,363,954), wood duck (1,119,921), and blue-winged/cinnamon teal (703,534).

Review of Public Comments and Flyway Council Recommendations

The preliminary proposed rulemaking, which appeared in the April 11, 2006, **Federal Register,** opened the public comment period for migratory game bird hunting regulations. The supplemental proposed rule, which appeared in the May 30, 2006, **Federal Register,** discussed the regulatory alternatives for the 2006–07 duck hunting season. Late-season comments are summarized below and numbered in the order used in the April 11 and July 28 **Federal Register** documents. We have included only the numbered items pertaining to late-season issues for which we received written comments. Consequently, the issues do not follow in successive numerical or alphabetical order.

We received recommendations from all four Flyway Councils. Some recommendations supported continuation of last year's frameworks. Due to the comprehensive nature of the annual review of the frameworks performed by the Councils, support for continuation of last year's frameworks is assumed for items for which no recommendations were received. Council recommendations for changes in the frameworks are summarized below.

We seek additional information and comments on the recommendations in this supplemental proposed rule. New proposals and modifications to previously described proposals are discussed below. Wherever possible, they are discussed under headings corresponding to the numbered items in the April 11 and July 28, 2006, **Federal Register** documents.

1. Ducks

Categories used to discuss issues related to duck harvest management are: (A) Harvest Strategy Considerations, (B) Regulatory Alternatives, (C) Zones and Split Seasons, and (D) Special Seasons/Species Management. The categories correspond to previously published

issues/discussion, and only those containing substantial recommendations are discussed below.

A. Harvest Strategy Considerations

Council Recommendations: The Atlantic and Pacific Flyway Councils and the Upper- and Lower-Regulations Committees of the Mississippi Flyway Council recommended the adoption of the ''liberal'' regulatory alternative.

The Central Flyway Council also recommended the ''liberal'' alternative. However, as part of their Hunter's Choice experiment, they recommended the following bag limits:

In Colorado, Montana, Nebraska, New Mexico, and Oklahoma, the daily bag limit would be six ducks, with species and sex restrictions as follows: five mallards (no more than two of which may be females), two redheads, two scaup, two wood ducks, one pintail, one mottled duck, and one canvasback. For pintails and canvasbacks, the season length would be 39 days, which may be split according to applicable zones/split duck hunting configurations approved for each State.

In Kansas, North Dakota, South Dakota, Texas, and Wyoming, the daily bag limit would be five ducks, with species and sex restrictions as follows: two scaup, two redheads, and two wood ducks, and only one from the following group—hen mallards, mottled ducks, pintails, canvasbacks.

Service Response: We are continuing development of an Adaptive Harvest Management (AHM) protocol that would allow hunting regulations to vary among Flyways in a manner that recognizes each Flyway's unique breeding-ground derivation of mallards. For the 2006 hunting season, we believe that the prescribed regulatory choice for the Mississippi, Central, and Pacific Flyways should continue to depend on the status of midcontinent mallards. We also recommend that the regulatory choice for the Atlantic Flyway continue to depend on the status of eastern mallards. Investigations of the dynamics of western mallards (and their potential effect on regulations in the West) are continuing; therefore we are not yet prepared to recommend an AHM protocol for this mallard stock.

For the 2006 hunting season, we are continuing to consider the same regulatory alternatives as those used last year. The nature of the restrictive, moderate, and liberal alternatives has remained essentially unchanged since 1997, except that extended framework dates have been offered in the moderate and liberal regulatory alternatives since 2002. Also, we agreed in 2003 to place a constraint on closed seasons in the western three Flyways whenever the midcontinent mallard breeding-population size (traditional survey area plus Minnesota, Michigan, and Wisconsin) is ≥5.5 million.

Optimal AHM strategies for the 2006 hunting season were calculated using: (1) Harvest-management objectives specific to each mallard stock; (2) the 2006 regulatory alternatives; and (3) current population models and associated weights for midcontinent and eastern mallards. Based on this year's survey results of 7.86 million midcontinent mallards (traditional survey area plus Michigan, Minnesota, and Wisconsin), 4.45 million ponds in Prairie Canada, and 899,000 eastern mallards, we believe the appropriate regulatory choice for all four Flyways is the ''liberal'' alternative.

Therefore, we concur with the recommendations of the Atlantic, Mississippi, Central, and Pacific Flyway Councils regarding selection of the ''liberal'' regulatory alternative and propose to adopt the ''liberal'' regulatory alternative, as described in the May 30 **Federal Register**.

Regarding Hunter's Choice, we support the Central Flyway Council's recommendation to initiate a 3-year evaluation of the Central Flyway's Hunter's Choice duck bag limit this year. The Central Flyway's Hunter's Choice regulations are intended to limit harvest on pintails and canvasbacks in a manner similar to the season-within-a-season regulations. Hunter's Choice regulations should also reduce harvests of mottled ducks and hen mallards, while maintaining full hunting opportunity on abundant species such as drake mallards. For the species included in the aggregate bag limit, the harvest of one species is intended to ''buffer'' the harvest of the others, thus reducing the harvest of all species included in the one-bird category. The Central Flyway has accumulated 4 years of baseline information on harvests resulting from ''season-within-a-season'' regulations in the Central Flyway; the season length for pintails and canvasbacks in season-within-a-season States under the ''liberal'' alternative will be 39 days.

Five States (Kansas, North Dakota, South Dakota, Texas, and Wyoming) have been randomly assigned to Hunter's Choice regulations and the remaining five States (Colorado, Montana, Nebraska, New Mexico, and Oklahoma) will serve as controls (season-within-a-season regulations) as the evaluation proceeds. The overall duck daily bag limit will be reduced from six to five for the Hunter's Choice States.

Finally, we believe that implementation of this experiment should not preclude any future changes in hunting regulations that may be deemed necessary on an annual basis for any other duck species in the Central Flyway, if such changes are deemed necessary.

D. Special Seasons/Species Management

iii. Black Ducks

Council Recommendations: The Atlantic Flyway Council and the Upper- and Lower-Regulations Committees of the Mississippi Flyway Council recommended that black duck harvest regulations remain unchanged for the 2006–07 season, while the Joint Atlantic Flyway—Mississippi Flyway Black Duck Committee continues to work with the Canadian Wildlife Service and the Fish and Wildlife Service to reach consensus on an interim black duck harvest strategy.

Service Response: We are proposing no change in the current harvest strategy on black ducks this year until new analyses are completed and evaluated with the United States Geological Survey and the International Black Duck Harvest Strategy Committee. We encourage both the Atlantic and Mississippi Flyway Councils to participate in this process. An important component of any new harvest strategy will be agreement on population objectives and regulatory strategies to inform future harvest-management decisions.

iv. Canvasbacks

Council Recommendations: The Atlantic and Pacific Flyway Councils and the Upper- and Lower-Region Regulations Committees of the Mississippi Flyway Council recommended a full season for canvasbacks consisting of a 1-bird daily bag limit and a 60-day season in the Atlantic and Mississippi Flyways, and 107-day season in the Pacific Flyway.

The Central Flyway Council, as part of their Hunter's Choice experiment, recommended a full season (74 days) for canvasbacks with a 1-bird daily bag limit in Kansas, North Dakota, South Dakota, Texas, and Wyoming and a 39-day season with a 1-bird daily bag limit in Colorado, Montana, Nebraska, New Mexico, and Oklahoma.

Service Response: This year's spring survey resulted in an estimate of 691,000 canvasbacks. This was 33 percent above the 2005 estimate of 520,600 canvasbacks and 23 percent above the 1955–2005 average. The estimate of ponds in Prairie Canada was 4.4 million, which was 13 percent above last year and 32 percent above the long-term average. According to the canvasback harvest strategy, the

allowable harvest in the United States is 266,000 birds. Since allowable harvest is larger than the predicted harvest in the United States during a ''liberal'' duck season (118,900 canvasbacks), a canvasback season spanning the entire length of the 2006–07 regular duck season is supported.

Furthermore, we agree with the Central Flyway Council's recommendation to adopt a 39-day ''season-within-a-season'' for canvasbacks in Colorado, Montana, Nebraska, New Mexico, and Oklahoma. We understand that this departure from the canvasback strategy is a necessary part of the experimental ''Hunter's Choice'' season.

v. Pintails

Council Recommendations: The Atlantic and Pacific Flyway Councils and the Upper- and Lower-Region Regulations Committees of the Mississippi Flyway Council recommended a full season for pintails consisting of a 1-bird daily bag limit and a 60-day season in the Atlantic and Mississippi Flyways, and a 107-day season in the Pacific Flyway.

The Central Flyway Council, as part of their Hunter's Choice experiment, recommended a full season (74 days) for pintails with a 1-bird daily bag limit in Kansas, North Dakota, South Dakota, Texas, and Wyoming and a 39-day season with a 1-bird daily bag limit in Colorado, Montana, Nebraska, New Mexico, and Oklahoma.

Service Response: During the spring of 2006, each Flyway Council endorsed the incorporation of several technical updates to the modeling framework used in the pintail harvest strategy. Based on these technical updates, along with an observed spring breeding population of 3.39 million, an overflight-bias-corrected breeding population of 4.23 million, and a projected fall flight of 5.34 million pintails, the interim pintail harvest strategy prescribes a full season and a 1-bird daily bag limit in all Flyways. Under the ''liberal'' season length, this regulation is expected to result in a harvest of 569,000 pintails and an observed breeding population estimate of 3.45 million in 2007.

Furthermore, we agree with the Central Flyway Council's recommendation to adopt a 39-day ''season-within-a-season'' for pintails in Colorado, Montana, Nebraska, New Mexico, and Oklahoma. We understand that this departure from the pintail strategy is a necessary part of the experimental ''Hunter's Choice'' season.

vi. Scaup

Council Recommendations: The Atlantic, Central, and Pacific Flyway Councils and the Upper- and Lower-Region Regulations Committees of the Mississippi Flyway Council recommended no changes in scaup harvest regulations for 2006. All the Flyway Councils reiterated their support for the cooperative development of a comprehensive scaup harvest management strategy.

Service Response: We are aware that the Flyway Councils and the Service have not made the progress anticipated in the development of a viable strategy to manage harvest that acknowledges the uncertainty about what factors are really influencing scaup numbers, but at the same time provides guidance on what changes in regulations are still appropriate.

Although we remain very concerned about the continued decline in scaup numbers and other evidence that this species is not doing well, we are proposing no change in scaup regulations for the 2006–07 hunting season. This decision is made with the firm understanding that a harvest strategy will be available for review this fall. The Service will develop the draft in time for review by the Flyway Councils at their winter meetings. Recommendations regarding the strategy will be expected from the Council meetings next March for consideration during the early-season regulations process.

We also are aware that much time and effort have been spent to date by researchers and managers to begin to help identify those factors during the scaup's annual cycle that are most important in influencing population change and we want this momentum to continue. We also acknowledge that our database on scaup, compared to many other waterfowl species, is limited; and any enhancement of our understanding of scaup population dynamics, which has a direct bearing on the utility of the harvest strategy, will require better information from the field. We encourage the Flyway Councils to work with us to help identify and support additional data-gathering activities for scaup and work with other groups and organizations to ensure that their programs, including existing or new habitat initiatives, can also be aligned to benefit scaup populations.

vii. Mottled Ducks

We continue to be concerned about the status of the Western Gulf Coast Population of mottled ducks. We recognize that the mottled duck is an integral part of the Central Flyway's Hunter's Choice bag-limit experiment, and we support inclusion of the mottled duck among those species with bag-limit restriction in the experiment as requested by the Central Flyway Council. However, we want to be clear that if it is determined that further reductions in harvest, or a different approach to harvest reduction, are warranted at any time over the next 3 years, we will make those changes. Thus, the implementation of this experiment will not preclude any future changes in hunting regulations that may be deemed necessary on an annual basis for mottled ducks.

We are pleased to see that the Central and Mississippi Flyway Councils and Service staff have initiated the work we requested on an approach to accomplish harvest reductions if reductions are determined to be necessary. We encourage that work to continue.

3. Mergansers

Council Recommendations: The Atlantic Flyway Council and Upper- and Lower-Region Regulations Committees of the Mississippi Flyway Council recommended that the daily bag limit on hooded mergansers be increased from 1 to 2 birds.

Service Response: We support the recommendations of the Atlantic and Mississippi Flyway to increase the bag limit for hooded mergansers from 1 to 2 and note that the survey information suggests this species is increasing throughout its range. Based on this fact, we propose a 2-bird daily bag limit for hooded mergansers in the Atlantic, Mississippi, and Central Flyways.

4. Canada Geese

B. Regular Seasons

Council Recommendations: The Atlantic Flyway Council forwarded a number of recommendations concerning Canada geese. First, the Council recommended that the framework opening date for the regular Canada goose season in the Lake Champlain Zones of Vermont and New York, the Interior Zone of Vermont, and the Western Zone of Massachusetts be fixed at October 20, beginning in 2006. Regarding the experimental season in Back Bay, Virginia, the Council recommended that the Service allow 1,000 permits to be issued in North Carolina's Northeast Hunt Unit, that the daily bag limit in Virginia be increased from 1 bird to 2 birds, and that the experimental season in both North Carolina and Virginia be expanded from 15 days to 30 days. Third, the Council recommended that the framework

closing date for North Atlantic Population (NAP) geese in established Low Harvest Zones be extended from January 31 to February 15. Lastly, the Council recommended that the season frameworks for Southern James Bay Population (SJBP) Canada geese in the Pymatuning Zone of Pennsylvania be increased to a 50-day season with framework dates of October 1 to January 31 and a daily bag limit of 2 geese.

The Upper- and Lower-Region Regulations Committees of the Mississippi Flyway Council recommended a number of changes in Canada goose seasons lengths and bag limits for several States in the Flyway. These changes are an outgrowth of recent revisions made to Canada goose harvest and population management plans and an evolving Canada goose harvest-management philosophy in the Flyway. The changes in harvest strategies and philosophies are largely driven by the increasing numbers of giant Canada geese in the Flyway and the decreasing importance of interior Canada geese to goose harvest opportunities in the Flyway. It appears that the large numbers of giant Canada geese may be buffering, to some extent, hunting pressure on interior Canada goose populations. These changes will allow States to evaluate the potential of this buffering effect. In keeping with the change in harvest management philosophy for Canada geese in the Flyway, the Council is also recommending to eliminate the requirement for Council and Service approval for States wanting to split their Canada goose seasons into 3 segments, including the requirement for a 3-year evaluation.

The Central Flyway Council recommended increasing the season length for Canada geese from 95 to 107 days in the east-tier States of the Flyway.

The Pacific Flyway Council recommended the following changes for geese in the Pacific Flyway:

1. Modify the frameworks for Aleutian Canada geese in southwest Oregon and northwest California by:

a. Changing season lengths to allow 107 days and changing outside dates to allow seasons until March 10 in Oregon and California in specified zones;

b. Redefining Oregon's Southwest Zone and creating a new South Coast Zone, with same bag limits in both zones; and

c. Authorizing a 3-way split season in Oregon's new South Coast Zone.

2. Remove Grays Harbor County, Washington, from the Southwest Washington Quota Zone.

3. Increase the dark goose daily bag limit in the Lincoln and Clark County Zone of Nevada from 2 to 3 per day.

4. Eliminate Utah's Washington County Canada Goose Zone and create a Northern Utah Goose Zone.

Service Response: We concur with the Atlantic Flyway Council's recommendation to change the opening framework date to a fixed date of October 20 in a portion of the Atlantic Population (AP) harvest area provided these changes are consistent with the objectives of the pending AP Management Plan. In addition, we concur with the recommended changes in the number of permits, season length, and bag limits for Back Bay, Virginia, and North Carolina's Northeast Hunt Unit as allowed in the MOA's during the 3-year evaluation. Further, we concur with the season framework closing-date extension to February 15 in the Low Harvest Zones for the North Atlantic Population. And, finally, we concur with framework changes recommended for the Pymatuning Zone of Pennsylvania to harvest SJBP Canada geese.

With reference to three-way split seasons for Canada geese in the Mississippi Flyway, we concur that the move toward redirection of harvest management from one of managing specific populations of Canada geese toward a more general approach of managing the collective harvest of Canada geese in the Flyway, together with the experience gained to date with three-way splits, eliminates the need for State-by-State approval by the Flyway Council and the Service and a 3-year evaluation.

We concur with the Central Flyway's recommendation to increase the season length from 95 to 107 days for Canada geese in the east tier States. The Tall Grass Prairie and Western Prairie/Great Plains Populations of Canada geese that migrate through and winter in this portion of the Flyway are above population objective levels, therefore the proposed increase in season length will provide additional hunting opportunity on these populations.

We also concur with all of the recommendations forwarded by the Pacific Flyway Council. The Service supports the changes proposed and recognizes that the changes in California and Oregon are intended to address increasing depredation problems associated with Aleutian Canada geese. Aleutian Canada geese continue to increase rapidly and currently are above the population objective levels identified in the Flyway management plan. The increased harvest opportunity will help address these depredation concerns in northwest California and southwest Oregon. The other changes proposed for Canada geese in Washington, Utah, and Nevada, are relatively minor boundary changes in harvest zones or bag limit increases that will help address depredation concerns in these States and will not impact the harvest of other Canada goose populations of management concern in the Flyway.

5. White-Fronted Geese

Council Recommendations: The Pacific Flyway Council recommended modification of frameworks for white-fronted geese in the Klamath Basin of Oregon and California by:

1. Increasing the white-fronted goose daily bag limit from 2 to 4 in California's Northeastern Zone;

2. Increasing the white-fronted goose daily bag limit from 3 to 4 in California's Balance of State Zone (except in the Sacramento Valley Special Management Area);

3. Redefine Oregon's Harney, Klamath, Lake and Malheur County Zone and create a new zone comprised of just Klamath County;

4. Change the outside dates in the new Klamath County Zone only to extend to March 10;

5. In the Klamath County Zone, late seasons would be for white-fronted geese only with a daily bag limit of 2;

6. Create a 3-way split in Oregon's new Klamath County Zone.

Service Response: We support the recommendations of the Pacific Flyway Council. Pacific white-fronted geese are currently well above population objective levels with this year's index totaling more than 500,000, well above the population objective of 300,000. Increasing numbers of this population are now staging in the Klamath Basin region of Oregon and California in the spring. These increasing numbers of geese are causing agricultural depredation problems that can be partially addressed by this proposed change in season structure for these geese. We support the use of sport harvest to address these concerns when possible. We will require monitoring and evaluation of these season changes to ensure that no adverse impacts occur on other goose populations of management concern.

6. Brant

Council Recommendations: The Pacific Flyway Council recommends increasing the season length for brant in California from 15 to 30 days and increasing the season length in Washington from 8 to 16 days.

Service Response: We concur with the Pacific Flyway Council recommendation to return to the Pacific Brant season frameworks that were in place prior to last year based on the midwinter survey index from last year and consistency with the Flyway Management Plan. However, we reiterate the concern expressed previously about provisions in the management plan that allow frequent changes among the three harvest levels. We request that the Flyway Council review these provisions and consider methods that might reduce the potential frequency of annual changes, such as those we have experienced in the last 2 years.

8. Swans

Council Recommendations: The Pacific Flyway Council recommended allowing hunters in Nevada two swan permits per year.

Service Response: We concur with the Pacific Flyway Council's recommendation concerning Nevada. We continue to support the carefully controlled harvest of Tundra swans in the Pacific Flyway States and continue to require careful monitoring of this harvest to insure that only small numbers of Trumpeter swans can be taken during this season. During the past 10 years, Nevada has only harvested one Trumpeter swan in this season. Further, Nevada's permit allocation would not be increased from that offered in previous years (650). The proposed change that would allow hunters a second permit is consistent with the existing harvest strategy in the Flyway management plan and no increase in Trumpeter swan harvest is expected. Monitoring programs will ensure that the season is closed if the assigned quota of five Trumpeter swans are harvested in the season.

Regarding the Eastern Population (EP) of tundra swans, the mid-winter index in 2006 was 74,500 and below the population objective of 80,000 for the second consecutive year. As a result, the 3-year average population index from the mid-winter has declined to 78,100. In accordance with the 1998 Hunt Plan, whenever the 3-year average drops below the population objective for more than one year, permit reductions should be considered. Therefore, we encourage the Flyway Councils to review the current status of EP tundra swans and determine appropriate permit changes prior to the development of the 2007–08 hunting regulations.

Public Comment Invited

The Department of the Interior's policy is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. We intend that adopted final rules be as responsive as possible to all concerned interests and, therefore, seek the comments and suggestions of the public, other concerned governmental agencies, nongovernmental organizations, and other private interests on these proposals. Accordingly, we invite interested persons to submit written comments, suggestions, or recommendations regarding the proposed regulations to the address indicated under **ADDRESSES.**

Special circumstances involved in the establishment of these regulations limit the amount of time that we can allow for public comment. Specifically, two considerations compress the time in which the rulemaking process must operate: (1) The need to establish final rules at a point early enough in the summer to allow affected State agencies to adjust their licensing and regulatory mechanisms; and (2) the unavailability, before mid-June, of specific, reliable data on this year's status of some waterfowl and migratory shore and upland game bird populations. Therefore, we believe that to allow comment periods past the dates specified in **DATES** is contrary to the public interest.

Before promulgation of final migratory game bird hunting regulations, we will take into consideration all comments received. Such comments, and any additional information received, may lead to final regulations that differ from these proposals. You may inspect comments received on the proposed annual regulations during normal business hours at the Service's office in room 4107, 4501 North Fairfax Drive, Arlington, Virginia. For each series of proposed rulemakings, we will establish specific comment periods. We will consider, but possibly may not respond in detail to, each comment. However, as in the past, we will summarize all comments received during the comment period and respond to them in the final rule.

NEPA Consideration

NEPA considerations are covered by the programmatic document ''Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FSES 88–14),'' filed with the Environmental Protection Agency on June 9, 1988. We published a Notice of Availability in the **Federal Register** on June 16, 1988 (53 FR 22582). We published our Record of Decision on August 18, 1988 (53 FR 31341). In addition, an August 1985 environmental assessment entitled ''Guidelines for Migratory Bird Hunting Regulations on Federal Indian Reservations and Ceded Lands'' is available from the address indicated under the caption **ADDRESSES.** In a notice published in the September 8, 2005, **Federal Register** (70 FR 53376), we announced our intent to develop a new Supplemental Environmental Impact Statement for the migratory bird hunting program. Public scoping meetings were held in the spring of 2006, as we announced in a March 9, 2006, **Federal Register** notice (71 FR 12216).

Endangered Species Act Consideration

Prior to issuance of the 2006–07 migratory game bird hunting regulations, we will comply with provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543; hereinafter the Act), to ensure that hunting is not likely to jeopardize the continued existence of any species designated as endangered or threatened or modify or destroy its critical habitat, and is consistent with conservation programs for those species. Consultations under Section 7 of this Act may cause us to change proposals in this and future supplemental proposed rulemaking documents.

Executive Order 12866

The migratory bird hunting regulations are economically significant and were reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. As such, a cost/benefit analysis was initially prepared in 1981. This analysis was subsequently revised annually from 1990–96, updated in 1998, and updated again in 2004. It is further discussed below under the heading *Regulatory Flexibility Act.* Results from the 2004 analysis indicate that the expected welfare benefit of the annual migratory bird hunting frameworks is on the order of $734 million to $1.064 billion, with a mid-point estimate of $899 million. Copies of the cost/benefit analysis are available upon request from the address indicated under **ADDRESSES** or from our Web site at *www.migratorybirds.gov.*

Executive Order 12866 also requires each agency to write regulations that are easy to understand. We invite comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order

of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the rule? (6) What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov.*

Regulatory Flexibility Act

These regulations have a significant economic impact on substantial numbers of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). We analyzed the economic impacts of the annual hunting regulations on small business entities in detail as part of the 1981 cost-benefit analysis discussed under *Executive Order 12866.* This analysis was revised annually from 1990–95. In 1995, the Service issued a Small Entity Flexibility Analysis (Analysis), which was subsequently updated in 1996, 1998, and 2004. The primary source of information about hunter expenditures for migratory game bird hunting is the National Hunting and Fishing Survey, which is conducted at 5-year intervals. The 2004 Analysis was based on the 2001 National Hunting and Fishing Survey and the U.S. Department of Commerce's County Business Patterns, from which it was estimated that migratory bird hunters would spend between $481 million and $1.2 billion at small businesses in 2004. Copies of the Analysis are available upon request from the address indicated under **ADDRESSES** or from our Web site at *www.migratorybirds.gov.*

Small Business Regulatory Enforcement Fairness Act

This rule is a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. For the reasons outlined above, this rule has an annual effect on the economy of $100 million or more. However, because this rule establishes hunting seasons, we do not plan to defer the effective date under the exemption contained in 5 U.S.C. 808(1).

Paperwork Reduction Act

We examined these regulations under the Paperwork Reduction Act of 1995 (PRA). There are no new information collections in this proposed rule that would require OMB approval under the PRA. The existing various recordkeeping and reporting requirements imposed under regulations established in 50 CFR part 20, Subpart K, are utilized in the formulation of migratory game bird hunting regulations. Specifically, OMB has approved the information collection requirements of the surveys associated with the Migratory Bird Harvest Information Program and assigned clearance number 1018–0015 (expires 2/29/2008). This information is used to provide a sampling frame for voluntary national surveys to improve our harvest estimates for all migratory game birds in order to better manage these populations.

A Federal 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.

Unfunded Mandates Reform Act

We have determined and certify, in compliance with the requirements of the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of $100 million or more in any given year on local or State government or private entities. Therefore, this rule is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Civil Justice Reform—Executive Order 12988

The Department, in promulgating this proposed rule, has determined that this proposed rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

Takings Implication Assessment

In accordance with Executive Order 12630, this proposed rule, authorized by the Migratory Bird Treaty Act, does not have significant takings implications and does not affect any constitutionally protected property rights. This rule will not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property. In fact, these rules allow hunters to exercise otherwise unavailable privileges and, therefore, reduce restrictions on the use of private and public property.

Energy Effects—Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. While this proposed rule is a significant regulatory action under Executive Order 12866, it is not expected to adversely affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Government-to-Government Relationship with Tribes

Due to the migratory nature of certain species of birds, the Federal Government has been given responsibility over these species by the Migratory Bird Treaty Act. Thus, 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 512 DM 2, we have evaluated possible effects on Federally recognized Indian tribes and have determined that there are no effects on Indian trust resources. However, in the April 11 proposed rule we solicited proposals for special migratory bird hunting regulations for certain Tribes on Federal Indian reservations, off-reservation trust lands, and ceded lands for the 2006–07 migratory bird hunting season. The resulting proposals will be contained in a separate proposed rule. By virtue of these actions, we have consulted with all the Tribes affected by this rule.

Federalism Effects

Due to the migratory nature of certain species of birds, the Federal Government has been given responsibility over these species by the Migratory Bird Treaty Act. We annually prescribe frameworks from which the States make selections regarding the hunting of migratory birds, and we employ guidelines to establish special regulations on Federal Indian reservations and ceded lands. This process preserves the ability of the States and tribes to determine which seasons meet their individual needs. Any State or Indian tribe may be more restrictive than the Federal frameworks at any time. The frameworks are developed in a cooperative process with the States and the Flyway Councils. This process allows States to participate in the development of frameworks from which they will make selections, thereby having an influence on their own regulations. These rules do not have a substantial direct effect on fiscal capacity, change the roles or responsibilities of Federal or State governments, or intrude on State policy or administration. Therefore, in

accordance with Executive Order 13132, these regulations do not have significant federalism effects and do not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

The rules that eventually will be promulgated for the 2006–07 hunting season are authorized under 16 U.S.C. 703–712 and 16 U.S.C. 742 a–j.

Dated: August 11, 2006.

David M. Verhey,

Acting Assistant Secretary for Fish and Wildlife and Parks.

Proposed Regulations Frameworks for 2006–07 Late Hunting Seasons on Certain Migratory Game Birds

Pursuant to the Migratory Bird Treaty Act and delegated authorities, the Department has approved frameworks for season lengths, shooting hours, bag and possession limits, and outside dates within which States may select seasons for hunting waterfowl and coots between the dates of September 1, 2006, and March 10, 2007.

General

Dates: All outside dates noted below are inclusive.

Shooting and Hawking (taking by falconry) Hours: Unless otherwise specified, from one-half hour before sunrise to sunset daily.

Possession Limits: Unless otherwise specified, possession limits are twice the daily bag limit.

Flyways and Management Units

Waterfowl Flyways

Atlantic Flyway—includes Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia.

Mississippi Flyway—includes Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Ohio, Tennessee, and Wisconsin.

Central Flyway—includes Colorado (east of the Continental Divide), Kansas, Montana (Counties of Blaine, Carbon, Fergus, Judith Basin, Stillwater, Sweetgrass, Wheatland, and all counties east thereof), Nebraska, New Mexico (east of the Continental Divide except the Jicarilla Apache Indian Reservation), North Dakota, Oklahoma, South Dakota, Texas, and Wyoming (east of the Continental Divide).

Pacific Flyway—includes Alaska, Arizona, California, Idaho, Nevada, Oregon, Utah, Washington, and those portions of Colorado, Montana, New Mexico, and Wyoming not included in the Central Flyway.

Management Units

High Plains Mallard Management Unit—roughly defined as that portion of the Central Flyway that lies west of the 100th meridian.

Definitions: For the purpose of hunting regulations listed below, the collective terms ''dark'' and ''light'' geese include the following species:

Dark geese: Canada geese, white-fronted geese, brant, and all other goose species except light geese.

Light geese: snow (including blue) geese and Ross' geese.

Area, Zone, and Unit Descriptions: Geographic descriptions related to late-season regulations are contained in a later portion of this document.

Area-Specific Provisions: Frameworks for open seasons, season lengths, bag and possession limits, and other special provisions are listed below by Flyway.

Compensatory Days in the Atlantic Flyway: In the Atlantic Flyway States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, North Carolina, Pennsylvania, and Virginia, where Sunday hunting is prohibited statewide by State law, all Sundays are closed to all take of migratory waterfowl (including mergansers and coots).

Atlantic Flyway

Ducks, Mergansers, and Coots

Outside Dates: Between the Saturday nearest September 24 (September 23) and the last Sunday in January (January 28).

Hunting Seasons and Duck Limits: 60 days. The daily bag limit is 6 ducks, including no more than 4 mallards (2 hens), 2 scaup, 1 black duck, 1 pintail, 1 canvasback, 1 mottled duck, 1 fulvous whistling duck, 2 wood ducks, 2 redheads, and 4 scoters.

Closures: The season on harlequin ducks is closed.

Sea Ducks: Within the special sea duck areas, during the regular duck season in the Atlantic Flyway, States may choose to allow the above sea duck limits in addition to the limits applying to other ducks during the regular duck season. In all other areas, sea ducks may be taken only during the regular open season for ducks and are part of the regular duck season daily bag (not to exceed 4 scoters) and possession limits.

Merganser Limits: The daily bag limit of mergansers is 5, only 2 of which may be a hooded merganser. In States that include mergansers in the duck bag limit, the daily limit is the same as the duck bag limit, only two of which may be hooded mergansers.

Coot Limits: The daily bag limit is 15 coots.

Lake Champlain Zone, New York: The waterfowl seasons, limits, and shooting hours shall be the same as those selected for the Lake Champlain Zone of Vermont.

Connecticut River Zone, Vermont: The waterfowl seasons, limits, and shooting hours shall be the same as those selected for the Inland Zone of New Hampshire.

Zoning and Split Seasons: Delaware, Florida, Georgia, Maryland, North Carolina, Rhode Island, South Carolina, and Virginia may split their seasons into three segments; Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Vermont, and West Virginia may select hunting seasons by zones and may split their seasons into two segments in each zone.

Canada Geese

Season Lengths, Outside Dates, and Limits: Specific regulations for Canada geese are shown below by State. These seasons also include white-fronted geese. Unless specified otherwise, seasons may be split into two segments. In areas within States where the framework closing date for Atlantic Population (AP) goose seasons overlaps with special late-season frameworks for resident geese, the framework closing date for AP goose seasons is January 14.

Connecticut: North Atlantic Population (NAP) Zone: Between October 1 and January 31, a 60-day season may be held with a 2-bird daily bag limit in the H Unit; and between October 1 and February 15, a 70-day season with a 3-bird daily bag in the L Unit.

Atlantic Population (AP) Zone: A 45-day season may be held between the fourth Saturday in October (October 28) and January 31, with a 3-bird daily bag limit.

South Zone: A special season may be held between January 15 and February 15, with a 5-bird daily bag limit.

Delaware: A 45-day season may be held between November 15 and January 31, with a 2-bird daily bag limit.

Florida: A 70-day season may be held between November 15 and February 15, with a 5-bird daily bag limit.

Georgia: In specific areas, a 70-day season may be held between November

15 and February 15, with a 5-bird daily bag limit.

Maine: A 60-day season may be held Statewide between October 1 and January 31, with a 2-bird daily bag limit.

Maryland: Resident Population (RP) Zone: A 70-day season may be held between November 15 and February 15, with a 5-bird daily bag limit.

AP Zone: A 45-day season may be held between November 15 and January 31, with a 2-bird daily bag limit.

Massachusetts: NAP Zone: A 60-day season may be held between October 1 and January 31, with a 2-bird daily bag limit. Additionally, a special season may be held from January 15 to February 15, with a 5-bird daily bag limit.

AP Zone: A 45-day season may be held between October 20 and January 31, with a 3-bird daily bag limit.

New Hampshire: A 60-day season may be held statewide between October 1 and January 31, with a 2-bird daily bag limit.

New Jersey: Statewide: A 45-day season may be held between the fourth Saturday in October (October 28) and January 31, with a 3-bird daily bag limit.

Special Late Goose Season Area: An experimental season may be held in designated areas of North and South New Jersey from January 15 to February 15, with a 5-bird daily bag limit.

New York: NAP Zone: Between October 1 and January 31, a 60-day season may be held, with a 2-bird daily bag limit in the High Harvest areas; and between October 1 and February 15, a 70-day season may be held, with a 3-bird daily bag limit in the Low Harvest areas.

Special Late Goose Season Area: An experimental season may be held between January 15 and February 15, with a 5-bird daily bag limit in designated areas of Chemung, Delaware, Tioga, Broome, Sullivan, Westchester, Nassau, Suffolk, Orange, Dutchess, Putnam, and Rockland Counties.

AP Zone: A 45-day season may be held between the fourth Saturday in October (October 28), except in the Lake Champlain Area where the opening date is October 20, and January 31, with a 3-bird daily bag limit.

RP Zone: A 70-day season may be held between the fourth Saturday in October (October 28) and February 15, with a 5-bird daily bag limit.

North Carolina: SJBP Zone: A 70-day season may be held between October 1 and December 31, with a 2-bird daily bag limit.

RP Zone: A 70-day season may be held between October 1 and February 15, with a 5-bird daily bag limit.

Northeast Hunt Unit: A 30-day experimental season (1,000 permits) may be held concurrent with the season selected for the Back Bay Area of Virginia. The seasonal bag limit is 1 bird.

Pennsylvania: SJBP Zone: A 70-day season may be held between the second Saturday in October (October 14) and February 15, with a 2-bird daily bag limit until January 14 and a 5-bird daily bag limit between January 15 and February 15.

Pymatuning Zone: A 50-day season may be held between October 1 and January 31, with a 2-bird daily bag limit.

RP Zone: A 70-day season may be held between November 15 and February 15, with a 5-bird daily bag limit.

AP Zone: A 45-day season may be held between the fourth Saturday in October (October 28) and January 31, with a 3-bird daily bag limit.

Special Late Goose Season Area: An experimental season may be held from January 15 to February 15, with a 5-bird daily bag limit.

Rhode Island: A 60-day season may be held between October 1 and January 31, with a 2-bird daily bag limit. An experimental season may be held in designated areas from January 15 to February 15, with a 5-bird daily bag limit.

South Carolina: In designated areas, a 70-day season may be held during November 15 to February 15, with a 5-bird daily bag limit.

Vermont: A 45-day season may be held between the fourth Saturday in October (October 28), except in the Lake Champlain Area where the opening date is October 20, and January 31, with a 3-bird daily bag limit.

Virginia: SJBP Zone: A 40-day season may be held between November 15 and January 14, with a 2-bird daily bag limit. Additionally, an experimental season may be held between January 15 and February 15, with a 5-bird daily bag limit.

AP Zone: A 45-day season may be held between November 15 and January 31, with a 2-bird daily bag limit.

RP Zone: A 70-day season may be held between November 15 and February 15, with a 5-bird daily bag limit.

Back Bay Area: A 30-day experimental season may be held between December 25 and January 28 in the AP Zone with a 2-bird daily bag limit.

West Virginia: A 70-day season may be held between October 1 and January 31, with a 3-bird daily bag limit.

Light Geese

Season Lengths, Outside Dates, and Limits: States may select a 107-day season between October 1 and March 10, with a 15-bird daily bag limit and no possession limit. States may split their seasons into three segments, except in Delaware and Maryland, where, following the completion of their duck season, and until March 10, Delaware and Maryland may split the remaining portion of the season to allow hunting on Mondays, Wednesdays, Fridays, and Saturdays only.

Brant

Season Lengths, Outside Dates, and Limits: States may select a 30-day season between the Saturday nearest September 24 (September 23) and January 31, with a 2-bird daily bag limit. States may split their seasons into two segments.

Mississippi Flyway

Ducks, Mergansers, and Coots

Outside Dates: Between the Saturday nearest September 24 (September 23) and the last Sunday in January (January 28).

Hunting Seasons and Duck Limits: The season may not exceed 60 days, with a daily bag limit of 6 ducks, including no more than 4 mallards (no more than 2 of which may be females), 3 mottled ducks, 2 scaup, 1 black duck, 1 pintail, 1 canvasback, 2 wood ducks, and 2 redheads.

Merganser Limits: The daily bag limit is 5, only 2 of which may be hooded mergansers. In States that include mergansers in the duck bag limit, the daily limit is the same as the duck bag limit, only 2 of which may be hooded mergansers.

Coot Limits: The daily bag limit is 15 coots.

Zoning and Split Seasons: Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Ohio, Tennessee, and Wisconsin may select hunting seasons by zones.

In Alabama, Arkansas, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Ohio, Tennessee, and Wisconsin, the season may be split into two segments in each zone.

In Mississippi, the season may be split into three segments.

Geese

Split Seasons: Seasons for geese may be split into three segments.

Season Lengths, Outside Dates, and Limits: States may select seasons for light geese not to exceed 107 days, with 20 geese daily between the Saturday

nearest September 24 (September 23) and March 10; for white-fronted geese not to exceed 72 days with 2 geese daily or 86 days with 1 goose daily between the Saturday nearest September 24 (September 23) and the Sunday nearest February 15 (February 18); and for brant not to exceed 70 days, with 2 brant daily or 107 days with 1 brant daily between the Saturday nearest September 24 (September 23) and January 31. There is no possession limit for light geese. Specific regulations for Canada geese and exceptions to the above general provisions are shown below by State. Except as noted below, the outside dates for Canada geese are the Saturday nearest September 24 (September 23) and January 31.

Alabama: In the SJBP Goose Zone, the season for Canada geese may not exceed 50 days. Elsewhere, the season for Canada geese may extend for 70 days in the respective duck-hunting zones. The daily bag limit is 2 Canada geese.

Arkansas: In the Northwest Zone, the season for Canada geese may extend for 33 days, provided that one segment of at least 9 days occurs prior to October 15. In the remainder of the State, the season may not exceed 23 days. The season may extend to February 15, and may be split into 2 segments. The daily bag limit is 2 Canada geese.

Illinois: The season for Canada geese may extend for 79 days in the North and Central Zones and 57 days in the South Zone. The daily bag limit is 2 Canada geese.

Indiana: The season for Canada geese may extend for 70 days, except in the SJBP Zone, where the season may not exceed 50 days. The daily bag limit is 2 Canada geese.

Iowa: The season for Canada geese may extend for 90 days. The daily bag limit is 2 Canada geese.

Kentucky: (a) Western Zone—The season for Canada geese may extend for 67 days (82 days in Fulton County). The season in Fulton County may extend to February 15. The daily bag limit is 2 Canada geese.

(b) Pennyroyal/Coalfield Zone—The season may extend for 50 days. The daily bag limit is 2 Canada geese.

(c) Remainder of the State—The season may extend for 50 days. The daily bag limit is 2 Canada geese.

Louisiana: The season for Canada geese may extend for 16 days. During the season, the daily bag limit is 1 Canada goose and 2 white-fronted geese with a 72-day white-fronted goose season or 1 white-fronted goose with an 86-day season. Hunters participating in the Canada goose season must possess a special permit issued by the State.

Michigan: (a) MVP—Upper and Lower Peninsula Zones—The total harvest of Canada geese will be limited to 82,600 birds for these zones combined. The framework opening date for all geese is September 16 and the season for Canada geese may extend for 50 days. The daily bag limit is 2 Canada geese.

(1) Allegan County GMU—The Canada goose season will close after 50 days or when 3,000 birds have been harvested, whichever occurs first. The daily bag limit is 2 Canada geese.

(2) Muskegon Wastewater GMU—The Canada goose season will close after 50 days or when 1,000 birds have been harvested, whichever occurs first. The daily bag limit is 2 Canada geese.

(b) SJBP Zone—The framework opening date for all geese is September 16 and the season for Canada geese may extend for 30 days. The daily bag limit is 2 Canada geese.

(1) Saginaw County GMU—The Canada goose season will close after 50 days or when 2,000 birds have been harvested, whichever occurs first. The daily bag limit is 1 Canada goose.

(2) Tuscola/Huron GMU—The Canada goose season will close after 50 days or when 750 birds have been harvested, whichever occurs first. The daily bag limit is 1 Canada goose.

(c) Southern Michigan GMU—A 30-day special Canada goose season may be held between December 31 and February 7. The daily bag limit may not exceed 5 Canada geese.

(d) Central Michigan GMU—A 30-day special Canada goose season may be held between December 31 and February 7. The daily bag limit may not exceed 5 Canada geese.

Minnesota: (a) West Zone. (1) West Central Zone—The season for Canada geese may extend for 40 days. The daily bag limit is 2 Canada geese.

(2) Remainder of West Zone—The season for Canada geese may extend for 60 days. The daily bag limit is 2 Canada geese.

(b) Remainder of the State—The season for Canada geese may extend for 70 days. The daily bag limit is 2 Canada geese.

(c) Special Late Canada Goose Season—A special Canada goose season of up to 10 days may be held in December, except in the West Central Goose zone. During the special season, the daily bag limit is 5 Canada geese, except in the Southeast Goose Zone, where the daily bag limit is 2.

Mississippi: The season for Canada geese may extend for 70 days. The daily bag limit is 3 Canada geese.

Missouri: The season for Canada geese may extend for 79 days and may be split into 3 segments provided that at least 1 segment of at least 9 days occurs prior to October 16. The daily bag limit is 3 Canada geese through October 15 and 2 Canada geese thereafter.

Ohio: The season for Canada geese may extend for 60 days in the respective duck-hunting zones, with a daily bag limit of 2 Canada geese, except in the Lake Erie SJBP Zone, where the season may not exceed 40 days and the daily bag limit is 2 Canada geese. A special Canada goose season of up to 22 days, beginning the first Saturday after January 10, may be held in the following Counties: Allen (north of U.S. Highway 30), Fulton, Geauga (north of Route 6), Henry, Huron, Lucas (Lake Erie Zone closed), Seneca, and Summit (Lake Erie Zone closed). During the special season, the daily bag limit is 2 Canada geese.

Tennessee: (a) Northwest Zone—The season for Canada geese may not exceed 72 days, and may extend to February 15. The daily bag limit is 2 Canada geese.

(b) Southwest Zone—The season for Canada geese may extend for 59 days, at least 9 of which must occur before Oct. 16. The daily bag limit is 2 Canada geese.

(c) Kentucky/Barkley Lakes Zone—The season for Canada geese may extend for 59 days, at least 9 of which must occur before Oct. 16. The daily bag limit is 2 Canada geese.

(d) Remainder of the State—The season for Canada geese may extend for 70 days. The daily bag limit is 2 Canada geese.

Wisconsin: The total harvest of Canada geese in the State will be limited to 131,100 birds. (a) Horicon Zone7mdash;The framework opening date for all geese is September 16. The harvest of Canada geese is limited to 27,000 birds. The season may not exceed 92 days. All Canada geese harvested must be tagged. The daily bag limit is 2 Canada geese, and the season limit will be the number of tags issued to each permittee.

(b) Collins Zone—The framework opening date for all geese is September 16. The harvest of Canada geese is limited to 1,500 birds. The season may not exceed 65 days. All Canada geese harvested must be tagged. The daily bag limit is 2 Canada geese, and the season limit will be the number of tags issued to each permittee.

(c) Exterior Zone—The framework opening date for all geese is September 16. The harvest of Canada geese is limited to 102,600 birds, 500 of which are allocated to the Mississippi River Subzone. The season may not exceed 92 days, except in the Mississippi River Subzone, where the season may not exceed 72 days. The daily bag limit is 2 Canada geese. In that portion of the

Exterior Zone outside the Mississippi River Subzone, the progress of the harvest must be monitored, and the season closed, if necessary, to ensure that the harvest does not exceed 102,100 birds.

Additional Limits: In addition to the harvest limits stated for the respective zones above, an additional 4,500 Canada geese may be taken in the Horicon Zone under special agricultural permits.

Quota Zone Closures: When it has been determined that the quota of Canada geese allotted to the Allegan County, Muskegon Wastewater, Saginaw County, and Tuscola/Huron Goose Management Units in Michigan and the Exterior Zone in Wisconsin will have been filled, the season for taking Canada geese in the respective unit/zone will be closed, either by the Director upon giving public notice through local information media at least 48 hours in advance of the time and date of closing, or by the State through State regulations with such notice and time (not less than 48 hours) as they deem necessary.

Central Flyway

Ducks, Mergansers, and Coots

Outside Dates: Between the Saturday nearest September 24 (September 23) and the last Sunday in January (January 28).

Hunting Seasons: (1) High Plains Mallard Management Unit (roughly defined as that portion of the Central Flyway which lies west of the 100th meridian): 97 days. The last 23 days may start no earlier than the Saturday nearest December 10 (December 9).

(2) Remainder of the Central Flyway: 74 days.

Bag Limits: (1) Colorado, Montana, Nebraska, New Mexico, and Oklahoma: The daily bag limit is 6 ducks, with species and sex restrictions as follows: 5 mallards (no more than 2 of which may be females), 2 redheads, 2 scaup, 2 wood ducks, 1 pintail, 1 mottled duck, and 1 canvasback. For pintails and canvasbacks, the season length would be 39 days, which may be split according to applicable zones/split duck hunting configurations approved for each State. A single canvasback and pintail may also be included in the 6-bird daily bag limit for designated youth-hunt days.

(2) Kansas, North Dakota, South Dakota, Texas, and Wyoming: The daily bag limit is 5 ducks, with species and sex restrictions as follows: 2 scaup, 2 redheads, and 2 wood ducks, and only 1 duck from the following group—hen mallard, mottled duck, pintail, canvasback.

Merganser Limits: The daily bag limit is 5 mergansers, only 2 of which may be a hooded merganser. In States that include mergansers in the duck daily bag limit, the daily limit may be the same as the duck bag limit, only two of which may be hooded mergansers.

Coot Limits: The daily bag limit is 15 coots.

Zoning and Split Seasons: Kansas (Low Plains portion), Montana, Nebraska (Low Plains portion), New Mexico, Oklahoma (Low Plains portion), South Dakota (Low Plains portion), Texas (Low Plains portion), and Wyoming may select hunting seasons by zones.

In Kansas, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming, the regular season may be split into two segments.

In Colorado, the season may be split into three segments.

Geese

Split Seasons: Seasons for geese may be split into three segments. Three-way split seasons for Canada geese require Central Flyway Council and U.S. Fish and Wildlife Service approval, and a 3-year evaluation by each participating State.

Outside Dates: For dark geese, seasons may be selected between the outside dates of the Saturday nearest September 24 (September 23) and the Sunday nearest February 15 (February 18). For light geese, outside dates for seasons may be selected between the Saturday nearest September 24 (September 23) and March 10. In the Rainwater Basin Light Goose Area (East and West) of Nebraska, temporal and spatial restrictions that are consistent with the late-winter snow goose hunting strategy cooperatively developed by the Central Flyway Council and the Service are required.

Season Lengths and Limits: Light Geese: States may select a light goose season not to exceed 107 days. The daily bag limit for light geese is 20 with no possession limit.

Dark Geese: In Kansas, Nebraska, North Dakota, Oklahoma, South Dakota, and the Eastern Goose Zone of Texas, States may select a season for Canada geese (or any other dark goose species except white-fronted geese) not to exceed 107 days with a daily bag limit of 3. Additionally, in the Eastern Goose Zone of Texas, an alternative season of 107 days with a daily bag limit of 1 Canada goose may be selected. For white-fronted geese, these States may select either a season of 72 days with a bag limit of 2 or a 86-day season with a bag limit of 1.

In South Dakota, for Canada geese in the Big Stone Power Plant Area of Canada Goose Unit 3, the daily bag limit is 3 until November 30, and 2 thereafter.

In Montana, New Mexico and Wyoming, States may select seasons not to exceed 107 days. The daily bag limit for dark geese is 5 in the aggregate.

In Colorado, the season may not exceed 95 days. The daily bag limit is 3 dark geese in the aggregate.

In the Western Goose Zone of Texas, the season may not exceed 95 days. The daily bag limit for Canada geese (or any other dark goose species except white-fronted geese) is 3. The daily bag limit for white-fronted geese is 1.

Pacific Flyway

Ducks, Mergansers, Coots, Common Moorhens, and Purple Gallinules

Hunting Seasons and Duck Limits: Concurrent 107 days. The daily bag limit is 7 ducks and mergansers, including no more than 2 female mallards, 1 pintail, 1 canvasback, 3 scaup, and 2 redheads.

The season on coots and common moorhens may be between the outside dates for the season on ducks, but not to exceed 107 days.

Coot, Common Moorhen, and Purple Gallinule Limits: The daily bag and possession limits of coots, common moorhens, and purple gallinules are 25, singly or in the aggregate.

Outside Dates: Between the Saturday nearest September 24 (September 23) and the last Sunday in January (January 28).

Zoning and Split Seasons: Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington may select hunting seasons by zones.

Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington may split their seasons into two segments.

Colorado, Montana, New Mexico, and Wyoming may split their seasons into three segments.

Colorado River Zone, California: Seasons and limits shall be the same as seasons and limits selected in the adjacent portion of Arizona (South Zone).

Geese

Season Lengths, Outside Dates, and Limits: California, Oregon, and Washington: Except as subsequently noted, 100-day seasons may be selected, with outside dates between the Saturday nearest October 1 (September 30), and the last Sunday in January (January 28). Basic daily bag limits are 4 light geese and 4 dark geese, except in California, Oregon, and Washington, where the dark goose bag limit does not include brant.

In Oregon's South Coast Zone and California's North Coast Special

Management Area, 107-day seasons may be selected, with outside dates between the Saturday nearest October 1 (September 30) and March 10. Hunting days that occur after the last Sunday in January shall be concurrent in both zones. A 3-way split season may be selected in Oregon's Southwest Zone.

Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming: Except as subsequently noted, 107-day seasons may be selected, with outside dates between the Saturday nearest September 24 (September 23), and the last Sunday in January (January 28). Basic daily bag limits are 4 light geese and 4 dark geese.

Split Seasons: Unless otherwise specified, seasons for geese may be split into up to 3 segments. Three-way split seasons for Canada geese and white-fronted geese require Pacific Flyway Council and U.S. Fish and Wildlife Service approval and a 3-year evaluation by each participating State.

Brant Season

Oregon may select a 16-day season, Washington a 16-day season, and California a 30-day season. Days must be consecutive. Washington and California may select hunting seasons by up to two zones. The daily bag limit is 2 brant and is in addition to dark goose limits. In Oregon and California, the brant season must end no later than December 15.

Arizona: The daily bag limit for dark geese is 3.

California: Northeastern Zone: The daily bag limit is 4 geese and may include no more than 1 cackling Canada goose or 1 Aleutian Canada goose.

Southern Zone: In the Imperial County Special Management Area, light geese only may be taken from the end of the general goose hunting season through the first Sunday in February (February 5).

Balance-of-the-State Zone: Limits may not include more than 4 geese per day. In the Sacramento Valley Special Management Area (West), the season on white-fronted geese must begin no earlier than the last Saturday in October and end on or before December 14, and the daily bag limit shall contain no more than 2 white-fronted geese.

Oregon: Except as subsequently noted, the dark goose daily bag limit is 4, including not more than 1 cackling or Aleutian goose.

Harney, Lake, and Malheur County Zone: For Lake County only, the daily dark goose bag limit may not include more than 2 white-fronted geese.

Klamath County Zone: A 107-day season may be selected, with outside dates between the Saturday nearest October 1 (September 30), and March 10. A 3-way split season may be selected. The daily dark goose bag limit is 4 dark geese and 4 white geese except for hunting days that occur after the last Sunday in January when only white-fronted geese may be taken with a daily bag limit of two.

Northwest Special Permit Zone: Except for designated areas, there will be no open season on Canada geese. In the designated areas, individual quotas will be established that collectively will not exceed 165 dusky geese. See section on quota zones. In those designated areas, the daily bag limit of dark geese is 4 including not more than 2 cackling or Aleutian geese.

Closed Zone: All of Tillamook County.

South Coast Zone: The daily dark goose bag limit is 4 including cackling and Aleutian geese.

Southwest Zone: The daily dark goose bag limit is 4 including cackling and Aleutian geese.

Washington: The daily bag limit is 4 geese. A 107-day season may be selected in Areas 4 and 5 (eastern Washington).

Southwest Quota Zone: In the Southwest Quota Zone, except for designated areas, there will be no open season on Canada geese. In the designated areas, individual quotas will be established that collectively will not exceed 85 dusky geese. See section on quota zones. In this area, the daily bag limit may include 2 cackling geese. In Southwest Quota Zone Area 2B (Pacific County), the daily bag limit may include 1 Aleutian goose.

Colorado: The daily bag limit for dark geese is 3 geese.

Idaho: The daily bag limit is 4 geese.

Nevada: The daily bag limit for dark geese is 3.

New Mexico: The daily bag limit for dark geese is 3.

Utah: The daily bag limit for dark geese is 3.

Quota Zones

Seasons on dark geese must end upon attainment of individual quotas of dusky geese allotted to the designated areas of Oregon and Washington. The September Canada goose season, the regular goose season, any special late dark goose season, and any extended falconry season, combined, must not exceed 107 days, and the established quota of dusky geese must not be exceeded. Hunting of dark geese in those designated areas will only be by hunters possessing a State-issued permit authorizing them to do so. In a Service-approved investigation, the State must obtain quantitative information on hunter compliance of those regulations aimed at reducing the take of dusky geese. If the monitoring program cannot be conducted, for any reason, the season must immediately close. In the designated areas of the Washington Southwest Quota Zone, a special late dark goose season may be held between the Saturday following the close of the general goose season and March 10.

In the Northwest Special Permit Zone of Oregon, the framework closing date is extended to the Sunday closest to March 1 (March 4). Regular dark goose seasons may be split into 3 segments within the Oregon and Washington quota zones. The daily bag limit for dark geese is 3.

Swans

In portions of the Pacific Flyway (Montana, Nevada, and Utah), an open season for taking a limited number of swans may be selected. Permits will be issued by the State and will authorize each permittee to take no more than 1 swan per season with each permit. Nevada may issue up to 2 permits per hunter. Montana and Utah may only issue 1 permit per hunter. Each State's season may open no earlier than the Saturday nearest October 1 (September 30). These seasons are also subject to the following conditions:

Montana: No more than 500 permits may be issued. The season must end no later than December 1. The State must implement a harvest-monitoring program to measure the species composition of the swan harvest and should use appropriate measures to maximize hunter compliance in reporting bill measurement and color information.

Utah: No more than 2,000 permits may be issued. During the swan season, no more than 10 trumpeter swans may be taken. The season must end no later than the second Sunday in December (December 10) or upon attainment of 10 trumpeter swans in the harvest, whichever occurs earliest. The Utah season remains subject to the terms of the Memorandum of Agreement entered into with the Service in August 2001, regarding harvest monitoring, season closure procedures, and education requirements to minimize the take of trumpeter swans during the swan season.

Nevada: No more than 650 permits may be issued. During the swan season, no more than 5 trumpeter swans may be taken. The season must end no later than the Sunday following January 1 (January 7) or upon attainment of 5 trumpeter swans in the harvest, whichever occurs earliest.

In addition, the States of Utah and Nevada must implement a harvest-monitoring program to measure the

species composition of the swan harvest. The harvest-monitoring program must require that all harvested swans or their species-determinant parts be examined by either State or Federal biologists for the purpose of species classification. The States should use appropriate measures to maximize hunter compliance in providing bagged swans for examination. Further, the States of Montana, Nevada, and Utah must achieve at least an 80-percent compliance rate, or subsequent permits will be reduced by 10 percent. All three States must provide to the Service by June 30, 2007, a report detailing harvest, hunter participation, reporting compliance, and monitoring of swan populations in the designated hunt areas.

Tundra Swans

In portions of the Atlantic Flyway (North Carolina and Virginia) and the Central Flyway (North Dakota, South Dakota [east of the Missouri River], and that portion of Montana in the Central Flyway), an open season for taking a limited number of tundra swans may be selected. Permits will be issued by the States that authorize the take of no more than 1 tundra swan per permit. A second permit may be issued to hunters from unused permits remaining after the first drawing. The States must obtain harvest and hunter participation data. These seasons are also subject to the following conditions:

In the Atlantic Flyway:

—The season is experimental.

—The season may be 90 days, from October 1 to January 31.

—In North Carolina, no more than 5,000 permits may be issued.

—In Virginia, no more than 600 permits may be issued.

In the Central Flyway:

—The season may be 107 days, from the Saturday nearest October 1 (September 30) to January 31.

—In the Central Flyway portion of Montana, no more than 500 permits may be issued.

—In North Dakota, no more than 2,200 permits may be issued.

—In South Dakota, no more than 1,300 permits may be issued.

Area, Unit, and Zone Descriptions

Ducks (Including Mergansers) and Coots

Atlantic Flyway

Connecticut

North Zone: That portion of the State north of I–95.

South Zone: Remainder of the State.

Maine

North Zone: That portion north of the line extending east along Maine State Highway 110 from the New Hampshire and Maine State line to the intersection of Maine State Highway 11 in Newfield; then north and east along Route 11 to the intersection of U.S. Route 202 in Auburn; then north and east on Route 202 to the intersection of Interstate Highway 95 in Augusta; then north and east along I–95 to Route 15 in Bangor; then east along Route 15 to Route 9; then east along Route 9 to Stony Brook in Baileyville; then east along Stony Brook to the United States border.

South Zone: Remainder of the State.

Massachusetts

Western Zone: That portion of the State west of a line extending south from the Vermont State line on I–91 to MA 9, west on MA 9 to MA 10, south on MA 10 to U.S. 202, south on U.S. 202 to the Connecticut State line.

Central Zone: That portion of the State east of the Berkshire Zone and west of a line extending south from the New Hampshire State line on I–95 to U.S. 1, south on U.S. 1 to I–93, south on I–93 to MA 3, south on MA 3 to U.S. 6, west on U.S. 6 to MA 28, west on MA 28 to I–195, west to the Rhode Island State line; except the waters, and the lands 150 yards inland from the high-water mark, of the Assonet River upstream to the MA 24 bridge, and the Taunton River upstream to the Center St.-Elm St. bridge shall be in the Coastal Zone.

Coastal Zone: That portion of Massachusetts east and south of the Central Zone.

New Hampshire

Coastal Zone: That portion of the State east of a line extending west from the Maine State line in Rollinsford on NH 4 to the city of Dover, south to NH 108, south along NH 108 through Madbury, Durham, and Newmarket to NH 85 in Newfields, south to NH 101 in Exeter, east to NH 51 (Exeter-Hampton Expressway), east to I–95 (New Hampshire Turnpike) in Hampton, and south along I–95 to the Massachusetts State line.

Inland Zone: That portion of the State north and west of the above boundary and along the Massachusetts State line crossing the Connecticut River to Interstate 91 and northward in Vermont to Route 2, east to 102, northward to the Canadian border.

New Jersey

Coastal Zone: That portion of the State seaward of a line beginning at the New York State line in Raritan Bay and extending west along the New York State line to NJ 440 at Perth Amboy; west on NJ 440 to the Garden State Parkway; south on the Garden State Parkway to the shoreline at Cape May and continuing to the Delaware State line in Delaware Bay.

North Zone: That portion of the State west of the Coastal Zone and north of a line extending west from the Garden State Parkway on NJ 70 to the New Jersey Turnpike, north on the turnpike to U.S. 206, north on U.S. 206 to U.S. 1 at Trenton, west on U.S. 1 to the Pennsylvania State line in the Delaware River.

South Zone: That portion of the State not within the North Zone or the Coastal Zone.

New York

Lake Champlain Zone: The U.S. portion of Lake Champlain and that area east and north of a line extending along NY 9B from the Canadian border to U.S. 9, south along U.S. 9 to NY 22 south of Keesville; south along NY 22 to the west shore of South Bay, along and around the shoreline of South Bay to NY 22 on the east shore of South Bay; southeast along NY 22 to U.S. 4, northeast along U.S. 4 to the Vermont State line.

Long Island Zone: That area consisting of Nassau County, Suffolk County, that area of Westchester County southeast of I–95, and their tidal waters.

Western Zone: That area west of a line extending from Lake Ontario east along the north shore of the Salmon River to I–81, and south along I–81 to the Pennsylvania State line.

Northeastern Zone: That area north of a line extending from Lake Ontario east along the north shore of the Salmon River to I–81 to NY 31, east along NY 31 to NY 13, north along NY 13 to NY 49, east along NY 49 to NY 365, east along NY 365 to NY 28, east along NY 28 to NY 29, east along NY 29 to I–87, north along I–87 to U.S. 9 (at Exit 20), north along U.S. 9 to NY 149, east along NY 149 to U.S. 4, north along U.S. 4 to the Vermont State line, exclusive of the Lake Champlain Zone.

Southeastern Zone: The remaining portion of New York.

Pennsylvania

Lake Erie Zone: The Lake Erie waters of Pennsylvania and a shoreline margin along Lake Erie from New York on the east to Ohio on the west extending 150 yards inland, but including all of Presque Isle Peninsula.

Northwest Zone: The area bounded on the north by the Lake Erie Zone and including all of Erie and Crawford Counties and those portions of Mercer and Venango Counties north of I–80.

North Zone: That portion of the State east of the Northwest Zone and north of a line extending east on I–80 to U.S. 220, Route 220 to I–180, I–180 to I–80, and I–80 to the Delaware River.

South Zone: The remaining portion of Pennsylvania.

Vermont

Lake Champlain Zone: The U.S. portion of Lake Champlain and that area north and west of the line extending from the New York State line along U.S. 4 to VT 22A at Fair Haven; VT 22A to U.S. 7 at Vergennes; U.S. 7 to the Canadian border.

Interior Zone: That portion of Vermont west of the Lake Champlain Zone and eastward of a line extending from the Massachusetts State line at Interstate 91; north along Interstate 91 to U.S. 2; east along U.S. 2 to VT 102; north along VT 102 to VT 253; north along VT 253 to the Canadian border.

Connecticut River Zone: The remaining portion of Vermont east of the Interior Zone.

West Virginia

Zone 1: That portion outside the boundaries in Zone 2.

Zone 2 (Allegheny Mountain Upland): That area bounded by a line extending south along U.S. 220 through Keyser to U.S. 50; U.S. 50 to WV 93; WV 93 south to WV 42; WV 42 south to Petersburg; WV 28 south to Minnehaha Springs; WV 39 west to U.S. 219; U.S. 219 south to I–64; I–64 west to U.S. 60; U.S. 60 west to U.S. 19; U.S. 19 north to I–79, I–79 north to I–68; I–68 east to the Maryland State line; and along the State line to the point of beginning.

Mississippi Flyway

Alabama

South Zone: Mobile and Baldwin Counties.

North Zone: The remainder of Alabama.

Arkansas

Zone 1: That portion of Arkansas north and east of a line beginning at the confluence of the White and Mississippi Rivers and extending northwest along the north bank of the White River to the north bank of the Arkansas Post Canal, west along the Arkansas Post Canal to Tichnor Blacktop Road, north and west along Tichnor Blacktop Road to Connor Levee Road, west along Connor Levee Road to Whiting Lane, south along Whiting Lane to the north bank of the Arkansas Post Canal, west along the north bank of the Arkansas Post Canal to the Arkansas River, west along the north bank/rock dike of the Arkansas River to the mouth of Moore's Bayou, northwest along the east bank of Moore's Bayou to State Highway 169, west along State 169 to the junction of U.S. Highway 165 and Gander Street Road, north along Gander Street Road to Simon Fuhrman Road, northwest along Simon Fuhrman to the north levee of the Arkansas River, northwest along the north levee of the Arkansas River to U.S. 165 near Baucum, northwest along U.S. 165 to Interstate Highway 440 near Little Rock, north along I–440 to I–40, west along I–40 to U.S. 65 at Conway, then north along U.S. 65 to the Missouri border.

Zone 2: The remainder of Arkansas.

Illinois

North Zone: That portion of the State north of a line extending west from the Indiana border along Peotone-Beecher Road to Illinois Route 50, south along Illinois Route 50 to Wilmington-Peotone Road, west along Wilmington-Peotone Road to Illinois Route 53, north along Illinois Route 53 to New River Road, northwest along New River Road to Interstate Highway 55, south along I–55 to Pine Bluff-Lorenzo Road, west along Pine Bluff-Lorenzo Road to Illinois Route 47, north along Illinois Route 47 to I–80, west along I–80 to I–39, south along I–39 to Illinois Route 18, west along Illinois Route 18 to Illinois Route 29, south along Illinois Route 29 to Illinois Route 17, west along Illinois Route 17 to the Mississippi River, and due south across the Mississippi River to the Iowa border.

Central Zone: That portion of the State south of the North Zone to a line extending west from the Indiana border along Interstate Highway 70 to Illinois Route 4, south along Illinois Route 4 to Illinois Route 161, west along Illinois Route 161 to Illinois Route 158, south and west along Illinois Route 158 to Illinois Route 159, south along Illinois Route 159 to Illinois Route 156, west along Illinois Route 156 to A Road, north and west on A Road to Levee Road, north on Levee Road to the south shore of New Fountain Creek, west along the south shore of New Fountain Creek to the Mississippi River, and due west across the Mississippi River to the Missouri border.

South Zone: The remainder of Illinois.

Indiana

North Zone: That portion of the State north of a line extending east from the Illinois State line along State Road 18 to U.S. Highway 31, north along U.S. 31 to U.S. 24, east along U.S. 24 to Huntington, then southeast along U.S. 224 to the Ohio State line.

Ohio River Zone: That portion of the State south of a line extending east from the Illinois State line along Interstate Highway 64 to New Albany, east along State Road 62 to State Road 56, east along State Road 56 to Vevay, east and north on State 156 along the Ohio River to North Landing, north along State 56 to U.S. Highway 50, then northeast along U.S. 50 to the Ohio State line.

South Zone: That portion of the State between the North and Ohio River Zone boundaries.

Iowa

North Zone: That portion of the State north of a line extending east from the Nebraska border along State Highway 175 to State Highway 37, southeast along State Highway 37 to State Highway 183, northeast along State Highway 183 to State Highway 141, east along State Highway 141 to U.S. Highway 30, then east along U.S. Highway 30 to the Illinois border.

South Zone: The remainder of Iowa.

Kentucky

West Zone: All counties west of and including Butler, Daviess, Ohio, Simpson, and Warren Counties.

East Zone: The remainder of Kentucky.

Louisiana

West Zone: That portion of the State west and south of a line extending south from the Arkansas State line along Louisiana Highway 3 to Bossier City, east along Interstate Highway 20 to Minden, south along Louisiana 7 to Ringgold, east along Louisiana 4 to Jonesboro, south along U.S. Highway 167 to Lafayette, southeast along U.S. 90 to the Mississippi State line.

East Zone: The remainder of Louisiana.

Michigan

North Zone: The Upper Peninsula.

Middle Zone: That portion of the Lower Peninsula north of a line beginning at the Wisconsin State line in Lake Michigan due west of the mouth of Stony Creek in Oceana County; then due east to, and easterly and southerly along the south shore of Stony Creek to Scenic Drive, easterly and southerly along Scenic Drive to Stony Lake Road, easterly along Stony Lake and Garfield Roads to Michigan Highway 20, east along Michigan 20 to U.S. Highway 10 Business Route (BR) in the city of Midland, easterly along U.S. 10 BR to U.S. 10, easterly along U.S. 10 to Interstate Highway 75/U.S. Highway 23, northerly along I–75/U.S. 23 to the U.S. 23 exit at Standish, easterly along U.S. 23 to the centerline of the Au Gres River, then southerly along the centerline of the Au Gres River to

Saginaw Bay, then on a line directly east 10 miles into Saginaw Bay, and from that point on a line directly northeast to the Canadian border.

South Zone: The remainder of Michigan.

Minnesota

North Duck Zone: That portion of the State north of a line extending east from the North Dakota State line along State Highway 210 to State Highway 23, east along State Highway 23 to State Highway 39, then east along State Highway 39 to the Wisconsin State line at the Oliver Bridge.

South Duck Zone: The remainder of Minnesota.

Missouri

North Zone: That portion of Missouri north of a line running west from the Illinois State line (Lock and Dam 25) on Lincoln County Highway N to Missouri Highway 79; south on Missouri Highway 79 to Missouri Highway 47; west on Missouri Highway 47 to Interstate 70; west on Interstate 70 to the Kansas State line.

South Zone: That portion of Missouri south of a line running west from the Illinois State line on Missouri Highway 34 to Interstate 55; south on Interstate 55 to U.S. Highway 62; west on U.S. Highway 62 to Missouri Highway 53; north on Missouri Highway 53 to Missouri Highway 51; north on Missouri Highway 51 to U.S. Highway 60; west on U.S. Highway 60 to Missouri Highway 21; north on Missouri Highway 21 to Missouri Highway 72; west on Missouri Highway 72 to Missouri Highway 32; west on Missouri Highway 32 to U.S. Highway 65; north on U.S. Highway 65 to U.S. Highway 54; west on U.S. Highway 54 to the Kansas State line.

Middle Zone: The remainder of Missouri.

Ohio

North Zone: That portion of the State north of a line extending east from the Indiana State line along U.S. Highway 33 to State Route 127, south along SR 127 to SR 703, south along SR 703 to SR 219, east along SR 219 to SR 364, north along SR 364 to SR 703, east along SR 703 to SR 66, north along SR 66 to U.S. 33, east along U.S. 33 to SR 385, east along SR 385 to SR 117, south along SR 117 to SR 273, east along SR 273 to SR 31, south along SR 31 to SR 739, east along SR 739 to SR 4, north along SR 4 to SR 95, east along SR 95 to SR 13, southeast along SR 13 to SR 3, northeast along SR 3 to SR 60, north along SR 60 to U.S. 30, east along U.S. 30 to SR 3, south along SR 3 to SR 226, south along SR 226 to SR 514, southwest along SR 514 to SR 754, south along SR 754 to SR 39/60, east along SR 39/60 to SR 241, north along SR 241 to U.S. 30, east along U.S. 30 to SR 39, east along SR 39 to the Pennsylvania State line.

South Zone: The remainder of Ohio.

Tennessee

Reelfoot Zone: All or portions of Lake and Obion Counties.

State Zone: The remainder of Tennessee.

Wisconsin

North Zone: That portion of the State north of a line extending east from the Minnesota State line along U.S. Highway 10 to U.S. Highway 41, then north on U.S. Highway 41 to the Michigan State line.

South Zone: The remainder of Wisconsin.

Central Flyway

Colorado (Central Flyway Portion)

Eastern Plains Zone: That portion of the State east of Interstate 25, and all of El Paso, Pueblo, Heurfano, and Las Animas Counties.

Mountain/Foothills Zone: That portion of the State west of Interstate 25 and east of the Continental Divide, except El Paso, Pueblo, Heurfano, and Las Animas Counties.

Kansas

High Plains Zone: That portion of the State west of U.S. 283.

Low Plains Early Zone: That area of Kansas east of U.S. 283, and generally west of a line beginning at the Junction of the Nebraska border and KS 28; south on KS 28 to U.S. 36; east on U.S. 36 to KS 199; south on KS 199 to Republic Co. Road 563; south on Republic Co. Road 563 to KS 148; east on KS 148 to Republic Co. Road 138; south on Republic Co. Road 138 to Cloud Co. Road 765; south on Cloud Co. Road 765 to KS 9; west on KS 9 to U.S. 24; west on U.S. 24 to U.S. 281; north on U.S. 281 to U.S. 36; west on U.S. 36 to U.S. 183; south on U.S. 183 to U.S. 24; west on U.S. 24 to KS 18; southeast on KS 18 to U.S. 183; south on U.S. 183 to KS 4; east on KS 4 to I–135; south on I–135 to KS 61; southwest on KS 61 to KS 96; northwest on KS 96 to U.S. 56; southwest on U.S. 56 to KS 19; east on KS 19 to U.S. 281; south on U.S. 281 to U.S. 54; west on U.S. 54 to U.S. 183; north on U.S. 183 to U.S. 56; southwest on U.S. 56 to Ford Co. Road 126; south on Ford Co. Road 126 to U.S. 400; northwest on U.S. 400 to U.S. 283.

Low Plains Late Zone: The remainder of Kansas.

Montana (Central Flyway Portion)

Zone 1: The Counties of Blaine, Carbon, Carter, Daniels, Dawson, Fallon, Fergus, Garfield, Golden Valley, Judith Basin, McCone, Musselshell, Petroleum, Phillips, Powder River, Richland, Roosevelt, Sheridan, Stillwater, Sweet Grass, Valley, Wheatland, Wibaux, and Yellowstone.

Zone 2: The remainder of Montana.

Nebraska

High Plains Zone: That portion of Nebraska lying west of a line beginning at the South Dakota-Nebraska border on U.S. 183, south on U.S. 183 to U.S. 20, west on U.S. 20 to NE 7, south on NE 7 to NE 91, southwest on NE 91 to NE 2, southeast on NE 2 to NE 92, west on NE 92 to NE 40, south on NE 40 to NE 47, south on NE 47 to NE 23, east on NE 23 to U.S. 283 and south on U.S. 283 to the Kansas-Nebraska border.

Low Plains Zone 1: That portion of Dixon County west of NE 26E Spur and north of NE 12; those portions of Cedar County north of NE 12; those portions of Knox counties north of NE 12 to intersection of Niobrara River; all of Boyd County; Keya Paha County east of U.S. 183. Both banks of the Niobrara River in Keya Paha, Boyd, and Knox counties east of U.S. 183 shall be included in Zone 1.

Low Plains Zone 2: Area bounded by designated Federal and State highways and political boundaries beginning at the Kansas-Nebraska border on U.S. 75 to U.S. 136; east to the intersection of U.S. 136 and the Steamboat Trace (Trace); north along the Trace to the intersection with Federal Levee R–562; north along Federal Levee R–562 to the intersection with the Trace; north along the Trace/Burlington Northern Railroad right-of-way to NE 2; west to U.S. 75; north to NE 2; west to NE 43; north to U.S. 34; east to NE 63; north and west to U.S. 77; north to NE 92; west to U.S. 81; south to NE 66; west to NE 14; south to County Road 22 (Hamilton County); west to County Road M, south to County Road 21; west to County Road K; south U.S. 34; west to NE 2; south to U.S. I–80; west to Gunbarrel Road. (Hall/Hamilton county line); south to Giltner Road.; west to U.S. 281; south to U.S. 34; west to NE 10; north to County Road ''R'' (Kearney County) and County Road #742 (Phelps County); west to County Road #438 (Gosper County line); south along County Road #438 (Gosper County line) to County Road #726 (Furnas County line); east to County Road #438 (Harlan County line); south to U.S. 34; south and west to U.S. 136; east to NE 14; south to the Kansas-Nebraska border, west to U.S. 283; north to NE 23;

west to NE 47; north to U.S. 30; east to NE 14; north to NE 52; west and north to NE 91 to U.S. 281; south to NE 22; west to NE 11; northwest to NE 91; west to Loup County Line, north to Loup-Brown county line; east along northern boundaries of Loup, Garfield and Wheeler counties; south on the Wheeler-Antelope county line to NE 70; east to NE 14; south to NE 39; southeast to NE 22; east to U.S. 81; southeast to U.S. 30; east to U.S. 75, north to the Washington County line; east to the Iowa-Nebraska border; south along the Iowa-Nebraska border; to the beginning at U.S. 75 and the Kansas-Nebraska border.

Low Plains Zone 3: The area east of the High Plains Zone, excluding Low Plains Zone 1, north of Low Plains Zone 2.

Low Plains Zone 4: The area east of the High Plains Zone and south of Zone 2.

New Mexico (Central Flyway Portion)

North Zone: That portion of the State north of I–40 and U.S. 54.

South Zone: The remainder of New Mexico.

North Dakota

High Plains Unit: That portion of the State south and west of a line from the South Dakota State line along U.S. 83 and I–94 to ND 41, north to U.S. 2, west to the Williams/Divide County line, then north along the County line to the Canadian border.

Low Plains Unit: The remainder of North Dakota.

Oklahoma

High Plains Zone: The Counties of Beaver, Cimarron, and Texas.

Low Plains Zone 1: That portion of the State east of the High Plains Zone and north of a line extending east from the Texas State line along OK 33 to OK 47, east along OK 47 to U.S. 183, south along U.S.183 to I–40, east along I–40 to U.S. 177, north along U.S. 177 to OK 33, east along OK 33 to OK 18, north along OK 18 to OK 51, west along OK 51 to I–35, north along I–35 to U.S. 412, west along U.S. 412 to OK 132, then north along OK 132 to the Kansas State line.

Low Plains Zone 2: The remainder of Oklahoma.

South Dakota

High Plains Zone: That portion of the State west of a line beginning at the North Dakota State line and extending south along U.S. 83 to U.S. 14, east on U.S. 14 to Blunt, south on the Blunt-Canning road to SD 34, east and south on SD 34 to SD 50 at Lee's Corner, south on SD 50 to I–90, east on I–90 to SD 50, south on SD 50 to SD 44, west on SD 44 across the Platte-Winner bridge to SD 47, south on SD 47 to U.S. 18, east on U.S. 18 to SD 47, south on SD 47 to the Nebraska State line.

North Zone: That portion of northeastern South Dakota east of the High Plains Unit and north of a line extending east along U.S. 212 to the Minnesota State line.

South Zone: That portion of Gregory County east of SD 47 and south of SD 44; Charles Mix County south of SD 44 to the Douglas County line; south on SD 50 to Geddes; east on the Geddes Highway to U.S. 281; south on U.S. 281 and U.S. 18 to SD 50; south and east on SD 50 to the Bon Homme County line; the Counties of Bon Homme, Yankton, and Clay south of SD 50; and Union County south and west of SD 50 and I–29.

Middle Zone: The remainder of South Dakota.

Texas

High Plains Zone: That portion of the State west of a line extending south from the Oklahoma State line along U.S. 183 to Vernon, south along U.S. 283 to Albany, south along TX 6 to TX 351 to Abilene, south along U.S. 277 to Del Rio, then south along the Del Rio International Toll Bridge access road to the Mexico border.

Low Plains North Zone: That portion of northeastern Texas east of the High Plains Zone and north of a line beginning at the International Toll Bridge south of Del Rio, then extending east on U.S. 90 to San Antonio, then continuing east on I–10 to the Louisiana State line at Orange, Texas.

Low Plains South Zone: The remainder of Texas.

Wyoming (Central Flyway portion)

Zone 1: The Counties of Converse, Goshen, Hot Springs, Natrona, Platte, and Washakie; and the portion of Park County east of the Shoshone National Forest boundary and south of a line beginning where the Shoshone National Forest boundary meets Park County Road 8VC, east along Park County Road 8VC to Park County Road 1AB, continuing east along Park County Road 1AB to Wyoming Highway 120, north along WY Highway 120 to WY Highway 294, south along WY Highway 294 to Lane 9, east along Lane 9 to Powel and WY Highway 14A, and finally east along WY Highway 14A to the Park County and Big Horn County line.

Zone 2: The remainder of Wyoming.

Pacific Flyway

Arizona—*Game Management Units (GMU) as follows:*

South Zone: Those portions of GMUs 6 and 8 in Yavapai County, and GMUs 10 and 12B–45.

North Zone: GMUs 1–5, those portions of GMUs 6 and 8 within Coconino County, and GMUs 7, 9, 12A.

California

Northeastern Zone: In that portion of California lying east and north of a line beginning at the intersection of Interstate 5 with the California-Oregon line; south along Interstate 5 to its junction with Walters Lane south of the town or Yreka; west along Walters Lane to its junction with Easy Street; south along Easy Street to the junction with Old Highway 99: south along Old Highway 99 to the point of intersection with Interstate 5 north of the town of Weed; south along Interstate 5 to its junction with Highway 89; east and south along Highway 89 to Main Street Greenville; north and east to its junction with North Valley Road; south to its junction of Diamond Mountain Road; north and east to its junction with North Arm Road; south and west to the junction of North Valley Road; south to the junction with Arlington Road (A22); west to the junction of Highway 89; south and west to the junction of Highway 70; east on Highway 70 to Highway 395; south and east on Highway 395 to the point of intersection with the California-Nevada State line; north along the California-Nevada State line to the junction of the California-Nevada-Oregon State lines; west along the California-Oregon State line to the point of origin.

Colorado River Zone: Those portions of San Bernardino, Riverside, and Imperial Counties east of a line extending from the Nevada State line south along U.S. 95 to Vidal Junction; south on a road known as ''Aqueduct Road'' in San Bernardino County through the town of Rice to the San Bernardino-Riverside County line; south on a road known in Riverside County as the ''Desert Center to Rice Road'' to the town of Desert Center; east 31 miles on I–10 to the Wiley Well Road; south on this road to Wiley Well; southeast along the Army-Milpitas Road to the Blythe, Brawley, Davis Lake intersections; south on the Blythe–Brawley paved road to the Ogilby and Tumco Mine Road; south on this road to U.S. 80; east seven miles on U.S. 80 to the Andrade-Algodones Road; south on this paved road to the Mexican border at Algodones, Mexico.

Southern Zone: That portion of southern California (but excluding the Colorado River Zone) south and east of a line extending from the Pacific Ocean east along the Santa Maria River to CA 166 near the City of Santa Maria; east on

CA 166 to CA 99; south on CA 99 to the crest of the Tehachapi Mountains at Tejon Pass; east and north along the crest of the Tehachapi Mountains to CA 178 at Walker Pass; east on CA 178 to U.S. 395 at the town of Inyokern; south on U.S. 395 to CA 58; east on CA 58 to I–15; east on I–15 to CA 127; north on CA 127 to the Nevada State line.

Southern San Joaquin Valley Temporary Zone: All of Kings and Tulare Counties and that portion of Kern County north of the Southern Zone.

Balance-of-the-State Zone: The remainder of California not included in the Northeastern, Southern, and Colorado River Zones, and the Southern San Joaquin Valley Temporary Zone.

Idaho

Zone 1: Includes all lands and waters within the Fort Hall Indian Reservation, including private inholdings; Bannock County; Bingham County, except that portion within the Blackfoot Reservoir drainage; and Power County east of ID 37 and ID 39.

Zone 2: Includes the following Counties or portions of Counties: Adams; Bear Lake; Benewah; Bingham within the Blackfoot Reservoir drainage; Blaine; Bonner; Bonneville; Boundary; Butte; Camas; Caribou except the Fort Hall Indian Reservation; Cassia within the Minidoka National Wildlife Refuge; Clark; Clearwater; Custer; Elmore within the Camas Creek drainage; Franklin; Fremont; Idaho; Jefferson; Kootenai; Latah; Lemhi; Lewis; Madison; Nez Perce; Oneida; Power within the Minidoka National Wildlife Refuge; Shoshone; Teton; and Valley Counties.

Zone 3: Includes the following Counties or portions of Counties: Ada; Boise; Canyon; Cassia except within the Minidoka National Wildlife Refuge; Elmore except the Camas Creek drainage; Gem; Gooding; Jerome; Lincoln; Minidoka; Owyhee; Payette; Power west of ID 37 and ID 39 except that portion within the Minidoka National Wildlife Refuge; Twin Falls; and Washington Counties.

Nevada

Lincoln and Clark County Zone: All of Clark and Lincoln Counties.

Remainder-of-the-State Zone: The remainder of Nevada.

Oregon

Zone 1: Clatsop, Tillamook, Lincoln, Lane, Douglas, Coos, Curry, Josephine, Jackson, Linn, Benton, Polk, Marion, Yamhill, Washington, Columbia, Multnomah, Clackamas, Hood River, Wasco, Sherman, Gilliam, Morrow and Umatilla Counties.

Columbia Basin Mallard Management Unit: Gilliam, Morrow, and Umatilla Counties.

Zone 2: The remainder of the State.

Utah

Zone 1: All of Box Elder, Cache, Daggett, Davis, Duchesne, Morgan, Rich, Salt Lake, Summit, Unitah, Utah, Wasatch, and Weber Counties, and that part of Toole County north of I–80.

Zone 2: The remainder of Utah.

Washington

East Zone: All areas east of the Pacific Crest Trail and east of the Big White Salmon River in Klickitat County.

Columbia Basin Mallard Management Unit: Same as East Zone.

West Zone: All areas to the west of the East Zone.

Wyoming

Snake River Zone: Beginning at the south boundary of Yellowstone National Park and the Continental Divide; south along the Continental Divide to Union Pass and the Union Pass Road (U.S.F.S. Road 600); west and south along the Union Pass Road to U.S F.S. Road 605; south along U.S.F.S. Road 605 to the Bridger-Teton National Forest boundary; along the national forest boundary to the Idaho State line; north along the Idaho State line to the south boundary of Yellowstone National Park; east along the Yellowstone National Park boundary to the Continental Divide.

Balance of Flyway Zone: Balance of the Pacific Flyway in Wyoming outside the Snake River drainage.

Geese

Atlantic Flyway

Connecticut

NAP L-Unit: That portion of Fairfield County north of Interstate 95 and that portion of New Haven County: starting at I–95 bridge on Housatonic River; north of Interstate 95; west of Route 10 to the intersection of Interstate 691; west along Interstate 691 to Interstate 84; west and south on Interstate 84 to Route 67; north along Route 67 to the Litchfield County line, then extending west along the Litchfield County line to the Shepaug River, then south to the intersection of the Litchfield and Fairfield County lines.

NAP H-Unit: All of the rest of the State not included in the AP or NAP–L descriptions.

AP Unit: Litchfield County and the portion of Hartford County, west of a line beginning at the Massachusetts State line in Suffield and extending south along Route 159 to its intersection with Route 91 in Hartford, and then extending south along Route 91 to its intersection with the Hartford/Middlesex County line.

South Zone: Same as for ducks.

North Zone: Same as for ducks.

Maryland

Resident Population (RP) Zone: Garrett, Allegany, Washington, Frederick, Howard, and Montgomery Counties; that portion of Baltimore County south of Route 138, Route 137, and Mount Carmel Road; that portion of Anne Arundel County west of Interstate 895, Interstate 97 and Route 3; that portion of Prince George's County west of Route 3 and Route 301, that portion of Charles County west of Route 301 to the Virginia State line; and that portion of Carroll County south of Route 88, west of Route 30 from the intersection of Route 30 and Route 88 to the intersection of Route 30 and Route 482, south of Route 482, south of Route 27 from the intersection of Route 27 and Route 482 to the intersection of Route 27 and Route 97, and west of Route 97 from the Intersection of Route 27 and Route 97 to the Pennsylvania line.

AP Zone: Remainder of the State.

Massachusetts

NAP Zone: Central Zone (same as for ducks) and that portion of the Coastal Zone that lies north of route 139 from Green Harbor.

AP Zone: Remainder of the State.

Special Late Season Area: That portion of the Coastal Zone (see duck zones) that lies north of the Cape Cod Canal and east of Route 3, north to the New Hampshire line.

New Hampshire: Same zones as for ducks.

New Jersey

North—that portion of the State within a continuous line that runs east along the New York State boundary line to the Hudson River; then south along the New York State boundary to its intersection with Route 440 at Perth Amboy; then west on Route 440 to its intersection with Route 287; then west along Route 287 to its intersection with Route 206 in Bedminster (Exit 18); then north along Route 206 to its intersection with Route 94: then west along Route 94 to the tollbridge in Columbia; then north along the Pennsylvania State boundary in the Delaware River to the beginning point.

South—that portion of the State within a continuous line that runs west from the Atlantic Ocean at Ship Bottom along Route 72 to Route 70; then west along Route 70 to Route 206; then south along Route 206 to Route 536; then west along Route 536 to Route 322; then west

along Route 322 to Route 55; then south along Route 55 to Route 553 (Buck Road); then south along Route 553 to Route 40; then east along Route 40 to route 55; then south along Route 55 to Route 552 (Sherman Avenue); then west along Route 552 to Carmel Road; then south along Carmel Road to Route 49; then east along Route 49 to Route 555; then south along Route 555 to Route 553; then east along Route 553 to Route 649; then north along Route 649 to Route 670; then east along Route 670 to Route 47; then north along Route 47 to Route 548; then east along Route 548 to Route 49; then east along Route 49 to Route 50; then south along Route 50 to Route 9; then south along Route 9 to Route 625 (Sea Isle City Boulevard); then east along Route 625 to the Atlantic Ocean; then north to the beginning point.

New York

Lake Champlain Goose Area—that area of New York State lying east and north of a continuous line extending along Route 11 from the New York-Canada International boundary south to Route 9B, south along Route 9B to Route 9, south along Route 9 to Route 22 south of Keeseville, south along Route 22 to the west shore of South Bay along and around the shoreline of South Bay to Route 22 on the east shore of South Bay, southeast along Route 22 to Route 4, northeast along Route 4 to the New York-Vermont boundary.

North Central Goose Area— that area of New York State lying north of a continuous line extending from Route 4 at the New York-Vermont boundary, west and south along Route 4 to Route 149 at Fort Ann, west on Route 149 to Route 9, south along Route 9 to Interstate Route 87 (at Exit 20 in Glens Falls), south along Route 87 to Route 29, west along Route 29 to Route 147 at Kimball Corners, south along Route 147 to Schenectady County Route 40 (West Glenville Road), west along Route 40 to Touareuna Road, south along Touareuna Road to Schenectady County Route 59, south along Route 59 to State Route 5, east along Route 5 to the Lock 9 bridge, southwest along the Lock 9 bridge to Route 5S, southeast along Route 5S to Schenectady County Route 58, southwest along Route 58 to the NYS Thruway, south along the Thruway to Route 7, southwest along Route 7 to Schenectady County Route 103, south along Route 103 to Route 406, east along Route 406 to Schenectady County Route 99 (Windy Hill Road), south along Route 99 to Dunnsville Road, south along Dunnsville Road to Route 397, southwest along Route 397 to Route 146 at Altamont, west along Route 146 to Albany County Route 252, northwest along Route 252 to Schenectady County Route 131, north along Route 131 to Route 7, west along Route 7 to Route 10 at Richmondville, south on Route 10 to Route 23 at Stamford, west along Route 23 to the south bank of the Susquehanna River, southwest along the south bank of the Susquehanna River to Interstate Route 88 near Harpursville, west along Route 88 to Route 79, northwest along Route 79 to Route 26 in Whitney Point, southwest along Route 26 to Interstate Route 81, north along Route 81 to the north shore of the Salmon River, west along the north shore of the Salmon River to the shore of Lake Ontario, extending generally northwest in a straight line to the nearest point of the international boundary with Canada, excluding the Lake Champlain Goose Hunting Area.

West Central Goose Area—that area of New York State lying within a continuous line beginning at the point where the northerly extension of Route 269 (County Line Road on the Niagara-Orleans County boundary) meets the International boundary with Canada, south to the shore of Lake Ontario at the eastern boundary of Golden Hill State Park, south along the extension of Route 269 and Route 269 to Route 104 at Jeddo, west along Route 104 to Niagara County Route 271, south along Route 271 to Route 31E at Middleport, south along Route 31E to Route 31, west along Route 31 to Griswold Street, south along Griswold Street to Ditch Road, south along Ditch Road to Foot Road, south along Foot Road to the north bank of Tonawanda Creek, west along the north bank of Tonawanda Creek to Route 93, south along Route 93 to the NYS Thruway, east along the Thruway 90 to Route 98 (at Thruway Exit 48) in Batavia, south along Route 98 to Route 20, east along Route 20 to Route 19 in Pavilion Center, south along Route 19 to Route 63, southeast along Route 63 to Route 246, south along Route 246 to Route 39 in Perry, south along Route 39 to Route 19A (south of Castile), south and southeast along Route 19A to Route 436, east along Route 436 to Route 36 in Dansville, south along Route 36 to Route 17, east along Route 17 to Belfast Street at Bath, east along Belfast Street to Route 415 (West Washington Street), southeast along Route 415 to Route 54, northeast along Route 54 to Steuben County Route 87, northeast along Route 87 to Steuben County Route 96, east along Route 96 to Steuben County Route 114, east along Route 114 to Schuyler County Route 23, east and southeast along Route 23 to Schuyler County Route 28, southeast along Route 28 to Route 409 at Watkins Glen, south along Route 409 to Route 14, south along Route 14 to Route 224 at Montour Falls, east along Route 224 to Route 228 in Odessa, north along Route 228 to Route 79 in Mecklenburg, east along Route 79 to Route 366 in Ithaca, northeast along Route 366 to Route 13, northeast along Route 13 to Interstate Route 81 in Cortland, north along Route 81 to the north shore of the Salmon River to shore of Lake Ontario, extending generally northwest in a straight line to the nearest point of the International boundary with Canada, south and west along the International boundary to the point of beginning.

Hudson Valley Goose Area—that area of New York State lying within a continuous line extending from Route 4 at the New York-Vermont boundary, west and south along Route 4 to Route 149 at Fort Ann, west on Route 149 to Route 9, south along Route 9 to Interstate Route 87 (at Exit 20 in Glens Falls), south along Route 87 to Route 29, west along Route 29 to Route 147 at Kimball Corners, south along Route 147 to Schenectady County Route 40 (West Glenville Road), west along Route 40 to Touareuna Road, south along Touareuna Road to Schenectady County Route 59, south along Route 59 to State Route 5, east along Route 5 to the Lock 9 bridge, southwest along the Lock 9 bridge to Route 5S, southeast along Route 5S to Schenectady County Route 58, southwest along Route 58 to the NYS Thruway, south along the Thruway to Route 7, southwest along Route 7 to Schenectady County Route 103, south along Route 103 to Route 406, east along Route 406 to Schenectady County Route 99 (Windy Hill Road), south along Route 99 to Dunnsville Road, south along Dunnsville Road to Route 397, southwest along Route 397 to Route 146 at Altamont, southeast along Route 146 to Main Street in Altamont, west along Main Street to Route 156, southeast along Route 156 to Albany County Route 307, southeast along Route 307 to Route 85A, southwest along Route 85A to Route 85, south along Route 85 to Route 443, southeast along Route 443 to Albany County Route 301 at Clarksville, southeast along Route 301 to Route 32, south along Route 32 to Route 23 at Cairo, west along Route 23 to Joseph Chadderdon Road, southeast along Joseph Chadderdon Road to Hearts Content Road (Greene County Route 31), southeast along Route 31 to Route 32, south along Route 32 to Greene County Route 23A, east along Route 23A to Interstate Route 87 (the NYS Thruway), south along Route 87 to Route 28 (Exit 19) near Kingston, northwest on Route

28 to Route 209, southwest on Route 209 to the New York-Pennsylvania boundary, southeast along the New York-Pennsylvania boundary to the New York-New Jersey boundary, southeast along the New York-New Jersey boundary to Route 210 near Greenwood Lake, northeast along Route 210 to Orange County Route 5, northeast along Orange County Route 5 to Route 105 in the Village of Monroe, east and north along Route 105 to Route 32, northeast along Route 32 to Orange County Route 107 (Quaker Avenue), east along Route 107 to Route 9W, north along Route 9W to the south bank of Moodna Creek, southeast along the south bank of Moodna Creek to the New Windsor-Cornwall town boundary, northeast along the New Windsor-Cornwall town boundary to the Orange-Dutchess County boundary (middle of the Hudson River), north along the county boundary to Interstate Route 84, east along Route 84 to the New York-Connecticut boundary, north along the New York-Connecticut boundary to the New York-Massachusetts boundary, north along the New York-Massachusetts boundary to the New York-Vermont boundary, north to the point of beginning.

Western Long Island Goose Area—that area of Westchester County and its tidal waters lying southeast of Interstate Route 95, and that area of Nassau and Suffolk Counties lying west of a continuous line extending due south from the New York-Connecticut boundary to the northern end of Sound Road (near Wading River), then south along Sound Road to North Country Road, then west along North Country Road to Randall Road, then south along Randall Road to State Route 25A, then west along Route 25A to the William Floyd Parkway (County Route 46), then south along William Floyd Parkway to Fire Island Beach Road, then due south to International waters.

Eastern Long Island Goose Area—that area of Suffolk County that is not part of the Western Long Island Goose Hunting Area, as defined above.

South Goose Area—the remainder of New York State, excluding New York City.

Special Late Canada Goose Area—that area of Westchester County lying southeast of Interstate Route 95, and that area of Nassau and Suffolk Counties lying north of State Route 25A and west of a continuous line extending northward from State Route 25A along Randall Road (near Shoreham) to North Country Road, then east to Sound Road and then north to Long Island Sound and then due north to the New York-Connecticut boundary.

North Carolina

SJBP Hunt Zone: Includes the following counties or portions of counties: Anson, Cabarrus, Chatham, Davidson, Durham, Halifax (that portion east of NC 903), Montgomery (that portion west of NC 109), Northampton (all of the county with the exception of that portion that is both north of U.S. 158 and east of NC 35), Richmond (that portion south of NC 73 and west of U.S. 220 and north of U.S. 74), Rowan, Stanly, Union, and Wake.

RP Hunt Zone: Includes the following counties or portions of counties: Alamance, Alleghany, Alexander, Ashe, Avery, Beaufort, Bertie (that portion south and west of a line formed by NC 45 at the Washington Co. line to U.S. 17 in Midway, U.S. 17 in Midway to U.S. 13 in Windsor, U.S. 13 in Windsor to the Hertford Co. line), Bladen, Brunswick, Buncombe, Burke, Caldwell, Carteret, Caswell, Catawba, Cherokee, Clay, Cleveland, Columbus, Craven, Cumberland, Davie, Duplin, Edgecombe, Forsyth, Franklin, Gaston, Gates, Graham, Granville, Greene, Guilford, Halifax (that portion west of NC 903), Harnett, Haywood, Henderson, Hertford, Hoke, Iredell, Jackson, Johnston, Jones, Lee, Lenoir, Lincoln, McDowell, Macon, Madison, Martin, Mecklenburg, Mitchell, Montgomery (that portion that is east of NC 109), Moore, Nash, New Hanover, Onslow, Orange, Pamlico, Pender, Person, Pitt, Polk, Randolph, Richmond (all of the county with exception of that portion that is south of NC 73 and west of U.S. 220 and north of U.S. 74), Robeson, Rockingham, Rutherford, Sampson, Scotland, Stokes, Surry, Swain, Transylvania, Vance, Warren, Watauga, Wayne, Wilkes, Wilson, Yadkin, and Yancey.

Northeast Hunt Unit: Includes the following counties or portions of counties: Bertie (that portion north and east of a line formed by NC 45 at the Washington County line to U.S. 17 in Midway, U.S. 17 in Midway to U.S. 13 in Windsor, U.S. 13 in Windsor to the Hertford Co. line), Camden, Chowan, Currituck, Dare, Hyde, Northampton (that portion that is both north of U.S. 158 and east of NC 35), Pasquotank, Perquimans, Tyrrell, and Washington.

Pennsylvania

Resident Canada Goose Zone: All of Pennsylvania except for Crawford, Erie, and Mercer counties and the area east of route SR 97 from Maryland State Line to the intersection of SR 194, east of SR 194 to intersection of U.S. Route 30, south of U.S. Route 30 to SR 441, east of SR 441 to SR 743, east of SR 743 to intersection of I–81, east of I–81 to intersection of I–80, south of I–80 to New Jersey State line).

SJBP Zone: Erie, Mercer and Crawford Counties except for the Pymatuning Zone.

Pymatuning Zone: The area south of SR 198 from the Ohio State line to intersection of SR 18, SR 18 south to SR 618, SR 618 south to U.S. Route 6, U.S. Route 6 east to U.S. Route 322/SR 18, U.S. Route 322/SR 18 west to intersection of SR 3013, SR 3013 south to the Crawford/Mercer County line.

AP Zone: The area east of route SR 97 from Maryland State Line to the intersection of SR 194, east of SR 194 to intersection of U.S. Route 30, south of U.S. Route 30 to SR 441, east of SR 441 to SR 743, east of SR 743 to intersection of I–81, east of I–81 to intersection of I–80, south of I–80 to New Jersey State line.

Rhode Island

Special Area for Canada Geese: Kent and Providence Counties and portions of the towns of Exeter and North Kingston within Washington County (see State regulations for detailed descriptions).

South Carolina

Canada Goose Area: Statewide except for Clarendon County and that portion of Lake Marion in Orangeburg County and Berkeley County.

Vermont: Same zones as for ducks.

Virginia

AP Zone: The area east and south of the following line—the Stafford County line from the Potomac River west to Interstate 95 at Fredericksburg, then south along Interstate 95 to Petersburg, then Route 460 (SE) to City of Suffolk, then south along Route 32 to the North Carolina line.

SJBP Zone: The area to the west of the AP Zone boundary *and* east of the following line: the ''Blue Ridge'' (mountain spine) at the West Virginia-Virginia Border (Loudoun County-Clarke County line) south to Interstate 64 (the Blue Ridge line follows county borders along the western edge of Loudoun-Fauquier-Rappahannock-Madison-Greene-Albemarle and into Nelson Counties), then east along Interstate Rt. 64 to Route 15, then south along Rt. 15 to the North Carolina line.

RP Zone: The remainder of the State west of the SJBP Zone.

Back Bay Area: The waters of Back Bay and its tributaries and the marshes adjacent thereto, and on the land and marshes between Back Bay and the Atlantic Ocean from Sandbridge to the North Carolina line, and on and along the shore of North Landing River and

the marshes adjacent thereto, and on and along the shores of Binson Inlet Lake (formerly known as Lake Tecumseh) and Red Wing Lake and the marshes adjacent thereto.

West Virginia: Same zones as for ducks.

Mississippi Flyway

Alabama: Same zones as for ducks, but in addition:

SJBP Zone: That portion of Morgan County east of U.S. Highway 31, north of State Highway 36, and west of U.S. 231; that portion of Limestone County south of U.S. 72; and that portion of Madison County south of Swancott Road and west of Triana Road.

Arkansas

Northwest Zone: Benton, Carroll, Baxter, Washington, Madison, Newton, Crawford, Van Buren, Searcy, Sebastion, Scott, Franklin, Logan, Johnson, Pope, Yell, Conway, Perry, Faulkner, Pulaski, Boone, and Marion Counties.

Illinois: Same zones as for ducks.

Indiana: Same zones as for ducks, but in addition:

SJBP Zone: Jasper, LaGrange, LaPorte, Starke, Elkhart, and Steuben Counties, and that portion of the Jasper-Pulaski Fish and Wildlife Area in Pulaski County.

Iowa

North Zone: That portion of the State north of U.S. Highway 20.

South Zone: The remainder of Iowa.

Kentucky

Western Zone: That portion of the State west of a line beginning at the Tennessee State line at Fulton and extending north along the Purchase Parkway to Interstate Highway 24, east along I–24 to U.S. Highway 641, north along U.S. 641 to U.S. 60, northeast along U.S. 60 to the Henderson County line, then south, east, and northerly along the Henderson County line to the Indiana State line.

Ballard Reporting Area: That area encompassed by a line beginning at the northwest city limits of Wickliffe in Ballard County and extending westward to the middle of the Mississippi River, north along the Mississippi River and along the low-water mark of the Ohio River on the Illinois shore to the Ballard-McCracken County line, south along the county line to Kentucky Highway 358, south along Kentucky 358 to U.S. Highway 60 at LaCenter; then southwest along U.S. 60 to the northeast city limits of Wickliffe.

Henderson-Union Reporting Area: Henderson County and that portion of Union County within the Western Zone.

Pennyroyal/Coalfield Zone: Butler, Daviess, Ohio, Simpson, and Warren Counties and all counties lying west to the boundary of the Western Goose Zone.

Michigan

MVP–Upper Peninsula Zone: The MVP–Upper Peninsula Zone consists of the entire Upper Peninsula of Michigan.

MVP–Lower Peninsula Zone: The MVP–Lower Peninsula Zone consists of the area within the Lower Peninsula of Michigan that is north and west of the point beginning at the southwest corner of Branch county, north continuing along the western border of Branch and Calhoun counties to the northwest corner of Calhoun county, then east to the southwest corner of Eaton county, then north to the southern border of Ionia county, then east to the southwest corner of Clinton county, then north along the western border of Clinton County continuing north along the county border of Gratiot and Montcalm counties to the southern border of Isabella county, then east to the southwest corner of Midland county, then north along the west Midland county border to Highway M–20, then easterly to U.S. Highway 10, then easterly to U.S. Interstate 75/U.S. Highway 23, then northerly along I–75/U.S. 23 and easterly on U.S. 23 to the centerline of the Au Gres River, then southerly along the centerline of the Au Gres River to Saginaw Bay, then on a line directly east 10 miles into Saginaw Bay, and from that point on a line directly northeast to the Canadian border.

SJBP Zone is the rest of the State, that area south and east of the boundary described above.

Tuscola/Huron Goose Management Unit (GMU): Those portions of Tuscola and Huron Counties bounded on the south by Michigan Highway 138 and Bay City Road, on the east by Colwood and Bay Port Roads, on the north by Kilmanagh Road and a line extending directly west off the end of Kilmanagh Road into Saginaw Bay to the west boundary, and on the west by the Tuscola-Bay County line and a line extending directly north off the end of the Tuscola-Bay County line into Saginaw Bay to the north boundary.

Allegan County GMU: That area encompassed by a line beginning at the junction of 136th Avenue and Interstate Highway 196 in Lake Town Township and extending easterly along 136th Avenue to Michigan Highway 40, southerly along Michigan 40 through the city of Allegan to 108th Avenue in Trowbridge Township, westerly along 108th Avenue to 46th Street, northerly ½ mile along 46th Street to 109th Avenue, westerly along 109th Avenue to I–196 in Casco Township, then northerly along I–196 to the point of beginning.

Saginaw County GMU: That portion of Saginaw County bounded by Michigan Highway 46 on the north; Michigan 52 on the west; Michigan 57 on the south; and Michigan 13 on the east.

Muskegon Wastewater GMU: That portion of Muskegon County within the boundaries of the Muskegon County wastewater system, east of the Muskegon State Game Area, in sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, and 32, T10N R14W, and sections 1, 2, 10, 11, 12, 13, 14, 24, and 25, T10N R15W, as posted.

Special Canada Goose Seasons

Southern Michigan GMU: That portion of the State, including the Great Lakes and interconnecting waterways and excluding the Allegan County GMU, south of a line beginning at the Ontario border at the Bluewater Bridge in the city of Port Huron and extending westerly and southerly along Interstate Highway 94 to I–69, westerly along I–69 to Michigan Highway 21, westerly along Michigan 21 to I–96, northerly along I–96 to I–196, westerly along I–196 to Lake Michigan Drive (M–45) in Grand Rapids, westerly along Lake Michigan Drive to the Lake Michigan shore, then directly west from the end of Lake Michigan Drive to the Wisconsin State line.

Central Michigan GMU: That portion of the Lower Peninsula north of the Southern Michigan GMU but south of a line beginning at the Wisconsin State line in Lake Michigan due west of the mouth of Stony Creek in Oceana County; then due east to, and easterly and southerly along the south shore of Stony Creek to Scenic Drive, easterly and southerly along Scenic Drive to Stony Lake Road, easterly along Stony Lake and Garfield Roads to Michigan Highway 20, easterly along Michigan 20 to U.S. Highway 10 Business Route (BR) in the city of Midland, easterly along U.S. 10 BR to U.S. 10, easterly along U.S. 10 to Interstate Highway 75/U.S. Highway 23, northerly along I–75/U.S. 23 to the U.S. 23 exit at Standish, easterly along U.S. 23 to the centerline of the Au Gres River, then southerly along the centerline of the Au Gres River to Saginaw Bay, then on a line directly east 10 miles into Saginaw Bay, and from that point on a line directly northeast to the Canadian border, excluding the Tuscola/Huron GMU, Saginaw County GMU, and Muskegon Wastewater GMU.

Minnesota

West Zone: That portion of the State encompassed by a line beginning at the junction of State Trunk Highway (STH) 60 and the Iowa State line, then north and east along STH 60 to U.S. Highway 71, north along U.S. 71 to Interstate Highway 94, then north and west along I–94 to the North Dakota State line.

West Central Zone: That area encompassed by a line beginning at the intersection of State Trunk Highway (STH) 29 and U.S. Highway 212 and extending west along U.S. 212 to U.S. 59, south along U.S. 59 to STH 67, west along STH 67 to U.S. 75, north along U.S. 75 to County State Aid Highway (CSAH) 30 in Lac qui Parle County, west along CSAH 30 to the western boundary of the State, north along the western boundary of the State to a point due south of the intersection of STH 7 and CSAH 7 in Big Stone County, and continuing due north to said intersection, then north along CSAH 7 to CSAH 6 in Big Stone County, east along CSAH 6 to CSAH 21 in Big Stone County, south along CSAH 21 to CSAH 10 in Big Stone County, east along CSAH 10 to CSAH 22 in Swift County, east along CSAH 22 to CSAH 5 in Swift County, south along CSAH 5 to U.S. 12, east along U.S. 12 to CSAH 17 in Swift County, south along CSAH 17 to CSAH 9 in Chippewa County, south along CSAH 9 to STH 40, east along STH 40 to STH 29, then south along STH 29 to the point of beginning.

Special Canada Goose Seasons

Southeast Zone: That part of the State within the following described boundaries: beginning at the intersection of U.S. Highway 52 and the south boundary of the Twin Cities Metro Canada Goose Zone; thence along the U.S. Highway 52 to State Trunk Highway (STH) 57; thence along STH 57 to the municipal boundary of Kasson; thence along the municipal boundary of Kasson County State Aid Highway (CSAH) 13, Dodge County; thence along CSAH 13 to STH 30; thence along STH 30 to U.S. Highway 63; thence along U.S. Highway 63 to the south boundary of the State; thence along the south and east boundaries of the State to the south boundary of the Twin Cities Metro Canada Goose Zone; thence along said boundary to the point of beginning.

Missouri: Same zones as for ducks but in addition:

Middle Zone:

Southeast Zone: That portion of the State encompassed by a line beginning at the intersection of Missouri Highway (MO) 34 and Interstate 55 and extending south along I–55 to U.S. Highway 62, west along U.S. 62 to MO 53, north along MO 53 to MO 51, north along MO 51 to U.S. 60, west along U.S. 60 to MO 21, north along MO 21 to MO 72, east along MO 72 to MO 34, then east along MO 34 to I–55.

Ohio: Same zones as for ducks but in addition:

North Zone:

Lake Erie SJBP Zone: That portion of the State encompassed by a line beginning in Lucas County at the Michigan State line on I–75, and extending south along I–75 to I–280, south along I–280 to I–80, east along I–80 to the Pennsylvania State line in Trumbull County, north along the Pennsylvania State line to SR 6 in Ashtabula County, west along SR 6 to the Lake/Cuyahoga County line, north along the Lake/Cuyahoga County line to the shore of Lake Erie.

Tennessee

Southwest Zone: That portion of the State south of State Highways 20 and 104, and west of U.S. Highways 45 and 45W.

Northwest Zone: Lake, Obion, and Weakley Counties and those portions of Gibson and Dyer Counties not included in the Southwest Tennessee Zone.

Kentucky/Barkley Lakes Zone: That portion of the State bounded on the west by the eastern boundaries of the Northwest and Southwest Zones and on the east by State Highway 13 from the Alabama State line to Clarksville and U.S. Highway 79 from Clarksville to the Kentucky State line.

Wisconsin: Same zones as for ducks but in addition:

Horicon Zone: That area encompassed by a line beginning at the intersection of State Highway 21 and the Fox River in Winnebago County and extending westerly along State 21 to the west boundary of Winnebago County, southerly along the west boundary of Winnebago County to the north boundary of Green Lake County, westerly along the north boundaries of Green Lake and Marquette Counties to State 22, southerly along State 22 to State 33, westerly along State 33 to Interstate Highway 39, southerly along Interstate Highway 39 to Interstate Highway 90/94, southerly along I–90/94 to State 60, easterly along State 60 to State 83, northerly along State 83 to State 175, northerly along State 175 to State 33, easterly along State 33 to U.S. Highway 45, northerly along U.S. 45 to the east shore of the Fond Du Lac River, northerly along the east shore of the Fond Du Lac River to Lake Winnebago, northerly along the western shoreline of Lake Winnebago to the Fox River, then westerly along the Fox River to State 21.

Collins Zone: That area encompassed by a line beginning at the intersection of Hilltop Road and Collins Marsh Road in Manitowoc County and extending westerly along Hilltop Road to Humpty Dumpty Road, southerly along Humpty Dumpty Road to Poplar Grove Road, easterly along Poplar Grove Road to Rockea Road, southerly along Rockea Road to County Highway JJ, southeasterly along County JJ to Collins Road, southerly along Collins Road to the Manitowoc River, southeasterly along the Manitowoc River to Quarry Road, northerly along Quarry Road to Einberger Road, northerly along Einberger Road to Moschel Road, westerly along Moschel Road to Collins Marsh Road, northerly along Collins Marsh Road to Hilltop Road.

Exterior Zone: That portion of the State not included in the Horicon or Collins Zones.

Mississippi River Subzone: That area encompassed by a line beginning at the intersection of the Burlington Northern & Santa Fe Railway and the Illinois State line in Grant County and extending northerly along the Burlington Northern & Santa Fe Railway to the city limit of Prescott in Pierce County, then west along the Prescott city limit to the Minnesota State line.

Rock Prairie Subzone: That area encompassed by a line beginning at the intersection of the Illinois State line and Interstate Highway 90 and extending north along I–90 to County Highway A, east along County A to U.S. Highway 12, southeast along U.S. 12 to State Highway 50, west along State 50 to State 120, then south along 120 to the Illinois State line.

Brown County Subzone: That area encompassed by a line beginning at the intersection of the Fox River with Green Bay in Brown County and extending southerly along the Fox River to State Highway 29, northwesterly along State 29 to the Brown County line, south, east, and north along the Brown County line to Green Bay, due west to the midpoint of the Green Bay Ship Channel, then southwesterly along the Green Bay Ship Channel to the Fox River.

Central Flyway

Colorado (Central Flyway Portion)

Northern Front Range Area: All areas in Boulder, Larimer and Weld Counties from the Continental Divide east along the Wyoming border to U.S. 85, south on U.S. 85 to the Adams County line, and all lands in Adams, Arapahoe, Broomfield, Clear Creek, Denver, Douglas, Gilpin, and Jefferson Counties.

North Park Area: Jackson County.

South Park and San Luis Valley Area: All of Alamosa, Chaffee, Conejos, Costilla, Custer, Fremont, Lake, Park, Rio Grande and Teller Counties, and those portions of Saguache, Mineral and Hinsdale Counties east of the Continental Divide.

Remainder: Remainder of the Central Flyway portion of Colorado.

Eastern Colorado Late Light Goose Area: That portion of the State east of Interstate Highway 25.

Nebraska

Dark Geese:

Niobrara Unit: That area contained within and bounded by the intersection of the South Dakota State line and the Cherry County line, south along the Cherry County line to the Niobrara River, east to the Norden Road, south on the Norden Road to U.S. Hwy 20, east along U.S. Hwy 20 to NE Hwy 137, north along NE Hwy 137 to the Niobrara River, east along the Niobrara River to the Boyd County line, north along the Boyd County line to the South Dakota State line. Where the Niobrara River forms the boundary, both banks of the river are included in the Niobrara Unit.

East Unit: That area north and east of U.S. 281 at the Kansas'Nebraska State line, north to Giltner Road (near Doniphan), east to NE 14, north to NE 66, east to U.S. 81, north to NE 22, west to NE 14 north to NE 91, east to U.S. 275, south to U.S. 77, south to NE 91, east to U.S. 30, east to Nebraska—Iowa State line.

Platte River Unit: That area south and west of U.S. 281 at the Kansas—Nebraska State line, north to Giltner Road (near Doniphan), east to NE 14, north to NE 66, east to U.S. 81, north to NE 22, west to NE 14 north to NE 91, west along NE 91 to NE 11, north to the Holt County line, west along the northern border of Garfield, Loup, Blaine and Thomas Counties to the Hooker County line, south along the Thomas'Hooker County lines to the McPherson County line, east along the south border of Thomas County to the western line of Custer County, south along the Custer—Logan County line to NE 92, west to U.S. 83, north to NE 92, west to NE 61, north along NE 61 to NE 2, west along NE 2 to the corner formed by Garden—Grant—Sheridan Counties, west along the north border of Garden, Morrill, and Scotts Bluff Counties to the Wyoming State line.

North—Central Unit: The remainder of the State.

Light Geese:

Rainwater Basin Light Goose Area (West): The area bounded by the junction of U.S. 283 and U.S. 30 at Lexington, east on U.S. 30 to U.S. 281, south on U.S. 281 to NE 4, west on NE 4 to U.S. 34, continue west on U.S. 34 to U.S. 283, then north on U.S. 283 to the beginning.

Rainwater Basin Light Goose Area (East): The area bounded by the junction of U.S. 281 and U.S. 30 at Grand Island, north and east on U.S. 30 to NE 92, east on NE 92 to NE 15, south on NE 15 to NE 4, west on NE 4 to U.S. 281, north on U.S. 281 to the beginning.

Remainder of State: The remainder portion of Nebraska.

New Mexico (Central Flyway Portion)

Dark Geese:

Middle Rio Grande Valley Unit: Sierra, Socorro, and Valencia Counties.

Remainder: The remainder of the Central Flyway portion of New Mexico.

South Dakota

Canada Geese:

Unit 1: Statewide except for Units 2, 3 and 4.

Big Stone Power Plant Area: That portion of Grant and Roberts Counties east of SD 15 and north of SD 20.

Unit 2: Bon Homme, Brule, Buffalo, Charles Mix, Gregory, Hughes, Lyman, Stanley, and Sully Counties; that portion of Dewey County south of U.S. 212, that portion of Hyde County south of U.S. Highway 14; that portion of Potter County west of U.S. Highway 83; Fall River County east of SD 71 and U.S. 385; and that portion of Custer County, east of SD 79 and south of French Creek.

Unit 3: Clark, Codington, Day, Deuel, Grant, Hamlin, Marshall, and Roberts Counties.

Unit 4: Bennett County.

Texas

Northeast Goose Zone: That portion of Texas lying east and north of a line beginning at the Texas—Oklahoma border at U.S. 81, then continuing south to Bowie and then southeasterly along U.S. 81 and U.S. 287 to I–35W and I–35 to the juncture with I–10 in San Antonio, then east on I–10 to the Texas–Louisiana border.

Southeast Goose Zone: That portion of Texas lying east and south of a line beginning at the International Toll Bridge at Laredo, then continuing north following I–35 to the juncture with I–10 in San Antonio, then easterly along I–10 to the Texas–Louisiana border.

West Goose Zone: The remainder of the State.

Wyoming (Central Flyway Portion)

Dark Geese:

Area 1: Converse, Hot Springs, Natrona, and Washakie Counties, and the portion of Park County east of the Shoshone National Forest boundary and south of a line beginning where the Shoshone National Forest boundary crosses Park County Road 8VC, easterly along said road to Park County Road 1AB, easterly along said road to Wyoming Highway 120, northerly along said highway to Wyoming Highway 294, southeasterly along said highway to Lane 9, easterly along said lane to the town of Powel and Wyoming Highway 14A, easterly along said highway to the Park County and Big Horn County Line.

Area 2: Albany, Campbell, Crook, Johnson, Laramie, Niobrara, Sheridan, and Weston Counties, and that portion of Carbon County east of the Continental Divide; that portion of Park County west of the Shoshone National Forest boundary, and that portion of Park County north of a line beginning where the Shoshone National Forest boundary crosses Park County Road 8VC, easterly along said road to Park County Road 1AB, easterly along said road to Wyoming Highway 120, northerly along said highway to Wyoming Highway 294, southeasterly along said highway to Lane 9, easterly along said lane to the town of Powel and Wyoming Highway 14A, easterly along said highway to the Park County and Big Horn County Line.

Area 3: Goshen and Platte Counties.

Area 4: Big Horn and Fremont Counties.

Pacific Flyway

Arizona

North Zone: Game Management Units 1–5, those portions of Game Management Units 6 and 8 within Coconino County, and Game Management units 7, 9, and 12A.

South Zone: Those portions of Game Management Units 6 and 8 in Yavapai County, and Game Management Units 10 and 12B–45.

California

Northeastern Zone: In that portion of California lying east and north of a line beginning at the intersection of Interstate 5 with the California-Oregon line; south along Interstate 5 to its junction with Walters Lane south of the town of Yreka; west along Walters Lane to its junction with Easy Street; south along Easy Street to the junction with Old Highway 99; south along Old Highway 99 to the point of intersection with Interstate 5 north of the town of Weed; south along Interstate 5 to its junction with Highway 89; east and south along Highway 89 to main street Greenville; north and east to its junction with North Valley Road; south to its junction of Diamond Mountain Road; north and east to its junction with North Arm Road; south and west to the

junction of North Valley Road; south to the junction with Arlington Road (A22); west to the junction of Highway 89; south and west to the junction of Highway 70; east on Highway 70 to Highway 395; south and east on Highway 395 to the point of intersection with the California-Nevada State line; north along the California-Nevada State line to the junction of the California-Nevada-Oregon State lines west along the California-Oregon State line to the point of origin.

Colorado River Zone: Those portions of San Bernardino, Riverside, and Imperial Counties east of a line extending from the Nevada border south along U.S. 95 to Vidal Junction; south on a road known as ''Aqueduct Road'' in San Bernardino County through the town of Rice to the San Bernardino—Riverside County line; south on a road known in Riverside County as the ''Desert Center to Rice Road'' to the town of Desert Center; east 31 miles on I–10 to the Wiley Well Road; south on this road to Wiley Well; southeast along the Army—Milpitas Road to the Blythe, Brawley, Davis Lake intersections; south on the Blythe—Brawley paved road to the Ogilby and Tumco Mine Road; south on this road to U.S. 80; east 7 miles on U.S. 80 to the Andrade—Algodones Road; south on this paved road to the Mexican border at Algodones, Mexico.

Southern Zone: That portion of southern California (but excluding the Colorado River Zone) south and east of a line extending from the Pacific Ocean east along the Santa Maria River to CA 166 near the City of Santa Maria; east on CA 166 to CA 99; south on CA 99 to the crest of the Tehachapi Mountains at Tejon Pass; east and north along the crest of the Tehachapi Mountains to CA 178 at Walker Pass; east on CA 178 to U.S. 395 at the town of Inyokern; south on U.S. 395 to CA 58; east on CA 58 to I–15; east on I–15 to CA 127; north on CA 127 to the Nevada border.

Imperial County Special Management Area: The area bounded by a line beginning at Highway 86 and the Navy Test Base Road; south on Highway 86 to the town of Westmoreland; continue through the town of Westmoreland to Route S26; east on Route S26 to Highway 115; north on Highway 115 to Weist Rd.; north on Weist Rd. to Flowing Wells Rd.; northeast on Flowing Wells Rd. to the Coachella Canal; northwest on the Coachella Canal to Drop 18; a straight line from Drop 18 to Frink Rd.; south on Frink Rd. to Highway 111; north on Highway 111 to Niland Marina Rd.; southwest on Niland Marina Rd. to the old Imperial County boat ramp and the water line of the Salton Sea; from the water line of the Salton Sea, a straight line across the Salton Sea to the Salinity Control Research Facility and the Navy Test Base Road; southwest on the Navy Test Base Road to the point of beginning.

Balance-of-the-State Zone: The remainder of California not included in the Northeastern, Southern, and the Colorado River Zones.

North Coast Special Management Area: The Counties of Del Norte and Humboldt.

Sacramento Valley Special Management Area (West): That area bounded by a line beginning at Willows south on I–5 to Hahn Road; easterly on Hahn Road and the Grimes-Arbuckle Road to Grimes; northerly on CA 45 to the junction with CA 162; northerly on CA 45/162 to Glenn; and westerly on CA 162 to the point of beginning in Willows.

Colorado (Pacific Flyway Portion)

West Central Area: Archuleta, Delta, Dolores, Gunnison, LaPlata, Montezuma, Montrose, Ouray, San Juan, and San Miguel Counties and those portions of Hinsdale, Mineral, and Saguache Counties west of the Continental Divide.

State Area: The remainder of the Pacific Flyway Portion of Colorado.

Idaho

Zone 1: Benewah, Bonner, Boundary, Clearwater, Idaho, Kootenai, Latah, Lewis, Nez Perce, and Shoshone Counties.

Zone 2: The Counties of Ada; Adams; Boise; Canyon; those portions of Elmore north and east of I–84, and south and west of I–84, west of ID 51, except the Camas Creek drainage; Gem; Owyhee west of ID 51; Payette; Valley; and Washington.

Zone 3: The Counties of Blaine; Camas; Cassia; those portions of Elmore south of I–84 east of ID 51, and within the Camas Creek drainage; Gooding; Jerome; Lincoln; Minidoka; Owyhee east of ID 51; Power within the Minidoka National Wildlife Refuge; and Twin Falls.

Zone 4: The Counties of Bear Lake; Bingham within the Blackfoot Reservoir drainage; Bonneville, Butte; Caribou except the Fort Hall Indian Reservation; Clark; Custer; Franklin; Fremont; Jefferson; Lemhi; Madison; Oneida; Power west of ID 37 and ID 39 except the Minidoka National Wildlife Refuge; and Teton.

Zone 5: All lands and waters within the Fort Hall Indian Reservation, including private inholdings; Bannock County; Bingham County, except that portion within the Blackfoot Reservoir drainage; and Power County east of ID 37 and ID 39.

Montana (Pacific Flyway Portion)

East of the Divide Zone: The Pacific Flyway portion of the State located east of the Continental Divide.

West of the Divide Zone: The remainder of the Pacific Flyway portion of Montana.

Nevada

Lincoln Clark County Zone: All of Lincoln and Clark Counties.

Remainder-of-the-State Zone: The remainder of Nevada.

New Mexico (Pacific Flyway Portion)

North Zone: The Pacific Flyway portion of New Mexico located north of I–40.

South Zone: The Pacific Flyway portion of New Mexico located south of I–40.

Oregon

Southwest Zone: Those portions of Douglas, Coos, and Curry Counties east of Highway 101, and Josephine and Jackson Counties.

South Coast Zone: Those portions of Douglas, Coos, and Curry Counties west of Highway 101.

Northwest Special Permit Zone: That portion of western Oregon west and north of a line running south from the Columbia River in Portland along I–5 to OR 22 at Salem; then east on OR 22 to the Stayton Cutoff; then south on the Stayton Cutoff to Stayton and due south to the Santiam River; then west along the north shore of the Santiam River to I–5; then south on I–5 to OR 126 at Eugene; then west on OR 126 to Greenhill Road; then south on Greenhill Road to Crow Road; then west on Crow Road to Territorial Hwy; then west on Territorial Hwy to OR 126; then west on OR 126 to Milepost 19, north to the intersection of the Benton and Lincoln County line, north along the western boundary of Benton and Polk Counties to the southern boundary of Tillamook County, west along the Tillamook County boundary to the Pacific Coast.

Lower Columbia/N. Willamette Valley Management Area: Those portions of Clatsop, Columbia, Multnomah, and Washington Counties within the Northwest Special Permit Zone.

Northwest Zone: Those portions of Clackamas, Lane, Linn, Marion, Multnomah, and Washington Counties outside of the Northwest Special Permit Zone and all of Lincoln County.

Closed Zone: All of Tillamook County.

Eastern Zone: Hood River, Wasco, Sherman, Gilliam, Morrow, Umatilla,

Deschutes, Jefferson, Crook, Wheeler, Grant, Baker, Union, and Wallowa Counties.

Harney, Lake, and Malheur County Zone: All of Harney, Lake, and Malheur Counties.

Klamath County Zone: All of Klamath County.

Utah

Northern Utah Zone: All of Cache and Rich Counties, and that portion of Box Elder County beginning at I–15 and the Weber-Box Elder County line; east and north along this line to the Weber-Cache County line; east along this line to the Cache-Rich County line; east and south along the Rich County line to the Utah-Wyoming State line; north along this line to the Utah-Idaho State line; west on this line to Stone, Idaho-Snowville, Utah road; southwest on this road to Locomotive Springs Wildlife Management Area; east on the county road, past Monument Point and across Salt Wells Flat, to the intersection with Promontory Road; south on Promontory Road to a point directly west of the northwest corner of the Bear River Migratory Bird Refuge boundary; east along an imaginary line to the northwest corner of the Refuge boundary; south and east along the Refuge boundary to the southeast corner of the boundary; northeast along the boundary to the Perry access road; east on the Perry access road to I–15; south on I–15 to the Weber-Box Elder County line.

Remainder-of-the-State Zone: The remainder of Utah.

Washington

Area 1: Skagit, Island, and Snohomish Counties.

Area 2A (SW Quota Zone): Clark County, except portions south of the Washougal River; Cowlitz, and Wahkiakum Counties.

Area 2B (SW Quota Zone): Pacific County.

Area 3: All areas west of the Pacific Crest Trail and west of the Big White Salmon River that are not included in Areas 1, 2A, and 2B.

Area 4: Adams, Benton, Chelan, Douglas, Franklin, Grant, Kittitas, Lincoln, Okanogan, Spokane, and Walla Walla Counties.

Area 5: All areas east of the Pacific Crest Trail and east of the Big White Salmon River that are not included in Area 4.

Brant

Pacific Flyway

California

North Coast Zone: Del Norte, Humboldt and Mendocino Counties.

South Coast Zone: Balance of the State.

Washington

Puget Sound Zone: Skagit County.

Coastal Zone: Pacific County.

Swans

Central Flyway

South Dakota: Aurora, Beadle, Brookings, Brown, Brule, Buffalo, Campbell, Clark, Codington, Davison, Deuel, Day, Edmunds, Faulk, Grant, Hamlin, Hand, Hanson, Hughes, Hyde, Jerauld, Kingsbury, Lake, Marshall, McCook, McPherson, Miner, Minnehaha, Moody, Potter, Roberts, Sanborn, Spink, Sully, and Walworth Counties.

Pacific Flyway

Montana (Pacific Flyway Portion)

Open Area: Cascade, Chouteau, Hill, Liberty, and Toole Counties and those portions of Pondera and Teton Counties lying east of U.S. 287–89.

Nevada

Open Area: Churchill, Lyon, and Pershing Counties.

Utah

Open Area: Those portions of Box Elder, Weber, Davis, Salt Lake, and Toole Counties lying west of I–15, north of I–80 and south of a line beginning from the Forest Street exit to the Bear River National Wildlife Refuge boundary, then north and west along the Bear River National Wildlife Refuge boundary to the farthest west boundary of the Refuge, then west along a line to Promontory Road, then north on Promontory Road to the intersection of SR 83, then north on SR 83 to I–84, then north and west on I–84 to State Hwy 30, then west on State Hwy 30 to the Nevada-Utah State line, then south on the Nevada-Utah State line to I–80.

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Part V

Department of Agriculture

Food and Nutrition Service

7 CFR Part 250

Revisions and Clarifications in Requirements for the Processing of Donated Foods; Proposed Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 250

RIN 0584–AD76

Revisions and Clarifications in Requirements for the Processing of Donated Foods

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule proposes to revise and clarify requirements for the processing of donated foods, in order to incorporate processing options tested in demonstration projects, to more effectively ensure accountability for donated foods provided for processing, and to streamline current reporting and review requirements. Most significantly, it would require multi-State processors to enter into National Processing Agreements to process donated foods into end products, and would permit processors to substitute donated beef and pork with commercially purchased beef and pork of U.S. origin and of equal or better quality than the donated food. The rule would also rewrite regulatory provisions in plain language, to make them easier to read and understand for the general public.

DATES: To be assured of consideration, comments must be received on or before November 22, 2006.

ADDRESSES: The Food and Nutrition Service invites interested persons to submit comments on this proposed rule. You may submit comments, identified by RIN number 0584–AD76, by any of the following methods:

E-mail: Send comments to *Robert.Delorenzo@fns.usda.gov*. Include RIN number 0584–AD76 in the subject line of the message.

Fax: Submit comments by facsimile transmission to (703) 305–2420. Disk or CD–ROM: Submit comments on disk or CD–ROM to Lillie F. Ragan, Assistant Branch Chief, Policy Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Room 500, 3101 Park Center Drive, Alexandria, Virginia 22302–1594.

Mail: Send comments to Lillie F. Ragan at the above address.

Hand Delivery or Courier: Deliver comments to the above address.

Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Further information on the submission of comments, or the review of comments submitted, may be found under **SUPPLEMENTARY INFORMATION**, Part III, Procedural Matters.

FOR FURTHER INFORMATION CONTACT: Lillie F. Ragan at the above address or telephone (703) 305–2662. You may also contact Robert DeLorenzo by e-mail at *Robert.Delorenzo@fns.usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Agriculture (the Department or USDA) provides donated foods to State distributing agencies for distribution to school food authorities participating in the National School Lunch Program (NSLP), and to recipient agencies in other child nutrition or food distribution programs. In accordance with Federal regulations in 7 CFR Part 250, distributing agencies may provide the donated foods to commercial processors for processing into end products that are more suitable for use in school lunch programs or other food programs. The regulations ensure that State and local agencies, and program recipients, receive the full benefit of the donated foods provided to such processors for processing into end products. Distributing agencies must enter into agreements with processors to ensure compliance with the requirements in Federal regulations.

Over the last 30 years or so, the quantity and variety of donated foods provided in the National School Lunch Program has increased substantially. Consequently, the processing of the donated foods into more useful end products has become an integral part of the successful operation of the school lunch program. In the last several years, the Department's Food and Nutrition Service (FNS) has taken a number of steps to facilitate the use of donated foods by commercial processors in the interest of providing more efficient and effective service to school food authorities and other recipient agencies. Most of these changes have been implemented as a result of discussions with State and local program operators, processors, and industry consultants.

In a final rule published in the **Federal Register** on October 23, 2002 at 67 FR 65011, 7 CFR Part 250 was amended to expand the types of donated foods that processors were permitted to substitute with commercially purchased foods without prior FNS approval. The rule permitted processors to substitute donated fruits, vegetables, and eggs with commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods. Additionally, limited substitution of donated poultry was permitted, in accordance with the processor's approved plan. Substitution allows processors to provide finished end products to school food authorities in a more efficient manner, which permits the schools to better utilize the donated foods in the school food service. Only the substitution of donated beef and pork is currently prohibited.

Since June 30, 2001, FNS has conducted a demonstration project to allow selected processors to substitute commercially purchased beef and pork for donated beef and pork, in accordance with an approved plan. The commercial product must be of U.S. origin, and of equal or better quality than the donated food. Since USDA's purchase specifications for ground beef and pork are more stringent than commercially available ground beef and pork, few processors have chosen to participate in the demonstration project. However, FNS has concluded that all processors should have the option to substitute commercial beef and pork, as long as they can meet the same specifications required of donated beef and pork.

In July 2004, FNS initiated a demonstration project to allow multi-State processors to submit end product data schedules to FNS for review and approval at the national level, rather than submitting them to State distributing agencies for their approval. End product data schedules indicate the required yield of donated foods that must be obtained in their processing into end products. Their review and approval, however, is a time and labor-intensive activity for State distributing agencies. Since processors are not required to submit end product data schedules for approval in each State in which they operate, national approval under the demonstration project has reduced the time and labor burden considerably for both distributing agencies and processors.

In conjunction with the demonstration project allowing national approval of end product data schedules, FNS has provided multi-State processors with the option of signing National Processing Agreements. Under the National Processing Agreement, FNS monitors the processor's national inventory of donated foods, and holds and manages the processor's performance bond or letter of credit, which protects the value of the processor's donated food inventories. The monitoring and protection of donated food inventories held by processors at the national level has further reduced the burden on distributing agencies. FNS has entered

into National Processing Agreements with an increasing number of multi-State processors since the initiation of the demonstration project. Under their State processing agreements (called State Participation Agreements), distributing agencies select the processor's nationally approved end products for sale in the State, and may include other State-specific processing requirements.

The regulatory amendments proposed in this rule would incorporate into 7 CFR Part 250 the processing options provided under the demonstration projects described above. They would also more effectively ensure accountability for donated foods provided for processing while streamlining current reporting and review requirements imposed on State distributing agencies and processors. Most significantly, the rule proposes to:

(1) Permit substitution of donated beef and pork with commercial beef and pork of U.S. origin, and of equal or better quality than the donated foods;

(2) Require multi-State processors to sign National Processing Agreements with FNS, and to submit end product data schedules to the Department for approval at the national level;

(3) Require multi-State processors to submit a performance bond or letter of credit to FNS to protect the value of the processors' donated food inventories;

(4) Require in-State processors to obtain independent Certified Public Accountant (CPA) audits every three years, and revise upward the donated food value thresholds that determine the required frequency of such audits for multi-State processors; and

(5) Remove the requirements that the distributing agency conduct an on-site review of in-State processors every two years, and develop a system to verify sales of end products through commercial distributors.

As discussed below, we propose to amend current §§ 250.3, 250.13, 250.16, 250.17, 250.19, and 250.24, and to completely revise § 250.18, and § 250.30 under Subpart C, *Processing and Labeling of Donated Foods*. The revision of Subpart C would break out the single section in that subpart into 10 new sections to more clearly present the specific processing requirements. Lastly, we propose to rewrite all revised sections in plain language, to make them easier to read and understand for the general public. The proposed changes to 7 CFR Part 250 are discussed in detail below.

II. Discussion of the Rule's Provisions

A. Definitions, § 250.3

Due to developments in food distribution programs, and for the purpose of clarification, we propose to remove, revise, and add definitions in current § 250.3 relating to processing of donated foods. We propose to remove the definitions of ''Contract value of the donated foods'', ''Contracting agency'', ''Discount system'', ''Fee-for-service'', ''Refund'', ''Refund application'', ''Refund system'', and ''Substituted food''. The proposed definition of ''Processing agreement value'' would replace the current definition of ''Contract value of the donated foods''. The term ''contracting agency'' would be replaced throughout the proposed regulatory provisions with the specific agency (i.e., distributing and/or recipient agency) that may enter into a processing agreement. The meaning of the other terms being removed is clear in the context of the proposed regulatory provisions, and no longer require separate definitions.

We propose to revise the definitions of ''Distributor'', ''Multi-State processor'' and ''Substitution''. The revised definition of ''Distributor'' would clarify that it is a commercial enterprise that may sell and/or deliver finished end products or store and distribute donated foods to distributing or recipient agencies. We propose to revise the current definition of ''Multi-State processor'' only to indicate that such a processor may operate in accordance with an agreement with a distributing or recipient agency.

Lastly, we propose to revise the definition of ''Substitution'' to simply indicate that it is the use of commercially purchased foods in place of donated foods, in accordance with the requirements in 7 CFR Part 250, as we propose to revise them in this rule. The current requirement that substitution of donated foods must be with commercial foods of the same generic identity, of domestic origin, and of equal or better quality than the donated food, would be included in the new § 250.34(a), as proposed in this rule.

The current provision for the substitution of donated nonfat dry milk with concentrated skim milk would be removed. Nonfat dry milk is a food commonly purchased by the Department under price support legislative authority and donated for use in food assistance programs. Hence, substitution of this donated food is rarely made at the current time, and is not encouraged by the Department. Additionally, it is a very complex substitution to make, as the processor must assure that the milk solids in the skim milk fully replace the quantity of milk solids in the substituted nonfat dry milk. The current stipulation that substitution must meet the 100 percent yield requirement would be removed, as processing yield requirements for donated foods, as well as commercially purchased foods substituted for them, would be included in the new § 250.33.

The provision describing the limited substitution of poultry would be removed. As proposed in the new § 250.34, we would allow substitution of donated poultry under the same conditions as substitution of other donated foods, with the exception of backhauled product. All proposed requirements for the substitution of donated foods are fully discussed later in section II.H.5 of the preamble.

We propose to add definitions of ''Backhauling'', ''Commingling'', ''End product data schedule'', ''In-State processor'', ''National Processing Agreement'', ''Processing agreement value'', ''Recipient Processing Agreement'', ''Replacement value'', ''7 CFR Part 3052'', ''Split shipment'', ''State Participation Agreement'', and ''State Processing Agreement''. A definition of ''Backhauling'' would describe a means of delivery of donated food to a processor that is sometimes used by recipient agencies. A definition of ''Commingling'' would describe the common storage of donated foods with commercially purchased foods, as currently permitted for processors and most recipient agencies. A definition of ''End product data schedule'' would convey the important function of this document in describing the processing of donated foods into finished end products. A definition of ''In-State processor'' would help the reader distinguish such an enterprise from a multi-State processor. Definitions of ''National Processing Agreement'', ''Recipient Processing Agreement'', ''State Participation Agreement'', and ''State Processing Agreement'' would help the reader understand the different types of processing agreements permitted. These processing agreements are further described in the new § 250.30. A definition of ''Processing agreement value'' would clarify the donated food value that must be used by processors in crediting for donated foods in finished end products. A definition of ''7 CFR Part 3052'' would identify the Departmental regulations relating to audit requirements for State and local governments and nonprofit organizations that receive Federal grants. A definition of ''Replacement value'' would clarify the donated food

value that must be used by processors to ensure compensation for donated foods lost in processing or other activities, and would distinguish it from the processing agreement value. A definition of ''Split shipment'' would describe a commonly used means of delivering donated foods to distributing or recipient agencies, or to processors.

B. Distribution and Control of Donated Foods, § 250.13

We propose to amend current § 250.13(c), which describes the timing of transfer of title to donated foods, and the agency to which title is transferred. Currently, title to donated foods transfers to the distributing agency upon its acceptance of donated foods at the time and place of delivery. However, in many cases, recipient agencies receive direct shipments of donated foods from USDA vendors, bypassing the distributing agency. In such cases, title should pass directly to the recipient agency. Hence, we propose to state that title to donated foods passes to the distributing or recipient agency, as appropriate, at the time and place of delivery. However, we also propose to add an exception to the timing of title transfer, in accordance with the requirements under National Processing Agreements proposed in this rule. In the new § 250.32(a), we are proposing to require a multi-State processor to provide a performance bond or letter of credit to FNS to protect the value of the processor's donated food inventory, in accordance with its National Processing Agreement. However, unless the Department retains title to the donated foods held by such a processor, FNS would not have the authority to call in the bond if the processor failed to comply with processing requirements. Hence, we propose to state that title to donated foods provided to a multi-State processor, in accordance with its National Processing Agreement, transfers to the distributing or recipient agency, as appropriate, upon the acceptance of finished end products at the time and place of delivery. We propose to stipulate that, notwithstanding transfer of title, the distributing agency must ensure that donated foods and end products are used in accordance with the requirements of 7 CFR Part 250.

C. Maintenance of Records, § 250.16

In current § 250.16(a)(3), distributing agencies are required to maintain records of refusal of donated foods by school food authorities, if a distributing agency permits those school food authorities to select a limited variety of donated foods from the full list of donated foods that USDA has made available for distribution. Such an ''offer and refusal'' system is described in current § 250.48(f). However, in accordance with a proposed rule published in the **Federal Register** on June 8, 2006 at 71 FR 33344, we would remove the ''offer and refusal'' system of ordering or selecting donated foods and require that the distributing agency permit school food authorities to order from the full list of available foods, and to distribute all such foods to them that can be distributed in a cost-effective manner. Under that proposed revision, refusal of donated foods, and records documenting such refusals, would be obsolete. Hence, we propose to remove current § 250.16(a)(3).

In current § 250.16(a)(4), processors, food service management companies, warehouses, and other entities must maintain records of receipt, distribution, storage, and inventory of donated foods. Processors must also maintain records such as formulas, recipes, production records, and receipt of shipments to document their use of donated foods. As discussed later in the preamble, we are proposing to include specific recordkeeping requirements for processors in the new § 250.37(d), and in the proposed rule published in the **Federal Register** on June 8, 2006 at 71 FR 33344, we proposed to include specific recordkeeping requirements for food service management companies. Hence, we propose to revise this section to state that processors and food service management companies must comply with the applicable recordkeeping requirements in 7 CFR Part 250, and with any other recordkeeping requirements included in their agreements or contracts. We also propose to require that storage facilities and distributors maintain records documenting the receipt, distribution, inventory, and disposal of donated foods or end products sufficient to ensure compliance with requirements in 7 CFR Part 250, and with any other such requirements in their agreements or contracts with distributing or recipient agencies. The specific types of records that such entities would have to maintain would depend on the agency with which they have a contract or agreement, and the specific donated food activities they are conducting under the contract or agreement.

In accordance with the proposed removal of § 250.16(a)(3), we would redesignate current § 250.16(a)(4), (a)(5), and (a)(6), as § 250.16(a)(3), (a)(4), and (a)(5), respectively.

D. Reports, § 250.17

Current § 250.17(b) and (c) contains reporting requirements to ensure processors' compliance with requirements in 7 CFR Part 250. In current § 250.17(b), the distributing agency must submit a report of processors' inventories to the FNS Regional Office on a quarterly basis (this requirement is also contained in current § 250.30(o)). In current § 250.17(c), processors must submit monthly performance reports to the distributing agency. We propose to remove § 250.17(b). FNS Regional Offices do not currently review reports of processors' donated food inventories. The distributing agency is responsible for monitoring such inventories through the review of processors' performance reports, and, in accordance with current § 250.30(n)(1), to ensure that processors do not maintain excessive inventories. As discussed in section II.H.8 of the preamble, we are proposing to include more specific reporting requirements for processors in the new § 250.37. Under the proposals, multi-State processors would be required to submit monthly reports of their national donated food inventories to FNS Headquarters for review. Accordingly, we propose to revise current § 250.17(c) (redesignated as paragraph (b) by this rule) to require processors to submit performance reports and other supporting documentation, as required by the distributing agency or by FNS. In accordance with the removal of § 250.17(b), we would redesignate current § 250.17(c), (d), and (e), as § 250.17(b), (c), and (d), respectively. We propose to remove current § 250.17(f), which stipulates that the date shown on a report submitted by facsimile machine may serve as the submission date.

E. Audits, § 250.18

Currently, § 250.18 describes audit requirements for distributing and recipient agencies and for multi-State processors. We propose to revise this section to clarify audit requirements for distributing and recipient agencies, to include new audit requirements for in-State processors, and to amend audit requirements for multi-State processors.

In current § 250.18(a), fiscal matters must be reviewed in audits conducted under the Single Audit Act, and in accordance with Departmental regulations in 7 CFR Part 3015. However, the current Departmental regulations establishing audit requirements for State and local governments and nonprofit organizations that receive Federal grants

are contained in 7 CFR Part 3052, which incorporates requirements in OMB Circular A–133. In accordance with 7 CFR Part 3052 and OMB Circular A–133, a State or local government or nonprofit organization that expends at least $500,000 in Federal awards in a school or fiscal year must obtain a single audit for that year. A program-specific audit may be substituted for the single audit if the auditee operates only one Federal program, or one recognized cluster of programs (e.g., National School Lunch, School Breakfast, and Summer Food Service Programs). A State or local government or nonprofit organization that expends less than $500,000 in Federal awards in a year is not required to obtain an audit for that year. In determining if an audit is required, the value of donated foods must be considered, along with other Federal expenditures.

We propose to include these audit requirements in the new § 250.18(a), as they apply to distributing and recipient agencies, and to reference the Departmental regulations in 7 CFR Part 3052. We also propose to require that the donated food values established by the distributing agency to credit a recipient agency's donated food assistance level, in accordance with current § 250.13(a)(5), must be used. We would indicate that, for a recipient agency utilizing a single inventory management system, the value of donated foods received in a year must be considered, rather than the value of donated foods used or distributed. Under single inventory management, donated foods are commingled with commercially purchased foods, and the amount or value used or distributed may not be discernible.

The requirements contained in 7 CFR Part 3052 and OMB Circular A–133 do not apply to commercial enterprises providing goods and services to distributing or recipient agencies in accordance with agreements or contracts. However, in accordance with current § 250.18(b), multi-State processors must obtain an independent CPA audit at a frequency determined by the value of the donated foods they receive for processing in a year. Currently, a multi-State processor must obtain an independent CPA audit for any year in which it receives more than $250,000 in donated foods; every two years, if it receives $75,000 to $250,000 in donated foods each year; and every three years, if it receives less than $75,000 in donated foods each year. Such audits must be paid for by the processor.

In-State processors are not currently required to obtain an independent CPA audit. In order to ensure their compliance with program requirements, the distributing agency must conduct an on-site review of such processors at least once every two years, in accordance with current § 250.19(b)(1)(iii). However, the performance of on-site reviews is a costly and time-consuming exercise for distributing agencies. Hence, we propose instead to require in-State processors to obtain independent CPA audits as well, and, as discussed in section II.F of the preamble, to remove the on-site review requirement currently imposed on the distributing agency for such processors.

In the new § 250.18(b), we propose to require that all in-State processors obtain an independent CPA audit in the first year that they receive donated foods for processing. We propose to require that, after the first year, in-State processors obtain an independent CPA audit every three years. As currently required for multi-State processors, we propose to require that in-State processors pay the cost of the audit. We propose to amend the current audit requirement for multi-State processors by requiring that a multi-State processor obtain an independent CPA audit in each of the first three years that it receives donated foods for processing. After the first three years, a multi-State processor must obtain an audit at a frequency determined by the average value of donated foods received for processing per year, as currently required. However, we propose to revise upward the current thresholds for determining the required frequency of such audits to reflect the much larger volume of donated foods provided to such processors for processing over the last several years. Hence, we propose to require a multi-State processor to obtain an independent CPA audit:

(1) Annually, if it receives, on average, more than $5,000,000 in donated foods for processing per year;

(2) Every two years, if it receives, on average, between $1,000,000 and $5,000,000 in donated foods for processing per year; and

(3) Every three years, if it receives, on average, less than $1,000,000 in donated foods for processing per year.

As in audits of distributing and recipient agencies, we propose to require that the donated food values established by the distributing agency in accordance with current § 250.13(a)(5) must be used to determine if an audit is required. We also propose to clarify that audits must determine processor compliance with the requirements in this part, and must be conducted in accordance with the FNS Audit Guide for Processors. However, we propose to remove the current stipulation that, at the discretion of FNS, auditors will be required to attend training sessions conducted by the Department.

In the new § 250.18(c), we propose to indicate that a distributing or recipient agency must submit reports and corrective action plans, and undertake corrective actions in response to the audit, in accordance with the requirements in 7 CFR Part 3052. We propose to clarify that, by December 31st of each year in which an audit is required, a multi-State processor is responsible for ensuring that a copy of the audit is provided to FNS, while an in-State processor must ensure that a copy of the audit is provided to the distributing agency. We also propose to include the requirement in current § 250.18(b)(6) that the processor provide verification to FNS, or the distributing agency, as appropriate, that all deficiencies identified in the audit have been corrected, or provide a corrective action plan with timelines for correcting all deficiencies identified in the audit.

In the new § 250.18(d), we propose to indicate that a distributing or recipient agency is subject to sanctions for failure to obtain the required audit, or for failure to correct deficiencies identified in audits. Such sanctions may include the withholding, suspension, or termination of a Federal award. In current § 250.18(b)(5), noncompliance with audit requirements makes the processor ineligible to continue to receive donated foods for processing. We propose to state that FNS may terminate a processor's National Processing Agreement, or prohibit the further distribution of donated foods to a processor, for its failure to obtain the required audit, or for failure to correct the deficiencies identified in the audit. We propose to state that a distributing or recipient agency may immediately terminate an agreement with a processor, and must not extend or renew such an agreement, for the same reasons, in accordance with the new § 250.38(e).

In current § 250.18(a), the Department, the Comptroller General of the United States, or any of their authorized representatives, may conduct audits or inspections of distributing, subdistributing, or recipient agencies, or with commercial enterprises with which they have agreements or contracts, to assure compliance with the requirements of this part. We propose to maintain that and move it to new § 250.18(e).

F. Reviews, § 250.19

As previously described, we propose to remove current § 250.19(b)(1)(iii), which requires the distributing agency to perform an on-site review of all in-State processors at least once every two years. In accordance with the removal of § 250.19(b)(1)(iii), we would redesignate current § 250.19(b)(1)(iv) and (b)(1)(v), as § 250.19(b)(1)(iii) and (b)(1)(iv), respectively.

Currently, in § 250.19(b)(2), the distributing agency must develop a system to verify sales of end products when a processor has provided end products to a distributor, and the distributor sells such end products to recipient agencies at a discount. The sales verification system must include a statistically valid sample of such sales over a six-month period. If the distributing agency delegates this sales verification requirement to the processor, it must select a subsample of the processor's findings, and reverify them. Current regulations also require the distributing agency to submit sales verification findings to the FNS Regional Office. The purpose of such sales verification is to assure that the distributor has sold the requisite quantity of end products to recipient agencies.

We propose to remove § 250.19(b)(2), and the requirement that the distributing agency develop a sales verification system, as described above. In the new §§ 250.36(d) and 250.37(d), as described later in the preamble, we are proposing to require the processor to ensure that the distributor notify it, on a monthly basis, of its sale of end products to recipient agencies at a discount, or under a fee-for-service, through automated sales reports, or other electronic or written submission, and to require the processor to maintain records of such notification. These records would be available for review by auditors, in conducting the audits required in the proposed § 250.18. We are also proposing, in the new § 250.37(f), to require recipient agencies to maintain records of the receipt of end products from processors or distributors. These records would also be available for review by the distributing agency or other parties, including auditors. Hence, in place of the current burden imposed on the distributing agency to develop a system to verify end product sales, we would ensure, through appropriate documentation, that such sales have been made, and that recipient agencies have received the end products that they are due. The distributing agency may still require, at its option, that the processor submit documentation to support information included in the processor's performance report, including sales of end products to recipient agencies. The distributing agency may also contact recipient agencies to ensure receipt of end products.

In accordance with the removal of § 250.19(b)(2), we would redesignate current § 250.19(b)(3), (b)(4), (b)(5), and (b)(6), as § 250.19(b)(2), (b)(3), (b)(4), and (b)(5), respectively. However, we propose to remove the last sentence in the redesignated § 250.19(b)(2), which requires the distributing agency to submit a copy of the processor review report to the FNS Regional Office.

G. Distributing Agency Performance Standards, § 250.24

In current § 250.24(g), distributing agencies must provide for the processing of donated foods, in accordance with current § 250.30, and must inform recipient agencies of the processing options available to them. Distributing agencies must also test end products, prior to entering into a processing agreement, or may allow recipient agencies to test end products, and must monitor acceptability of end products. We propose to retain the current requirements in the revised § 250.24(g), but to reference requirements under Subpart C, and to clarify that the distributing agency must ensure that recipient agencies are aware of the processing options available to them. Most of the information on processing is available on the FNS Web site or from other readily available sources, as indicated in the new § 250.39(b).

H. Subpart C—Processing of Donated Foods

As previously mentioned, we propose to completely revise current Subpart C, *Processing and Labeling of Donated Foods,* which currently contains only § 250.30. In revising Subpart C, we would restructure it into 10 new sections, to more clearly present the specific processing requirements, and would rewrite them in plain language. We propose to include the requirements for specific processing activities more or less in the order in which they occur; *i.e.*, entering into processing agreements, processing of donated foods into end products, sale of end products, submission of reports, etc. We also propose to change the heading of Subpart C to *Processing of Donated Foods.* The new sections proposed under the revised Subpart C include the following:

250.30, Types of processing agreements.

250.31, Procurement requirements.

250.32, Protection of donated food value.

250.33, Processing yields of donated foods.

250.34, Substitution of donated foods.

250.35, Storage, inspection, quality control, and inventory management.

250.36, End product sales and crediting for the value of donated foods.

250.37, Reports, records, and reviews of processor performance.

250.38, Provisions of agreements.

250.39, Miscellaneous provisions.

1. Types of Processing Agreements, § 250.30

In the new § 250.30, we propose to state clearly why donated foods are provided to processors for processing, and to describe the different types of processing agreements permitted, including National, State, and Recipient Processing Agreements. However, we propose to include the specific provisions required for each type of agreement in the new § 250.38, as the reason for their inclusion will only be clear with an understanding of the processing requirements contained in the preceding sections.

In the new § 250.30(a), we propose to describe the benefit of providing donated foods to a processor for processing into end products, and to clarify that a processor's use of a commercial facility to repackage donated foods, or to use donated foods in the preparation of meals, is also considered processing in 7 CFR Part 250.

In current § 250.30(b), a distributing agency may contract with a processor to process donated foods, or may permit subdistributing or recipient agencies to contract with processors. In current practice, such contracting is performed under agreements entered into between the parties; hence, in this rule, we use the term agreement, rather than contract, to describe any legal compact entered into with a processor to process donated foods. Currently, most donated foods are processed in accordance with State Processing Agreements. However, some large school food authorities currently have agreements with processors to process donated foods and purchase the finished end products, as permitted by distributing agencies. Additionally, as previously described, FNS has permitted multi-State processors to process donated foods in accordance with National Processing Agreements under a demonstration project initiated in 2004.

In the new § 250.30(b), we propose to clarify that processing of donated foods must be performed in accordance with an agreement between the processor and FNS, between the processor and the distributing agency, or, if permitted by the distributing agency, between the processor and a recipient agency (or subdistributing agency). We propose to include in new § 250.30(b) the stipulation in current § 250.30(c)(4)(ix) that an agreement may not obligate the distributing or recipient agency, or the Department, to provide donated foods to a processor for processing. USDA purchase and donation of foods is dependent on market conditions, and specific foods may not be available for donation in certain years. Additionally, we propose to retain in this new § 250.30(b) the requirement in current § 250.30(p) that, for processing of donated foods in child nutrition programs, the distributing agency must provide the State administering agency (if a different agency) with an opportunity to review its processing agreements to ensure compliance with nutritional and labeling requirements. We propose to remove the stipulation in current § 250.30(c)(1) that a processing agreement must be in standard written form.

In accordance with the National Processing Agreements permitted under the demonstration project, FNS reviews and approves end product data schedules submitted by multi-State processors, and holds and manages the processor's performance bond or letter of credit to protect the value of donated food inventories. FNS also monitors the processor's national donated food inventory through the review of performance reports, which processors must submit to FNS on a monthly basis. As previously mentioned, FNS' performance of these activities has significantly reduced the labor and paperwork burden for both processors and distributing agencies. Hence, in the new § 250.30(c), we propose to require that a multi-State processor enter into a National Processing Agreement with FNS to process donated foods into end products, in accordance with end product data schedules approved by FNS. We would also indicate that, as proposed in the new § 250.32, FNS holds and manages the processor's performance bond or letter of credit to protect the value of donated food inventories under the National Processing Agreement. We would indicate that FNS does not itself procure or purchase end products under such agreements, and that a multi-State processor must enter into a State Participation Agreement with the distributing agency in order to sell nationally approved end products in the State, as proposed in the new § 250.30(d). However, a distributing agency may still choose to provide donated foods to a multi-State processor for processing in accordance with its State Processing Agreement, as described below, irrespective of that processor's National Processing Agreement.

In the new § 250.30(d), we propose to require the distributing agency to enter into a State Participation Agreement with a multi-State processor to permit the sale of end products produced under the processor's National Processing Agreement in the State, as previously indicated. The State Participation Agreement is currently utilized in conjunction with National Processing Agreements in the demonstration project. Under the State Participation Agreement, we propose to permit the distributing agency to select the processor's nationally approved end products for sale to eligible recipient agencies within the State, or to directly purchase such end products. The processor may provide a list of such nationally approved end products in a summary end product data schedule. We also propose to permit the distributing agency to include other processing requirements in the State Participation Agreement, such as the specific methods of end product sales permitted in the State, in accordance with the new § 250.36, (e.g., a refund, discount, or indirect discount method of sales), or the use of labels attesting to fulfillment of meal pattern requirements in child nutrition programs.

Currently, a distributing agency must enter into a State Processing Agreement with a processor to process donated foods into finished end products for sale in the State. Under such an agreement, the distributing agency may purchase the finished end products for distribution to eligible recipient agencies. However, it may also select a number of processors with which it enters into such agreements, and permit recipient agencies to purchase finished end products from them, in accordance with applicable procurement requirements. These latter types of State Processing Agreements are commonly called ''master agreements''. The distributing agency must utilize selection criteria in current § 250.30(c)(1) to select processors with which to enter into master agreements. Under all State Processing Agreements, the distributing agency must approve end product data schedules submitted by the processor, hold and manage the processor's performance bond or letter of credit, and assure compliance with all processing requirements.

In the new § 250.30(e), we propose to clarify the distinction between master agreements and other State Processing Agreements, and to include in this new section the required criteria in current § 250.30(c)(1) for selecting processors under master agreements. However, we propose to remove the statement that selection criteria will be reviewed by the FNS Regional Office during its management evaluation of the distributing agency. We propose to require that the distributing agency enter into a State Processing Agreement with an in-State processor to process donated foods, as currently required. We would also indicate that the distributing agency may choose to provide donated foods for processing under such an agreement with a multi-State processor as well, rather than utilize the State Participation Agreement, as described above.

In current § 250.30(b)(3), the distributing agency may permit recipient agencies (or subdistributing agencies) to enter into agreements with processors to process donated foods and to purchase the finished end products. We propose to permit such agreements in the new § 250.30(f), and to refer to them as Recipient Processing Agreements. We also propose to clarify that, under such agreements, the distributing agency may also permit the recipient agency to approve end product data schedules or select nationally approved end product data schedules, review processor performance reports, and monitor other processing activities. All such activities must be performed in accordance with the requirements of this part. We propose to clarify that a recipient agency may also enter into a Recipient Processing Agreement, and perform the activities described above, on behalf of other recipient agencies, in accordance with an agreement between the parties (such as in a school cooperative, or co-op). We propose to include the requirement in current § 250.30(l) that the distributing agency approve all Recipient Processing Agreements.

In current § 250.30(b)(1), the distributing agency must test end products with recipient agencies prior to entering into processing agreements, to ensure that they will be acceptable to recipient agencies. Such testing is not required if end products have previously been tested, or have otherwise been determined to be acceptable to recipient agencies. We propose to include these requirements in the new § 250.30(g), but to clarify that

the distributing agency may permit recipient agencies to test end products. We also propose to amend the current requirement that the distributing agency develop a system to monitor product acceptability on a periodic basis by requiring instead that the distributing agency, or its recipient agencies, must monitor product acceptability on an ongoing basis.

In current § 250.30(c)(4)(xvi), a processor may not assign the processing agreement, or subcontract with another entity, to perform any aspect of processing without the written consent of the distributing agency and the contracting agency. We propose to clarify, in the new § 250.30(h), that a processor may not assign any processing activities under its processing agreement, or subcontract with another entity to perform any aspect of processing, without the written consent of the other party to the agreement, which may be the distributing, subdistributing, or recipient agency, or FNS. We propose to permit the distributing agency to provide the required consent as part of its State Participation Agreement with the processor.

In current § 250.30(c)(1), processing agreements are limited to one year, but may provide for an option to extend the agreement for two additional one-year periods. In the new § 250.30(i), we propose to revise this requirement by permitting all agreements between a distributing, subdistributing, or recipient agency and a processor to be up to five years in duration. This proposal would permit the appropriate agency to determine the length of agreement that would be to its best advantage, within the five-year limitation, and would reduce the time and labor burden imposed on such agencies. We propose to make National Processing Agreements permanent. We propose to indicate that amendments to any agreements may be made as needed, with the concurrence of the parties to the agreement, and that such amendments will be effective for the duration of the agreement, unless otherwise indicated.

We propose to remove the following requirements or statements in current § 250.30 relating to processing agreements, as they are overly restrictive, or simply unnecessary:

- The requirement in current § 250.30(c)(1) that the FNS Regional Office review processing agreements.
- The requirement in current § 250.30(c)(2) that the agreement be prepared and reviewed by State legal staff to ensure conformance with Federal regulations.
- The statement in current § 250.30(c)(3) indicating which official in the processing enterprise must sign the agreement.
- The requirement in current § 250.30(l) that the distributing agency provide a copy of the 7 CFR Part 250 regulations to processors, and a copy of agreements to the FNS Regional Office.
- The requirement in current § 250.30(q) with respect to FNS reviews of processing agreements or reports, and FNS actions following from such reviews.
- The stipulation in current § 250.30(r) that FNS will provide copies of agreements to persons requesting them.

2. Procurement Requirements, § 250.31

The requirements for the procurement of goods and services under Federal grants are described in 7 CFR Parts 3016 and 3019. 7 CFR Part 3016 contains the Department's regulations establishing uniform administrative requirements for Federal grants and cooperative agreements and subawards to State, local, and Indian tribal governments; 7 CFR Part 3019 contains the Department's regulations establishing uniform administrative requirements for Federal grants and cooperative agreements awarded to institutions of higher education, hospitals, and other nonprofit organizations. In the new § 250.31(a), we propose to indicate the applicability of these requirements to the procurement of processed end products or of other processing services relating to donated foods, and to indicate that distributing or recipient agencies may use procurement procedures that conform to applicable State or local laws, as appropriate, but must ensure compliance with the Federal procurement requirements. We propose to remove the reference in current § 250.30(c)(1) to procurement standards in Attachment O of OMB Circular A–102, as this circular is obsolete.

In accordance with 7 CFR 3016.36 and 3019.44, procurement of goods and services may be performed using small purchase procedures if the cost of such procurement does not exceed the simplified acquisition threshold, as defined in 41 U.S.C. 403(11), which is currently $100,000. Under these procedures, price quotations must be obtained from several sources. However, if the cost of such procurement exceeds this threshold, sealed bids or competitive proposals must be used. In the new § 250.31(b), we propose to indicate the method of procurement required in accordance with 7 CFR 3016.36 and 3019.44, and the simplified acquisition threshold. We indicate that these methods of procurement are more fully described in 7 CFR 3016.36 and 3019.44. We also propose to clarify that, if the threshold for determining the required method of procurement is lower under State or local laws, as applicable, then the distributing or recipient agency is obligated to comply with those procedures.

In the new § 250.31(c), we propose to require specific information in procurement documents, to assist recipient agencies in ensuring that they receive credit for the value of donated foods in finished end products. We propose to require that procurement documents include the price to be charged for the finished end product or other processing service, the method of end product sales that will be utilized, the processing agreement value of the donated food in the finished end products, and the location for the delivery of the finished end products. We propose to remove current requirements for the provision of pricing information outside of the procurement process, including:

(1) The requirement in current § 250.30(c)(4)(ii) that pricing information be included with the end product data schedule; and

(2) The requirements in current § 250.30(d)(3) and (e)(2) that the processor provide pricing information summaries to the distributing agency, and the distributing agency provide such information to recipient agencies, as soon as possible after completion of the agreement.

3. Protection of Donated Food Value, § 250.32

In current § 250.30(c)(4)(viii)(B), the processor is required to obtain, and furnish to the distributing agency, financial protection to protect the value of donated foods prior to their delivery for processing, by means of a performance bond, an irrevocable letter of credit, or an escrow account. The distributing agency must determine the dollar value of the financial protection, based on the quantity of donated foods for which the processor is accountable. In the new § 250.32(a), we propose to include the current requirement that the processor obtain such financial protection, but to remove the option to obtain an escrow account, as it is little-used. However, we propose to require that a multi-State processor provide the performance bond or irrevocable letter of credit to FNS, in accordance with its National Processing Agreement. We propose to clarify that the amount of the performance bond or letter of credit must be sufficient to cover the

maximum value of raw or processed donated foods that the processor is expected to maintain in inventory at any give time, which is determined by the distributing agency or by FNS, as appropriate.

In the new § 250.32(b), we propose to indicate the conditions under which the distributing agency must call in the performance bond or letter of credit. We also propose to indicate that FNS will call in the performance bond or letter of credit under the same conditions, and will ensure that any monies recovered are reimbursed to distributing agencies for losses of entitlement foods.

4. Processing Yields of Donated Foods, § 250.33

In current § 250.30(c)(4), the processor must submit, as part of the agreement approval, information regarding the production of an end product to ensure that the distributing or recipient agency, as appropriate, receives the benefit of the donated food processed. This information, which is submitted in a format called the end product data schedule, must include the following:

- A description of the end product.
- The types and quantities of donated foods and other ingredients needed to produce a specific quantity of end product.
- The yield factor for the donated food.
- The contract value of the donated food.
- Any pricing information in addition to the charge for the end product or fee-for-service.

In the new § 250.33, we propose to retain the required submission of the end product data schedule, and to more specifically describe the required processing yields of donated food, which is currently referred to as the yield factor. In the new § 250.33(a), we propose to require submission of the currently required information on the end product data schedule, with the exception of the price charged for the end product or other pricing information, and the contract value of the donated food. As described above, pricing information must be included in the procurement of end products or other processing services relating to donated foods. Inclusion of such information on end product data schedules may be misleading, as it may lead some recipient agencies to conclude that procurement has been performed by the distributing agency under its State Processing Agreement or State Participation Agreement. Prices currently included on end product data schedules generally reflect the highest price that a processor will charge for the finished end product.

We also propose to require inclusion of the processing yield of donated food, which may be expressed as the quantity of donated food (e.g., lbs. or cases) needed to produce a specific quantity of end product, or as the percentage of donated food returned in the finished end product. We propose to retain the requirement that end product data schedules be approved by the distributing agency under State Processing Agreements. We propose to clarify that, for donated foods processed under guaranteed return or standard yield, the end product data schedules must also be approved by the Department. We propose to require that, under National Processing Agreements, end product data schedules be approved by the Department. Lastly, we propose to clarify that an end product data schedule must be submitted, and approved, for each new end product that a processor wishes to provide, or for a previously approved end product in which the ingredients or other pertinent information have been altered.

In new § 250.33(b) through (e), we propose to describe the several different processing yields of donated foods that may be approved in end product data schedules. In current § 250.30(c)(4)(ii), the processor must meet a 100 percent yield in the processing of all substitutable donated foods (i.e., all donated foods except beef, pork, and poultry). Under 100 percent yield, the processor must ensure that 100 percent of the raw donated food is returned in the finished end product. Production loss of donated food must be accounted for by replacement with commercially purchased food of the same generic identity, of U.S. origin, and of equal or better quality than the donated food. To demonstrate this, the processor must report reductions in donated food inventories on performance reports in the amount of donated food contained in the finished end product rather than the amount that went into production. We propose to include the current 100 percent yield requirement in the new § 250.33(b), and to clarify that this processing yield is required for all donated foods except beef, pork, and poultry. We propose to indicate that FNS may make exceptions to the 100 percent yield requirement, on a case-by-case basis, if a processor experiences a significant manufacturing loss.

Processing of donated foods such as beef, pork, and poultry, invariably results in significant loss of product, such as the bones in chicken. Hence, the processing yield must take such losses into account, in the same manner that the processing of commercial product accounts for such losses. Currently, the three processing yields approved in end product data schedules to account for such losses include guaranteed yield, guaranteed minimum yield, and standard yield. We propose to describe these processing yields in the following sections.

Under guaranteed yield or return, the processor must ensure that a specific quantity of end product will be produced from the specific quantity of donated food put into production, as determined by the parties to the processing agreement, and, for State Processing Agreements, approved by the Department. The guaranteed yield must be indicated on the end product data schedule. We propose to describe guaranteed yield in the new § 250.33(c).

Under guaranteed minimum yield or return, the processor must ensure that a specific minimum quantity of end product will be produced from the specific quantity of donated food in a production run. If a larger quantity of end product than the guaranteed minimum is produced, the processor must provide the full quantity to the appropriate agency, which must pay the processor for the additional end products produced. We propose to describe guaranteed minimum yield in the new § 250.33(d).

Under standard yield, the processor must ensure that a specific quantity of end product, as determined by the Department, will be produced from a specific quantity of donated food. The established standard yield is higher than the average yield under normal commercial production, and serves to reward those processors that can process donated foods most efficiently. Like guaranteed yield, standard yield ensures that the recipient agency will receive a specific quantity of end product, which helps to ensure that it can meet its food service needs. It also avoids the paperwork and review needed to ensure that guaranteed minimum yield is met. We propose to describe standard yield in the new § 250.33(e).

In the new § 250.33(f), we propose to require that the processor compensate the distributing or recipient agency, as appropriate, for the loss of donated foods, or for commercially purchased foods substituted for donated foods. Loss of donated foods may result for a number of reasons, including the processor's failure to meet the required processing yield, as described above, or from spoilage or damage of donated foods in storage, or improper distribution of end products. In order to compensate for such losses of donated

foods, we propose to require that the processor:

(1) Replace the lost donated food or commercial substitute with commercially purchased food of the same generic identity, of U.S. origin, and of equal or better quality than the donated food; or

(2) Pay the distributing or recipient agency, as appropriate, for the replacement value of the donated food or commercial substitute.

Processing of donated foods may sometimes result in finished end products that are wholesome, but do not meet the specifications required for use in the recipient agency's food service. As this is considered production loss, the processor must provide compensation for the donated foods processed into such end products. In normal business practice, such products are usually returned to production for processing into end products that meet required specifications. These are often called rework products. In the new § 250.33(g), we propose to require that the processor compensate the distributing or recipient agency, as appropriate, for such donated foods, or for commercially purchased foods substituted for donated foods, by returning the end products to production for processing into end products that meet the required specifications. However, we also propose to permit the processor to make such compensation by paying the distributing or recipient agency, as appropriate, for the replacement value of the donated food or commercial substitute in the end products, and retaining such end products for its own use. This option would not, however, be permitted under guaranteed return or standard yield.

In current § 250.30(c)(4)(viii)(D), the processor must credit the distributing or recipient agency, as appropriate, for the sale of any by-products resulting from the processing of donated foods, or of commercially purchased foods substituted for donated foods. Crediting must be achieved through reduction of the processing fee, and must be in the amount received from such sale, or the market value of the by-products. However, such crediting is not required under guaranteed return or standard yield. We propose to include this requirement in the new § 250.33(h), but propose to require crediting through invoice reductions, or another means of crediting. We also propose to clarify that the processor must credit the appropriate agency for the net value received from the sale of by-products, after subtraction of any documented expenses incurred in preparing the by-product for sale. We propose to remove the requirement in current § 250.30(c)(4)(viii)(D) that the processor credit the distributing or recipient agency for the sale of donated food containers.

In current § 250.30(i), the processor must meet applicable Federal labeling requirements, and must follow the procedures required for approval of labels for end products that claim to meet meal pattern requirements in child nutrition programs. We propose to include these requirements in the new § 250.33(i).

5. Substitution of Donated Foods, § 250.34

We propose to include requirements for the substitution of donated foods in the new § 250.34. Currently, in § 250.30(f)(1), the processing agreement may allow the processor to substitute commercially purchased foods for all donated foods except donated beef, pork, and poultry without prior approval of the Department. Substitution must be with commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods. Substitution of donated poultry is permitted with some limitations in accordance with a processor's approved plan. Substitution of donated beef and pork is not permitted under the regulations.

As previously mentioned in the preamble, the Department has waived current regulations, since 2001, to conduct a demonstration project that has permitted selected processors to substitute commercially purchased beef and pork for donated beef and pork, in accordance with an approved plan. Substitution must be with commercial beef and pork of U.S. origin, and of equal or better quality than the donated food. Under the demonstration project, only bulk beef and pork delivered to the processor from a USDA vendor may be substituted. Donated beef and pork delivered to a processor from a recipient agency facility for processing may not be substituted (this process is commonly called backhauling). In a similar manner, substitution of backhauled donated poultry is prohibited in current § 250.30(f)(1)(ii). In its plan, the processor must describe the production and recordkeeping procedures that will be utilized to ensure that substitution requirements will be met.

In the new § 250.34(a), we propose to permit a processor to substitute any donated food that is delivered to it from a USDA vendor with commercially purchased food of the same generic identity, of U.S. origin, and of equal or better quality than the donated food. Prior approval, or an approved substitution plan, would not be required. Hence, we propose to remove the required elements of a processor's plan for poultry substitution in current § 250.30(f)(1)(ii)(B).

In current § 250.30(f)(1)(ii)(A), substitution of commercial poultry for donated poultry may be made before the processor actually receives a shipment of the donated poultry. In such case, however, the processor assumes all risks—i.e., the Department will not be liable if, due to changing market conditions or other reasons, it is unable to purchase and deliver donated poultry to the processor for processing. In the new § 250.34(a), we propose to allow a processor the option to substitute any donated food in advance of the receipt of the donated food shipment, and to more clearly describe the processor's assumption of risk should the Department be unable to purchase and deliver any donated food so substituted. Lastly, we propose to require that commercially purchased food substituted for donated food meet the same processing yield requirements that would be required for the donated food, as proposed in the new § 250.33.

Donated food may be backhauled to a processor from a recipient agency facility when a recipient agency determines that, despite earlier projections, it is unable to utilize the donated food in its current form. Rather than see it go to waste, the recipient agency provides the food to a processor to process into a more usable form. However, because the food has been sitting in storage for some time, it may be approaching the end of its shelf life. Hence, in the interest of food safety, it is important to assure that the food is processed and used as soon as possible. In the new § 250.34(b), we propose to prohibit substitution or commingling of all backhauled donated foods, and to require that the processor process them into end products for sale and delivery to the recipient agency that provided them, and not to any other recipient agency. Additionally, we propose to prohibit the processor from providing payment for them in lieu of processing.

In current § 250.30(g), the processing of donated beef, pork, and poultry must occur under Federal acceptance service grading, in order to assure that substitution requirements are met. Such grading is conducted by the Agricultural Marketing Service (AMS). The grader verifies the quality and quantity of food that is put into production, and the quantity of end products produced, and includes the pertinent information on a

grading certificate. Federal acceptance service grading is not required for substitution of other donated foods, unless specifically requested by the Department, or by the distributing agency. In accordance with current § 250.30(h), if the distributing agency determines that acceptance service grading is to be performed, it must consult with the applicable Federal agency in establishing specific grading requirements. In all cases, the processor is responsible for paying the cost of the acceptance service grading. In current § 250.30(f)(1), the processor must maintain records (including grading certificates) necessary to document that substitution of all donated foods has been conducted in accordance with the requirements in 7 CFR Part 250. We propose to include all of these requirements in the new § 250.34(c).

In current § 250.30(g), the distributing agency may approve a waiver of the grading requirement for donated beef, pork, or poultry under certain conditions. We propose to include this contingency, and retain the current conditions under which the distributing agency may approve such a waiver, in the new § 250.34(d). However, we propose to indicate that such waivers may only be approved on a case by case basis—*i.e.*, for a specific production run. The distributing agency may not approve a blanket waiver of the requirement. We also include the current stipulation that a waiver may only be approved if the processor's past performance indicates that the quality of the end product will not be adversely affected.

Also, in current § 250.30(f)(1)(ii)(A), the processor may use donated poultry that has been substituted with commercially purchased poultry in any processing activities conducted at its facilities. However, the processor may not sell the donated poultry as an intact unit. Additionally, in current § 250.30(f)(2), substituted donated food must be used by the processor and may not be sold or disposed of in bulk form. In the new § 250.34(e), we propose to include the current provision that the processor may use any substituted donated food in other processing activities conducted at its facilities. We also propose to permit the processor to sell any substituted donated food as an intact unit as long as the processor removes all USDA labels, as applicable. We propose to remove the stipulation, in current § 250.30(f)(4), that title to the substituted donated food passes to the processor upon the initiation of processing of the end product with the commercial substitute. The transfer of title to donated foods, which are part of the Federal grant, is limited to the distributing agency or recipient agency, as the recipients of the grant. Subsequent donated food activities may be performed, in accordance with Federal regulations and the terms of processing agreements, but would not include a further transfer of title.

We propose to remove the requirements in current § 250.30(f) that the processor maintain documentation that it has not reduced its level of commercial production in exercising the option to substitute commercially purchased foods for donated foods, or that it has made sufficient purchases to meet the 100 percent yield requirement in processing of donated foods. In addition to being virtually impossible to determine, it is unlikely that a processor would choose to process donated foods if it were to adversely affect its commercial activities. The requirement that the processor compensate the distributing or recipient agency for failure to meet required processing yields of donated foods, as proposed in the new § 250.33, is more appropriate, and effective, than a requirement that the processor make specific purchases of foods on the commercial market.

We propose to remove the requirements in current § 250.30(f)(2) and (f)(3) relating to the substitution of concentrated skim milk for donated nonfat dry milk, in accordance with the proposed removal of this substitution option under the revised definition of substitution in § 250.3.

6. Storage, Inspection, Quality Control, and Inventory Management, § 250.35

We propose to include requirements for the storage, inspection, quality control, and inventory management of donated foods provided for processing in the new § 250.35. In current § 250.30(c)(4)(x), the processor must describe its quality control system, and assure that an effective quality control system will be maintained for the duration of its agreement. In the new § 250.35(a), we propose to require the processor to ensure the safe and effective storage of donated foods, including compliance with the general storage requirements in current § 250.14(b), and to maintain an effective quality control system at its processing facilities. We propose to require the processor to maintain documentation to verify the effectiveness of its quality control system, and to provide such documentation upon request.

In current § 250.30(g), the processing of donated beef, pork, and poultry, and of commercial meat products that contain any donated foods, must be performed in plants under continuous Federal meat or poultry inspection. However, in States certified as having programs at least equal to Federal standards, processing of such foods may be performed in plants under continuous State meat or poultry inspection for processed end products that are utilized in the State, rather than the Federal inspection. The inspection requirements assure that processing of donated foods is performed in a safe and sanitary environment, and that labeling requirements are met. We propose to include these inspection requirements without change in the new § 250.35(b).

In the new § 250.35(c), we propose to clarify that a processor may commingle donated foods and commercially purchased foods, unless the processing agreement specifically requires that donated foods and commercially purchased foods be stored separately, or the donated foods have been backhauled from a recipient agency. However, we propose to clarify that such commingling must be performed in a manner that ensures the safe and efficient use of donated foods, as well as compliance with substitution requirements, and with reporting of donated food inventories on performance reports, as required in 7 CFR Part 250. We also propose to require processors to ensure that commingling of finished end products with other food products by distributors ensures the sale to recipient agencies of end products that meet substitution requirements. This incorporates the provision in current § 250.30(f)(1)(ii)(B) that finished poultry end products that have not been produced under AMS acceptance service grading may not be substituted for end products containing donated foods. However, we propose to remove the requirement in current § 250.30(i) that exterior shipping containers or product labels for end products containing nonsubstitutable donated foods (*i.e.*, beef, pork, and poultry) include such information to ensure their sale to eligible recipient agencies. Such assurance may be made through notification of the appropriate parties or by other means.

In current § 250.30(n)(1), a processor is limited in the amount of donated foods for which it is accountable at any one time. A processor may not have on hand more than a six-month supply of donated foods, based on an average amount utilized for that period. However, the distributing agency may allow the processor, through written approval, to maintain a larger amount of donated foods in inventory if it determines that the processor may efficiently store and process such an amount. The distributing agency may

not order donated foods for delivery to a processor if it would result in excessive inventories, unless it has granted such approval. We propose to include the current limitation on processors' inventories of donated foods, and the distributing agency's authority to approve a larger inventory, in the new § 250.35(d).

In current § 250.30(n)(3), a processor must pay the distributing agency for the value of donated foods held in excess of allowed inventory levels at the end of the year, as indicated on the June performance report. However, in practice, the distributing agency often allows a processor to carry over such donated foods into the next year of the agreement, in accordance with its authority to approve donated food inventories in excess of the six-month limitation. The distributing agency may also direct the processor, in accordance with current § 250.13, to transfer or redonate donated foods held in excess of allowed levels to another distributing or recipient agency, or processor, if the processor is unable to process such foods. In the new § 250.35(e), we propose to clarify that the distributing agency may permit the processor to carry over donated foods in excess of allowed levels into the next year of its agreement, if it determines that the processor may efficiently process such foods. We also propose to include the distributing agency's current option to direct the processor to transfer or redonate such donated foods to another distributing or recipient agency or processor. Lastly, we propose to clarify that, if these options are not practical, the distributing agency must require the processor to pay it for the donated foods held in excess of allowed levels, at the replacement value of the donated foods.

In current § 250.30(j), when an agreement terminates, and is not extended or renewed, the distributing agency must direct the processor to return donated foods remaining in inventory, or pay the distributing or recipient agency for the donated foods at the replacement value. For substitutable donated foods, the distributing agency may also permit the processor to return commercially purchased foods that meet substitution requirements in place of the donated foods, or transfer the donated foods to other agencies with which it has entered into agreements. In the new § 250.35(f), we propose to expand the current options for the disposition of substitutable donated foods at the termination of an agreement to all donated foods, in accordance with our proposal, in the new § 250.34, to permit substitution of all donated foods. We propose to clarify that the disposition of donated foods may include a redonation, as well as a transfer; i.e., the distributing agency may permit a redonation of donated foods to another State distributing agency, with FNS approval, in accordance with current § 250.13(h). We also propose to permit the transfer or redonation of commercially purchased foods that meet the substitution requirements in the new § 250.34 in place of the donated foods. If the distributing agency requires the processor to pay for donated foods, we propose to require such payment at the processing agreement value or replacement value, whichever is higher, rather than the several options for assigning the donated food value currently included in the regulations. We propose to include the current requirement that the processor pay the cost of transporting any donated foods when the agreement is terminated at the processor's request, or as a result of the processor's failure to comply with the requirements of 7 CFR Part 250.

We propose to remove the stipulation in current § 250.30(j)(3) that funds received by distributing agencies from payments for donated foods upon termination of an agreement be used in accordance with FNS Instruction 410–1. The allowable use of funds accruing from program operations is described in current § 250.15(f).

7. End Product Sales and Crediting for the Value of Donated Foods, § 250.36

In current § 250.30(d)(1), a processor must sell end products to recipient agencies under a system that assures such agencies receive credit or ''value pass-through'' for the contract value of donated food contained in the end product. And, in current § 250.30(e), a processor must ensure that, when end products are provided to commercial distributors for sale and delivery to recipient agencies, such sales occur under a system that provides such agencies with a credit for the contract value of donated food contained in the end product. In the new § 250.36(a), we propose to require that the sales of end products, either directly by the processor or through a commercial distributor, be performed utilizing one of the methods of end product sales contained in this section, to ensure that the distributing or recipient agency, as appropriate, receives credit for the value of donated foods contained in end products. We also propose to require that all systems of sales utilized must provide clear documentation of crediting for the value of the donated foods contained in the end products.

In current § 250.30(d)(1)(i), a processor may utilize a refund or rebate system, in which the processor sells end products to the distributing or recipient agency, as appropriate, at the commercial, or gross, price, and provides the appropriate agency with a refund for the contract value of donated foods contained in the end products. In current § 250.30(e), a distributor may also sell end products received from the processor under a refund system, with the processor responsible for providing the refund to the appropriate agency. We propose to permit end product sales under this system, by either the processor or distributor, in the new § 250.36(b). We propose to require the processor to remit the refund to the distributing or recipient agency, as appropriate, within 30 days of receiving a request for a refund from the appropriate agency. We propose to clarify that the refund request must be in writing but may be made by e-mail or other electronic means. We propose to remove the requirement in current § 250.30(k) that the recipient agency submit a refund application to receive a refund for the value of donated foods in end products, as the term ''refund application'' implies the submittal of a written form, which is not necessary. Additionally, we propose to remove the 30-day, or quarterly, period by which the distributing or recipient agency must currently submit such a request. Once end product sales are made, we would expect requests for refunds to be made in an expeditious manner, in the interest of the program. However, it should be up to the appropriate agency to determine how frequently it wishes to receive its refunds. To that end, we also propose to remove the option, in current § 250.30(k)(3), for the processor to submit refunds that total $25 or less on a quarterly basis. Lastly, we propose to remove the requirement in current § 250.30(k)(3) that the processor submit copies of refund payments to the distributing agency; however, the distributing agency may choose to require the submission of such documentation to support information included in the processor's performance reports.

In current § 250.30(d)(1)(ii), the processor may utilize a discount system, in which the processor sells end products at a net price that provides a discount from the commercial case price for the value of the donated foods contained in the end products. We propose to permit end product sales under this system in the new § 250.36(c). We propose to refer to this system as a direct discount system to

distinguish it from the method of end product sales described in the following paragraph.

In current § 250.30(e)(1)(ii), a distributor may sell end products to the distributing or recipient agency, as appropriate, at a net price that provides a discount from the commercial case price for the value of the donated foods contained in the end products. The processor then compensates the distributor for the value of the discount provided to the distributing or recipient agency. Since the distributor has purchased the end products from the processor at the commercial price, this system is referred to as the ''hybrid'' system—*i.e.*, it includes a sale of the end product at both the commercial and discounted price. We propose to permit end product sales under this system in the new § 250.36(d), and to refer to it as the indirect discount system. We propose to require the processor to ensure that the distributor notify it of such sales, on a monthly basis, through automated sales reports or other electronic or written submission. We propose to remove the requirement, in current § 250.30(k)(2), that the distributor apply to the processor for a refund under this system.

In current § 250.30(d)(2), and in accordance with the definition in current § 250.3, the processor may sell end products to the distributing or recipient agency at a ''fee-for-service''. The fee-for-service includes all costs to produce the end product minus the value of the donated food put into production. The processor must identify any charge for delivery of end products separately from the fee-for-service on its invoice. We propose to permit this method of end product sales in the new § 250.36(e). In current § 250.30(e)(1)(iv), the processor may provide end products sold under a fee-for-service system to a distributor for delivery to the distributing or recipient agency. In such cases, the processor must identify the distributor's delivery charge separately from the fee-for-service on its invoice, or may permit the distributor to bill the distributing or recipient agency separately for the delivery of end products. As a matter of policy, we have also permitted the processor to provide written approval to the distributor to bill the distributing or recipient agency for the total case price-*i.e.*, for the fee-for-service and the delivery charge. In such cases, the processor must ensure that the distributor identifies the fee-for-service and delivery charge separately on the invoice. The processor must require the distributor to notify it of such sales, on a monthly basis, through automated sales reports or other submission, which may include e-mail or other electronic means. We propose to include these requirements in the new § 250.36(e).

In current § 250.30(d)(1)(iii), the processor may sell end products to the distributing or recipient agency under an alternate method of end product sales that is approved by FNS and the distributing agency. In current § 250.30(e)(1)(iii), the distributor may also sell end products under such an approved alternate method of sales. Such alternate methods of sale must ensure that the distributing or recipient agency, as appropriate, receives credit for the value of donated foods contained in the end products. We propose to include this option for both processor and distributor in the new § 250.36(f).

In the new § 250.36(g), we propose to clarify that the processing agreement value of the donated foods must be used in crediting for donated foods in end product sales, and to refer to the definition of processing agreement value included in § 250.3. In the new § 250.36(h), we propose to require that the distributing agency provide the processor with a list of recipient agencies eligible to purchase end products, along with the quantity of raw donated food that is to be delivered to the processor for processing on behalf of each recipient agency. This would ensure that only eligible recipient agencies receive end products, and in the amounts for which they are eligible. For end products sold through distributors, we propose to require that the processor provide the distributor with a list of eligible recipient agencies, and the quantities of end products that they are eligible to receive.

8. Reports, Records, and Reviews of Processor Performance, § 250.37

In the new § 250.37, we propose to include the reporting and recordkeeping requirements for the processing of donated foods, and the use of such reports and records to review processor performance. In current § 250.30(m), the processor must submit a monthly performance report to the distributing agency, including the following information for the reporting period, with year-to-date totals:

(1) A list of all eligible recipient agencies;

(2) The quantity of donated foods on hand at the beginning of the reporting period;

(3) The quantity of donated foods received;

(4) The quantity of donated foods transferred to the processor from another entity, or transferred by the processor to another entity;

(5) The quantity of end products delivered to each eligible recipient agency; and

(6) The quantity of donated foods remaining at the end of the reporting period.

In the new § 250.37(a), we propose to retain the requirement that the processor submit the performance report to the distributing agency on a monthly basis, to describe its processing of donated foods. We propose to retain all of the currently required information in the report with the exception of a list of eligible recipient agencies, as the distributing agency would already have this information. We propose to require that the processor also include grading certificates and other documentation, as requested by the distributing agency, to support the information included in the performance reports. Such documentation may include, for example, bills of lading, invoices, or copies of refund payments to verify sales and delivery of end products to recipient agencies. However, we propose to remove the requirement in current § 250.30(m)(1)(viii) that the processor submit sales verification findings obtained in accordance with current § 250.19(b)(2) along with the December and June performance reports. As discussed in section II.F of the preamble, we are proposing to remove the sales verification requirements in current § 250.19(b)(2). We propose to retain the current deadlines for the submission of performance reports in the new § 250.37(a). However, we propose to remove the requirement in current § 250.30(c)(4)(viii)(I) that the processor submit annual reconciliation reports. The June performance report serves to reconcile data that may have been submitted erroneously earlier in the year.

In the new § 250.37(b), we propose to prohibit the processor from reporting reductions in donated food inventories on performance reports until sales of end products have been made, or until sales of end products through distributors have been verified. We propose to require that, when a distributor sells end products under a refund system, such verification must be through receipt of the distributing or recipient agency's request for a refund; and, when a distributor sells end products under indirect discount or fee-for-service, such verification must be through the distributor's automated sales reports or other electronic or written submission.

In the new § 250.37(c), we propose to require that a multi-State processor submit a summary performance report

to FNS, on a monthly basis, containing information from the performance report that would allow FNS to track the processor's total and State-by-State donated food inventories, for the purpose of assessing the amount of the performance bond or letter of credit required of the processor under its National Processing Agreement. However, each distributing agency would still be responsible for monitoring the multi-State processor's inventory of donated foods received for processing in the respective State, in accordance with the new § 250.37(a).

As indicated in section II.C of the preamble, we propose to remove the specific recordkeeping requirements for processors included in current § 250.16(a)(4) (redesignated as paragraph (a)(3) by this rule). However, in the new § 250.37(d), we propose to require processors to maintain specific records to demonstrate compliance with processing requirements in 7 CFR Part 250, including, for example, assurance of receipt of donated food shipments, production, sale, and delivery of end products, and crediting for donated foods contained in end products.

In accordance with current § 250.16(a)(1)(i), accurate and complete records must be maintained with respect to end products processed from donated foods, but specific recordkeeping requirements for distributing agencies are not included. In the new § 250.37(e), we propose to require distributing agencies to maintain specific records to demonstrate compliance with processing requirements in 7 CFR Part 250, including, for example, end product data schedules, performance reports, copies of audits, and documentation of the correction of any deficiencies identified in such audits.

In the new § 250.37(f), we propose to require recipient agencies to maintain specific records to demonstrate compliance with processing requirements in 7 CFR Part 250, including, for example, the receipt of end products purchased from processors or distributors, crediting for donated foods included in end products, and procurement documents.

In accordance with current § 250.19(b)(4), the distributing agency must make a continuing evaluation of processors and recipient agencies, through the review of performance reports and other reports and records, to ensure compliance with the requirements of 7 CFR Part 250. And, in accordance with current § 250.30(m)(3), the distributing agency must review and analyze reports submitted by processors to ensure compliance with such requirements. We propose to clarify the review requirements for the distributing agency in the new § 250.37(g), including the review of performance reports to ensure that the processor:

(1) Receives donated food shipments, as applicable;

(2) Delivers end products to eligible recipient agencies, in the types and quantities for which they are eligible;

(3) Meets the required processing yields for donated foods under guaranteed minimum yield; and

(4) Accurately reports donated food inventory activity and maintains inventories within approved levels.

We propose to remove current requirements for the distributing agency to submit the following reports to FNS:

- The final performance report for the year to the FNS Regional Office in accordance with current § 250.30(n)(4); and
- The inventory portion of the performance report to the FNS Regional Office on a quarterly basis, in accordance with current § 250.30(o).

We propose to remove the requirement in current § 250.30(m)(1)(ix) that the processor provide certification that sufficient donated foods are on hand to meet processing obligations under its agreements, and that sufficient foods are in inventory to meet commercial obligations. We expect that, since a processor's failure to meet processing obligations with respect to donated foods would result in either the distributing agency or FNS, as appropriate, calling in the performance bond or letter of credit, in accordance with the new § 250.32(b), a processor would be unlikely to maintain inventories insufficient to conduct its processing activities. We propose to remove the requirements in current § 250.30(m)(2) and (n)(2) relating to the submission of reports and the performance of reviews to ensure that substitution of concentrated skim milk for donated nonfat dry milk is in compliance with requirements. As described in section II.A of the preamble, we are proposing to remove this substitution option under the revised definition of substitution in § 250.3. Lastly, we propose to remove the provision in current § 250.30(n)(5) that prohibits distributing agencies from submitting food orders for processors that report no sales of end products during the prior year. While this would ordinarily be a good practice, it is the distributing agency's decision to determine if a processor may effectively receive and process donated foods in a future period.

9. Provisions of Agreements, § 250.38

In the new § 250.38, we propose to include the required provisions for each type of processing agreement included in the new § 250.30, to ensure compliance with the requirements in 7 CFR Part 250. In the new § 250.38(a), we propose to indicate that the National Processing Agreement includes provisions to ensure that a multi-State processor complies with all applicable requirements relating to the processing of donated foods. FNS has developed a prototype National Processing Agreement that includes all such required provisions.

In the new § 250.38(b), we propose to require that the State Participation Agreement with a multi-State processor contain specific provisions or attachments to assure compliance with requirements in 7 CFR Part 250 that are not included in the multi-State processor's National Processing Agreement. Such provisions include, for example, a list of recipient agencies eligible to receive end products, summary end product data schedules that contain a list of end products that may be sold in the State, and the allowed method(s) of end product sales implemented by the distributing agency.

In the new § 250.38(c), we propose to require that the State Processing Agreement contain specific provisions or attachments to assure compliance with requirements in 7 CFR Part 250. Most of these provisions are included in current § 250.30(c)(4) and include, for example, assurance that the processor will meet processing yields for donated foods and substitution requirements, report donated food inventory activity and maintain inventories within approved levels, credit recipient agencies for donated foods contained in end products, and obtain required audits.

In accordance with the new § 250.38(d), we propose to require that the Recipient Processing Agreement contain the same provisions as a State Processing Agreement, to the extent that the distributing agency permits the recipient agency to monitor compliance with the applicable processing requirements (*e.g.*, approval of end product data schedules or review of performance reports). However, a list of recipient agencies eligible to receive end products need not be included.

In the new § 250.38(e), we propose to prohibit the distributing or recipient agency, as appropriate, from extending or renewing an agreement if the processor has not complied with processing requirements. We propose to indicate that the distributing or

recipient agency may immediately terminate the agreement in the event of such noncompliance.

10. Miscellaneous Provisions, § 250.39

In current § 250.30(t), FNS may waive any of the requirements in 7 CFR Part 250 for the purpose of conducting demonstration projects to determine if processing of donated foods may be performed more efficiently or effectively by other means. We propose to include this provision without change in the new § 250.39(a).

In the new § 250.39(b), we propose to clarify that guidance or information relating to the processing of donated foods is included on the FNS Web site at *http://www.fns.usda.gov/fdd*, or may otherwise be obtained from FNS. Such guidance and information includes program regulations and policies, the processing handbook, the FNS Audit Guide, and National Processing Agreement and summary end product data schedule prototypes.

We propose to remove the requirement in current § 250.30(s) that the distributing agency develop and provide a processing manual or similar materials to processors and other parties. The information described above should provide sufficient guidance for processors and other parties to permit compliance with requirements for the processing of donated foods. The distributing agency may provide additional information relating to State-specific processing procedures upon request.

III. Procedural Matters

A. Public Comment Procedures

Your written comments on this proposed rule should be specific, confined to issues pertinent to the proposed rule, and should explain your reasons for any change recommended. Where possible, you should reference the specific section or paragraph of the proposal you are addressing. Comments received after the close of the comment period (see **DATES**) will not be considered or included in the Administrative Record for the final rule.

The comments, including names, street addresses, and other contact information of commenters, will be available for public review at the Food and Nutrition Service, Room 500, 3101 Park Center Drive, Alexandria, Virginia, during regular business hours (8:30 a.m. to 5 p.m.), Mondays through Fridays, except Federal holidays.

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these regulations easier to understand, including answers to questions such as the following:

(1) Are the requirements in the rule clearly stated?

(2) Does the rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) make it more or less clear?

(4) Would the rule be easier to understand if it were divided into more (but shorter) sections?

(5) Is the description of the rule in the preamble sections entitled ''Background'' and ''Discussion of the Rule's Provisions'' helpful in understanding the rule? How could this description be more helpful?

B. Executive Order 12866

This proposed rule has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

C. Regulatory Flexibility Act

This proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Roberto Salazar, Administrator of the Food and Nutrition Service, has certified that this action will not have a significant impact on a substantial number of small entities. Although the rule would require specific procedures for processors and distributing and recipient agencies to follow in the processing of donated foods, USDA does not expect them to have a significant impact on such entities.

D. Public Law 104–4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector of $100 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 12372

The donation of foods in USDA food distribution and child nutrition programs is included in the Catalog of Federal Domestic Assistance under 10.550. For the reasons set forth in the final rule in 7 CFR Part 3015, Subpart V and related Notice (48 FR 29115, June 24, 1983), the donation of foods in such programs is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

F. Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

1. Prior Consultation With State Officials

The programs affected by the regulatory proposals in this rule are all State-administered, Federally-funded programs. Hence, our national headquarters office has formal and informal discussions with State and local officials, as well as processors, on an ongoing basis regarding program issues relating to the processing of donated foods. FNS attends annual conferences of the American Commodity Distribution Association, a national group with State, local, and industry representation, and the School Nutrition Association, as well as other conferences.

2. Nature of Concerns and the Need To Issue This Rule

The rule addresses the concerns of program operators that use donated foods to provide the school lunches and other meals in NSLP and other programs, as well as the processors that process the donated foods into finished end products on their behalf. The rule would reduce the workload for all parties involved in the processing of donated foods, and would facilitate the more efficient processing and delivery of end products.

3. Extent To Which We Meet Those Concerns

FNS has considered the impact of the proposed rule on State and local agencies. The overall effect of this rule is to better ensure that such agencies receive the greatest benefit from donated foods through their processing into end products by commercial processors.

G. Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule, when finalized, would have preemptive effect with respect to any State or local laws, regulations, or policies which conflict with its provisions or which would otherwise impede its full implementation. This proposed rule would not have retroactive effect. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

H. Civil Rights Impact Analysis

FNS has reviewed this rule in accordance with the Department Regulation 4300–4, ''Civil Rights Impact Analysis'', to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, FNS has determined that this rule will not in any way limit or reduce the ability of participants to receive the benefits of donated foods on the basis of an individual's or group's race, color, national origin, sex, age, or disability. FNS found no factors that would negatively and disproportionately affect any group of individuals.

I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. chap. 35; see 5 CFR part 1320) requires that OMB approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This proposed rule contains information collections that are subject to review and approval by OMB; therefore, in accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other agencies to comment on the proposed information collections affected by the proposals in the rule. Written comments on this proposed information collection must be received on or before October 23, 2006.

Comments concerning the information collection aspects of this proposed rule should be sent to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503, Attention: Desk Officer for the Food and Nutrition Service. A copy of these comments may also be sent to Lillie F. Ragan, at the address listed in the **ADDRESSES** section of this preamble. Commenters are asked to separate their comments on the information collection requirements from their comments on the remainder of the proposed rule.

OMB is required to make a decision concerning the collection of information contained in this proposed regulation between 30 to 60 days after the publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having full consideration if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulation.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

The title, description, and respondent description of the information collections affected by this rule are shown below, with an estimate of the annual reporting and recordkeeping burdens. These burden hours represent proposed changes to current reporting and recordkeeping requirements, and incorporate some additional proposed requirements.

Title: Food Distribution Regulations and Forms.

OMB Number: 0584–0293.

Expiration Date: March 31, 2009.

Type of Request: Revision of a currently approved collection.

Abstract: This proposed rule would affect only the reporting and recordkeeping requirements under 7 CFR Part 250 described in the following paragraphs and indicated in the tables.

1. Reporting Requirements

Section 250.18, Audits. The reporting burden relating to audit requirements would be reduced from 240 hours to 170 hours. Although distributing agencies would have to review audits required of in-State processors, in addition to those currently required of multi-State processors, the time required for each response would be reduced from the current 4 hours to 2 hours.

Section 250.30, Processing agreements. The reporting burden relating to the execution of processing agreements would be reduced from 324 hours to 245 hours. The reduction is the result of our proposal, in the new § 250.30(c), to permit distributing agencies to sign more abbreviated State Participation Agreements with multi-State processors (which must have National Processing Agreements), rather than the currently required State Processing Agreements. This would reduce the estimated time required for each response from 2 hours to 0.636 hours. Currently, in § 250.30(l), distributing agencies must provide copies of processing agreements to FNS. We are proposing to remove this requirement. Hence, the reporting burden for this activity would be reduced from 456 hours to 0 hours.

Section 250.36, End product sales. The reporting burden relating to the verification of end product sales would be reduced from 4,018.50 hours to 1,410 hours. This is a result of our proposal, in the new § 250.36(b), to permit distributing or recipient agencies, as appropriate, to submit requests for refunds to processors by e-mail or other electronic means, rather than by written submission, which would reduce the time required for each response from 0.57 hours to 0.20 hours.

Section 250.37, Performance reports. The burden relating to the review of performance reports submitted by processors would increase from 4,500 hours to 10,350 hours. This is the result of the increase in the number of processors with which distributing agencies have agreements to process donated foods into end products. In the new § 250.37, we propose to include as respondents the 50 distributing agencies that must review the performance reports submitted by processors. Each distributing agency has a processing agreement with, on average, 23 processors, each of which submits 9 performance reports annually. Hence, each distributing agency must review 207 performance reports annually, resulting in a total of 10,350 annual responses. As each response would take

1 hour, the reporting burden for this activity would be 10,350 hours.

In current § 250.30, the submission of forms FNS–519A and FNS–519B as processor's monthly performance reports and inventory reports is listed erroneously. Hence, we propose to remove the 1,560 burden hours currently listed under this submission. In current §§ 250.17(b) and 250.30(o), distributing agencies must complete and submit a processing inventory report to FNS on a quarterly basis. We are proposing to remove this requirement. Hence, the reporting burden for this activity would be reduced from 912 hours to 0 hours. In current § 250.30(s), distributing agencies are required to develop and provide a processing manual or similar material to processors and recipient agencies. We are also proposing to remove this requirement. Hence, the reporting burden for this activity would be reduced from 18.81 hours to 0 hours.

2. Recordkeeping Requirements

Section 250.18, Audits. The recordkeeping burden relating to audit requirements would increase from 9.90 hours to 28.1 hours, as distributing agencies would have to maintain records of audit findings for in-State processors, in addition to the current requirement to maintain such records for multi-State processors.

Section 250.30, Processing agreements. The recordkeeping burden relating to the execution of processing agreements would increase from 13.28 hours to 31 hours, as a result of the increase in the number of processors that distributing agencies enter into agreements to process donated foods.

Section 250.37, Records of processing activities. The current recordkeeping burden for the receipt of processed end products, performance reports, and other records related to the processing of donated foods is included under current §§ 250.16 and 250.30, which also include the burden for the maintenance of other records relating to the distribution and management of donated foods. In accordance with the new § 250.37(e), we are proposing to clarify the specific records that the distributing agency must maintain to ensure compliance with processing requirements, including records of end product data schedules, performance reports, grading certificates, the receipt of end products, etc. In the new § 250.37(f), we are clarifying the recordkeeping requirements for recipient agencies, which would include records of the receipt of end products and of crediting for donated foods included in end products. However, the overall recordkeeping burden would remain unchanged from the current 9,200 hours.

Respondents: State, local, or Tribal Government; Program participants; Business or other for-profit; Nonprofit institutions; Federal Government.

Total Annual Responses: Current: 1,642,762; Proposed: 1,659,358.

Estimated Total Annual Burden on Respondents: Current: 1,085,814; Proposed: 1,104,505.

The proposed changes in the reporting and recordkeeping requirements described above are included in the following tables.

REPORTING

Current/proposed	§§	Respondents	Responses per year	Total responses	Hours/response	Total hours
Current	250.18(c)	30	2	60	4	240
Proposed	250.18	50	1.7	85	2	170
Current	250.12(f) and 250.30(c)	166	1	166	2	324
Proposed	250.30	50	7.7	385	0.636	245
Current	250.30(l)	19	12	228	2	456
Proposed		0	0	0	0	0
Current	250.30(k)	2,350	3	7,050	0.57	4,018.50
Proposed	250.36	2,350	3	7,050	0.20	1,410
Current	250.17(c) and 250.30(m)	500	9	4,500	1	4,500
Proposed	250.37	50	207	10,350	1	10,350
Current	250.17(b) and 250.30(o)	57	4	228	4	912
Proposed		0	0	0	0	0
Current	250.30	57	1	57	0.33	18.81
Proposed		0	0	0	0	0
Current	250.30(m)	40	13	520	3	1,560
Proposed		0	0	0	0	0
Total:						
Current		3,219	3.97	12,809	0.940	12,037.31
Proposed		2,500	7.15	17,870	0.685	12,175

RECORDKEEPING

Current/proposed	§§	Respondents	Responses per year	Total responses	Hours/response	Total hours
Current	250.18(b)	30	1	30	0.33	9.90
Proposed	250.18	50	1.7	85	0.33	28.1
Current	250.12(f)	166	1	166	0.08	13.28
Proposed	250.30	50	7.7	385	0.08	30.8
Current	250.16 and 250.30	115,000	1	115,000	0.08	9,200
Proposed	250.37	115,000	1	115,000	0.08	9,200
Total:						
Current		115,196	1	115,196	0.08	9,223.18
Proposed		115,100	1	115,470	0.08	9,259

J. E-Government Act Compliance

FNS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to government information and services, and for other purposes. In accordance with current practice, and as clarified in this rule, distributing and recipient agencies, and processors, may, in most cases, submit required information electronically, including through e-mail or other means. For example, the rule clarifies that recipient agencies may submit requests for refunds for the value of donated foods in processed end products by e-mail or other electronic submission.

List of Subjects in 7 CFR Part 250

Administrative practice and procedure, Food assistance programs, Grant programs, Social programs, Indians, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, 7 CFR Part 250 is proposed to be amended as follows:

PART 250–DONATION OF FOODS FOR USE IN THE UNITED STATES, ITS TERRITORIES AND POSSESSIONS AND AREAS UNDER ITS JURISDICTION

1. The authority citation for Part 250 continues to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 612c, 612c note, 1431, 1431b, 1431e, 1431 note, 1446a–1, 1859, 2014, 2025; 15 U.S.C. 713c; 22 U.S.C. 1922; 42 U.S.C. 1751, 1755, 1758, 1760, 1761, 1762a, 1766, 3030a, 5179, 5180.

2. In § 250.3:

a. Remove definitions of *Contract value of the donated foods, Contracting agency, Discount system, Fee-for-service, Refund, Refund application, Refund system,* and *Substituted food.*

b. Revise definitions of *Distributor, Multi-State processor* and *Substitution.*

c. Add definitions, in the appropriate alphabetical order, of *Backhauling, Commingling, End product data schedule, In-State processor, National Processing Agreement, Processing agreement value, Recipient Processing Agreement, Replacement value, 7 CFR 3052, Split shipment, State Participation Agreement,* and *State Processing Agreement.*

The revisions and additions read as follows:

§ 250.3 Definitions.

Backhauling means the delivery of donated foods to a processor for processing from a recipient agency's storage facility.

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Commingling means the storage of donated foods together with commercially purchased foods.

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Distributor means a commercial enterprise that sells and/or delivers finished end products, or stores and distributes donated foods, to distributing or recipient agencies.

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End product data schedule means a processor's description of the processing of donated food into a finished end product, including the processing yield of donated food.

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In-State processor means a processor that has entered into agreements with distributing or recipient agencies that are located only in the State in which the processor's facilities or office is located.

Multi-State processor means a processor that has entered into agreements with distributing or recipient agencies in more than one State, or that has entered into agreements with distributing or recipient agencies that are located in a State other than the State in which the processor's processing facility is located.

National Processing Agreement means an agreement between FNS and a multi-State processor to process donated foods into end products for sale to distributing or recipient agencies.

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Processing agreement value means the specific commodity file value for donated food assigned by the Department that reflects the Department's cost of purchase, delivery, and processing of the donated food, as applicable.

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Recipient Processing Agreement means a recipient agency's agreement with a processor to process donated foods and purchase the finished end products.

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Replacement value means the specific commodity file value assigned by the Department to ensure compensation for donated foods lost in processing or other activities.

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7 CFR Part 3052 means the Department's regulations establishing audit requirements for State and local governments and nonprofit organizations that receive Federal grants.

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Split shipment means a shipment of donated foods with more than one stop-off or delivery location, or a shipment to one delivery location that is split between two different distributing agencies.

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State Participation Agreement means a distributing agency's agreement with a multi-State processor to permit the sale of finished end products produced under the processor's National Processing Agreement to eligible recipient agencies in the State, or to directly purchase such finished end products.

State Processing Agreement means a distributing agency's agreement with a processor to process donated foods into finished end products for sale to eligible recipient agencies, or to the distributing agency.

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Substitution means the use of commercially purchased foods in place of donated foods in accordance with the requirements of this part.

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3. In § 250.13, revise paragraph (c) to read as follows:

§ 250.13 Distribution and control of donated foods.

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(c) *Transfer of title.* Title to donated foods transfers to the distributing agency or recipient agency, as appropriate, upon acceptance of the donated foods at the time and place of delivery, with the following exception. Title to donated foods provided to a multi-State processor, in accordance with its National Processing Agreement, transfers to the distributing agency or recipient agency, as appropriate, upon acceptance of the finished end products at the time and place of delivery. Notwithstanding transfer of title, the distributing agency must ensure that donated foods and end products are used in accordance with the requirements of this part.

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4. In § 250.16:

a. Remove paragraph (a)(3).

b. Redesignate paragraphs (a)(4), (a)(5), and (a)(6) as paragraphs (a)(3), (a)(4), and (a)(5), respectively.

c. Revise newly redesignated paragraph (a)(3) to read as follows:

§ 250.16 Maintenance of records.

(a) * * *

(3) Processors and food service management companies must comply

with the applicable recordkeeping requirements in this part, and with any other recordkeeping requirements included in their agreements or contracts. Storage facilities and distributors must maintain records documenting the receipt, distribution, inventory, and disposal of donated foods sufficient to ensure compliance with requirements in this part, and with any other such requirements in their agreements or contracts with distributing or recipient agencies.

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5. In § 250.17:

a. Remove paragraphs (b) and (f).

b. Redesignate paragraphs (c), (d), and (e), as paragraphs (b), (c), and (d), respectively.

c. Revise newly redesignated paragraph (b) to read as follows:

§ 250.17 Reports.

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(b) *Processor performance.* Processors must submit performance reports and other supporting documentation, as required by the distributing agency or by FNS, in accordance with § 250.37, to ensure compliance with requirements in this part.

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6. Revise § 250.18 to read as follows:

§ 250.18 Audits.

(a) *Requirements for distributing and recipient agencies.* In accordance with Departmental regulations in 7 CFR Part 3052 and OMB Circular A–133, a State or local government or nonprofit organization that expends at least $500,000 in Federal grants or awards (*i.e.*, funds and/or donated foods) in a school or fiscal year must obtain a single audit for that year. A program-specific audit may be substituted for a single audit if the auditee operates only one Federal program (or one recognized cluster of programs). A State or local government or nonprofit organization that expends less than $500,000 in Federal grants or awards in a school year or fiscal year is not required to have an audit for that year. The value of donated foods used in determining if an audit is required must be the value assigned by the distributing agency, in accordance with § 250.13(a)(5). Recipient agencies utilizing a single inventory management system must consider the value of all donated foods received for the year, rather than the value of donated foods actually used. (For availability of the OMB circular mentioned in this paragraph, please refer to 5 CFR 1310.3).

(b) *Requirements for processors.* In-State processors must obtain an independent certified public accountant (CPA) audit in the first year that they receive donated foods for processing, while multi-State processors must obtain such an audit in each of the first three years that they receive donated foods for processing. After this initial requirement period, an in-State processor must obtain an independent CPA audit every three years, while a multi-State processor must obtain such an audit at a frequency determined by the average value of donated foods it receives for processing per year, as indicated in this paragraph (b). The value of donated foods used in determining if an audit is required must be the value assigned by the distributing agency, in accordance with § 250.13(a)(5). The audit must determine that the processor's performance is in compliance with the requirements in this part, and must be conducted in accordance with procedures in the FNS Audit Guide for Processors. All processors must pay for audits required in this paragraph (b). A multi-State processor must obtain an audit:

(1) Annually, if it receives, on average, more than $5,000,000 in donated foods for processing per year;

(2) Every two years, if it receives, on average, between $1,000,000 and $5,000,000 in donated foods for processing per year; or

(3) Every three years, if it receives, on average, less than $1,000,000 in donated foods for processing per year.

(c) *Required actions resulting from audit.* The distributing or recipient agency, as appropriate, must submit reports and corrective action plans, and undertake corrective actions in response to the audit, in accordance with the requirements in 7 CFR Part 3052. A multi-State processor must ensure that a copy of the audit is provided to FNS, and an in-State processor must ensure that a copy of the audit is provided to the distributing agency, by December 31st of each year in which an audit is required. Along with the audit, the processor must provide verification to FNS or the distributing agency, as appropriate, that all deficiencies identified in the audit have been corrected, or must provide a corrective action plan with timelines for correcting all deficiencies identified in the audit.

(d) *Failure to meet audit requirements.* A distributing or recipient agency is subject to sanctions for failure to obtain the required audit, or for failure to correct deficiencies identified in the audit, including the withholding, suspension, or termination of a Federal award. FNS may terminate a processor's National Processing Agreement, or prohibit the further distribution of donated foods to a processor, for its failure to obtain the required audit, or its failure to correct deficiencies identified in the audit. A distributing or recipient agency may terminate an agreement with a processor, and must not extend or renew such an agreement, for the same reasons, in accordance with § 250.38(e).

(e) *Departmental audits or inspections.* The Department, the Comptroller General of the United States, or any of their authorized representatives, may conduct audits or inspections of distributing, subdistributing, or recipient agencies, or the commercial enterprises with which they have contracts or agreements, to assure compliance with the requirements of this part.

§ 250.19 [Amended]

7. In § 250.19:

a. Remove paragraph (b)(1)(iii), and redesignate paragraphs (b)(1)(iv) and (b)(1)(v) as paragraphs (b)(1)(iii) and (b)(1)(iv), respectively.

b. Remove paragraph (b)(2), and redesignate paragraphs (b)(3), (b)(4), (b)(5), and (b)(6) as paragraphs (b)(2), (b)(3), (b)(4), and (b)(5), respectively.

c. Remove the undesignated text appearing after newly redesignated paragraph (b)(2)(iv).

8. In § 250.24, revise paragraph (g) to read as follows:

§ 250.24 Distributing agency performance standards.

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(g) *Processing.* The distributing agency must provide for the processing of donated foods in accordance with Subpart C of this part, and must ensure that recipient agencies are aware of the processing options available to them. In accordance with § 250.30(g), the distributing agency must provide for testing of end products to ensure their acceptability by recipient agencies before entering into processing agreements. The distributing agency must develop a system to monitor product acceptability on a periodic basis.

9. Revise Subpart C to read as follows:

Subpart C—Processing of Donated Foods

Sec.

250.30 Types of processing agreements.
250.31 Procurement requirements.
250.32 Protection of donated food value.
250.33 Processing yields of donated foods.
250.34 Substitution of donated foods.
250.35 Storage, inspection, quality control, and inventory management.
250.36 End product sales and crediting for the value of donated foods.
250.37 Reports, records, and reviews of processor performance.
250.38 Provisions of agreements.
250.39 Miscellaneous provisions.

Subpart C—Processing of Donated Foods

§ 250.30 Types of processing agreements.

(a) *Purpose of processing donated foods.* Donated foods are most commonly provided to processors to process into approved end products that are more suitable for use in school lunch programs or other food services provided by recipient agencies. For example, a whole chicken or chicken parts may be processed into chicken nuggets for use in the National School Lunch Program. However, in some cases donated foods are provided to processors to prepare meals, or for repackaging. A processor's use of a commercial facility to repackage donated foods, or to use donated foods in the preparation of meals, is considered processing in this part.

(b) *Agreement requirement.* The processing of donated foods must be performed in accordance with an agreement between the processor and FNS, between the processor and the distributing agency, or, if allowed by the distributing agency, between the processor and a recipient agency or subdistributing agency. However, a processing agreement will not obligate the distributing, subdistributing, or recipient agency, or the Department, to provide donated foods to a processor for processing. For donated foods received in child nutrition programs, the distributing agency must provide the State administering agency (if a different agency) with an opportunity to review its processing agreements to ensure compliance with nutritional and labeling requirements. The different types of processing agreements are described in this section.

(c) *National Processing Agreement.* A multi-State processor must enter into a National Processing Agreement with FNS in order to process donated foods into end products in accordance with end product data schedules approved by FNS. FNS also holds and manages the processor's performance bond or letter of credit under the National Processing Agreement, in accordance with § 250.32. FNS does not itself procure or purchase end products under a National Processing Agreement. A multi-State processor must also enter into a State Participation Agreement with the distributing agency in order to sell nationally approved end products in the State, in accordance with paragraph (d) of this section.

(d) *State Participation Agreement.* The distributing agency must enter into a State Participation Agreement with a multi-State processor to permit the sale of finished end products produced under the processor's National Processing Agreement to eligible recipient agencies in the State, or to directly purchase such finished end products. The distributing agency may include other State-specific processing requirements in its State Participation Agreement, such as the methods of end product sales permitted, in accordance with § 250.36, or the use of labels attesting to fulfillment of meal pattern requirements in child nutrition programs.

(e) *State Processing Agreement.* A distributing agency must enter into a State Processing Agreement with an in-State processor to process donated foods into finished end products. The distributing agency may also choose to provide donated foods for processing to a multi-State processor under such an agreement, rather than utilize the National Processing Agreement. Under a State Processing Agreement, the distributing agency approves end product data schedules submitted by the processor, holds and manages the processor's performance bond or letter of credit, in accordance with § 250.32, and assures compliance with other processing requirements. The distributing agency may purchase the finished end products for distribution to eligible recipient agencies in the State under a State Processing Agreement, or may choose to select a number of processors with which it enters into such agreements, and permit recipient agencies to purchase finished end products from them, in accordance with applicable procurement requirements. The latter type of State Processing Agreement is called a master agreement. In selecting processors with which it enters into master agreements, the distributing agency must develop selection criteria, which must include the following:

(1) The nutritional contribution provided by end products;

(2) The marketability or acceptability of end products;

(3) The means by which end products will be distributed;

(4) Prices of end products and processing yields of donated foods;

(5) Any applicable labeling requirements; and

(6) The processor's record of ethics and integrity, and capacity to meet regulatory requirements.

(f) *Recipient Processing Agreement.* The distributing agency may permit a recipient agency to enter into an agreement with a processor to process donated foods and to purchase the finished end products in accordance with a Recipient Processing Agreement. A recipient agency may also enter into a Recipient Processing Agreement on behalf of other recipient agencies, in accordance with an agreement between the parties. The distributing agency may also permit a recipient agency to approve end product data schedules or select nationally approved end product data schedules, review processor performance reports, and monitor other processing activities under a Recipient Processing Agreement. All such activities must be performed in accordance with the requirements of this part. All Recipient Processing Agreements must be reviewed and approved by the distributing agency.

(g) *Ensuring acceptability of end products.* The distributing agency must provide for testing of end products to ensure their acceptability by recipient agencies prior to entering into State Processing Agreements or State Participation Agreements. End products that have previously been tested, or that are otherwise determined to be acceptable, need not be tested. The distributing agency, or its recipient agencies, must monitor product acceptability on an ongoing basis.

(h) *Prohibition against subcontracting.* A processor may not assign any processing activities under its processing agreement, or subcontract with another entity to perform any aspect of processing, without the specific written consent of the other party to the agreement (i.e., distributing, subdistributing, or recipient agency, or FNS, as appropriate). The distributing agency may, for example, provide the required consent as part of its State Participation Agreement with the processor.

(i) *Duration of agreements.* An agreement between a distributing, subdistributing, or recipient agency and a processor may be up to five years in duration. National Processing Agreements are permanent. Amendments to any agreements may be made as needed, with the concurrence of the parties to the agreement. Such amendments will be effective for the duration of the agreement, unless otherwise indicated.

§ 250.31 Procurement requirements.

(a) *Applicability of Federal procurement requirements.* Federal procurement requirements in 7 CFR Parts 3016 and 3019 pertain to the purchase of finished end products from processors or other processing services relating to donated foods. In conducting such procurements, distributing or recipient agencies may use procedures that conform to applicable State or local laws, as appropriate, but must ensure

compliance with Federal regulations in 7 CFR Parts 3016 or 3019, as applicable.

(b) *Methods of procurement.* In accordance with 7 CFR 3016.36 and 3019.44, the distributing or recipient agency may use small purchase procedures in purchasing finished end products or other processing services from processors if the cost of the purchase does not exceed the simplified acquisition threshold fixed at 41 U.S.C. 403(11) (currently set at $100,000). If the cost of such purchase exceeds that amount, the distributing or recipient agency must use sealed bids or competitive proposals in conducting the procurement. These methods of procurement are more fully explained in 7 CFR 3016.36 and 3019.44. Federal requirements do not absolve the distributing or recipient agency from its obligation to comply with State or local procurement laws or procedures that are more stringent than the Federal requirements.

(c) *Required information in procurement documents.* The procurement documents must include the following information:

(1) The price to be charged for the finished end product or other processing service;

(2) The method of end product sales that will be utilized;

(3) The contract value of the donated food in the finished end products; and

(4) The location for the delivery of the finished end products.

§ 250.32 Protection of donated food value.

(a) *Performance bond or irrevocable letter of credit.* The processor must obtain a performance bond or an irrevocable letter of credit to protect the value of donated foods that it is to receive for processing, prior to the delivery of the donated foods. The processor must provide the performance bond or letter of credit to the distributing agency, in accordance with its State Processing Agreement. The amount of the performance bond or letter of credit must be sufficient to cover the maximum value of donated foods, both raw and processed, that the processor is expected to maintain in inventory at any given time, as determined by the distributing agency. A multi-State processor must provide the performance bond or letter of credit to FNS, in accordance with its National Processing Agreement. The amount of the performance bond or letter of credit must be sufficient to cover the maximum value of donated foods that the processor is expected to maintain in its national inventory at any given time, as determined by FNS. The surety company from which a bond or letter of credit is obtained must be listed in the most current Department of Treasury Circular 570.

(b) *Calling in the performance bond or letter of credit.* The distributing agency must call in the performance bond or letter of credit whenever a processor's lack of compliance with Federal requirements, or with the terms of the State Processing Agreement, results in a loss of donated foods to the distributing or recipient agency, and the processor fails to make restitution or respond to a claim action initiated to recover the loss. FNS will call in the performance bond or letter of credit in the same circumstances, in accordance with National Processing Agreements, and will ensure that any monies recovered are reimbursed to distributing agencies for losses of entitlement foods.

§ 250.33 Processing yields of donated foods.

(a) *End product data schedules.* The processor must submit an end product data schedule for approval before it may process donated foods into end products. For State Processing Agreements, the end product data schedule must be approved by the distributing agency and, for donated foods processed under guaranteed return or standard yield, must also be approved by the Department. For National Processing Agreements, the end product data schedule must be approved by the Department. On the end product data schedule, the processor must describe its processing of donated food into an end product, including the information indicated in this paragraph (a). An end product data schedule must be submitted, and approved, for each new end product that a processor wishes to provide, or for a previously approved end product in which the ingredients (or other pertinent information) have been altered. In submitting the end product data schedule, the processor may use its own format, as long as all of the required information is included. The end product data schedule must include the following information:

(1) A description of the end product;

(2) The types and quantities of donated foods included;

(3) The types and quantities of other ingredients included;

(4) The quantity of end product produced; and

(5) The processing yield of donated food, which may be expressed as the quantity (lbs. or cases) of donated food needed to produce a specific quantity of end product, or as the percentage of donated food returned in the finished end product.

(b) *100 per cent yield.* Processing of all donated foods except beef, pork, and poultry must be performed under 100 percent yield. Under 100 percent yield, the processor must ensure that 100 percent of the raw donated food is returned in the finished end product. The processor must replace any processing loss of donated food with commercially purchased food of the same generic identity, of U.S. origin, and of equal or better quality than the donated food. The processor must demonstrate such replacement by reporting reductions in donated food inventories on performance reports by the amount of donated food contained in the finished end product, rather than the amount that went into production. The Department may approve an exception if a processor experiences a significant manufacturing loss.

(c) *Guaranteed yield or return.* Under guaranteed yield or return, the processor must ensure that a specific quantity of end product will be produced from a specific quantity of donated food, as determined by the parties to the processing agreement, and, for State Processing Agreements, approved by the Department. The guaranteed yield must be indicated on the end product data schedule.

(d) *Guaranteed minimum yield or return.* Under guaranteed minimum yield or return, the processor must ensure that a specific minimum quantity of end product will be produced from a specific quantity of donated food in a production run, as indicated on the end product data schedule. If a larger quantity of end product than the guaranteed minimum is produced, the processor must provide the full quantity to the distributing or recipient agency, as appropriate, and that agency must pay the processor for the additional end products produced.

(e) *Standard yield.* Under standard yield, the processor must ensure that a specific quantity of end product, as determined by the Department, will be produced from a specific quantity of donated food. The established standard yield is higher than the average yield under normal commercial production, and serves to reward those processors that can process donated foods most efficiently. The standard yield must be indicated on the end product data schedule.

(f) *Compensation for loss of donated foods.* The processor must compensate the distributing or recipient agency, as appropriate, for the loss of donated foods, or for the loss of commercially purchased foods substituted for donated foods. Such loss may occur, for example, if the processor fails to meet

the required processing yield of donated food, if donated foods are spoiled, damaged, or otherwise adulterated at a processing facility, or if end products are improperly distributed. To compensate for such loss, the processor must:

(1) Replace the lost donated food or commercial substitute with commercially purchased food of the same generic identity, of U.S. origin, and of equal or better quality than the donated food; or

(2) Pay the distributing or recipient agency, as appropriate, for the replacement value of the donated food or commercial substitute.

(g) *Compensation for end products that are wholesome but not suitable for use.* The processor must compensate the distributing or recipient agency, as appropriate, for donated foods, or for commercially purchased foods substituted for donated foods, contained in any end products that are wholesome but not suitable for use in the recipient agency's food service. To make such compensation, the processor must return the end products to production for processing into end products that meet the required specifications (which are commonly called rework products). However, except under guaranteed return or standard yield, the processor may also make such compensation by paying the distributing or recipient agency, as appropriate, for the replacement value of the donated foods or commercial substitutes contained in the end products and retain such end products for its own use.

(h) *Credit for sale of by-products.* The processor must credit the distributing or recipient agency, as appropriate, for the sale of any by-products produced in the processing of donated foods, except under guaranteed return or standard yield. The processor must credit for the net value of such sale, or the market value of the by-products, after subtraction of any documented expenses incurred in preparing the by-product for sale. Crediting must be achieved through invoice reduction or by another means of crediting.

(i) *Labeling requirements.* The processor must ensure that all end product labels meet Federal labeling requirements. If a processor claims that an end product contributes to fulfillment of meal pattern requirements in child nutrition programs, it must follow the procedures required for approval of labels for such end products.

§ 250.34 Substitution of donated foods.

(a) *Substitution of commercially purchased foods for donated foods.* Unless its agreement specifically stipulates that the donated foods must be used in processing, the processor may substitute commercially purchased foods for donated foods that are delivered to it from a USDA vendor. The commercially purchased food must be of the same generic identity, of U.S. origin, and of equal or better quality than the donated food. At the option of the processor, substitution may be made before the actual receipt of the donated food shipment. However, the Department may not be held liable if, due to changing market conditions or other reasons, the purchase of donated foods and their delivery to the processor is not feasible. Commercially purchased food substituted for donated food must meet the same processing yield requirements in § 250.33 that would be required for the donated food.

(b) *Prohibition against substitution and other requirements for backhauled donated foods.* The processor may not substitute or commingle donated foods that are backhauled to it from a recipient agency's storage facility. The processor must process backhauled donated foods into end products for sale and delivery to the recipient agency that provided them, and not to any other recipient agency. The processor may not provide payment for backhauled donated foods in lieu of processing.

(c) *Grading requirements.* To assure that substitution requirements are met, the processing of donated beef, pork, and poultry must occur under Federal acceptance service grading, which is conducted by the Agricultural Marketing Service (AMS). Under Federal acceptance service grading, the grader verifies the quality and quantity of food that is put into production, and the quantity of end products produced. Federal acceptance service grading is not required for substitution of other donated foods, unless specifically requested by the Department or by the distributing agency. If the distributing agency determines that acceptance service grading is to be performed, it must consult with the applicable Federal agency in establishing specific grading requirements. The processor is responsible for paying the cost of acceptance service grading, whether required by regulations, or requested by the Department or the distributing agency. The processor must maintain grading certificates and other records necessary to document that substitution of all donated foods has been conducted in accordance with the requirements of this subpart.

(d) *Waiver of grading requirements.* The distributing agency may waive the grading requirement for donated beef, pork, or poultry in accordance with one of the conditions listed in this paragraph (d). However, grading may only be waived on a case by case basis (i.e., for a particular production run); the distributing agency may not approve a blanket waiver of the requirement. Additionally, a waiver may only be granted if a processor's past performance indicates that the quality of the end product will not be adversely affected. The conditions for granting a waiver include:

(1) The processor has insufficient time to secure the services of a grader;

(2) The cost of the grader's service in relation to the value of donated beef, pork, or poultry being processed would be excessive; or

(3) The distributing or recipient agency's urgent need for the product leaves insufficient time to secure the services of a grader.

(e) *Use of substituted donated foods.* The processor may use donated foods that have been substituted with commercially purchased foods in other processing activities conducted at its facilities. The processor may also sell substituted donated foods as an intact unit, but must remove all USDA labels (as applicable) before such sale.

§ 250.35 Storage, inspection, quality control, and inventory management.

(a) *Storage and quality control.* The processor must ensure the safe and effective storage of donated foods, including compliance with the general storage requirements in § 250.14(b), and must maintain an effective quality control system at its processing facilities. The processor must maintain documentation to verify the effectiveness of its quality control system, and must provide such documentation upon request.

(b) *Inspection requirements.* The processor must ensure that all processing of donated beef, pork, and poultry, and of commercial meat products that contain any donated foods, is performed in plants under continuous Federal meat or poultry inspection. However, in States certified as having programs at least equal to Federal standards, processing of such foods may be performed in plants under continuous State meat or poultry inspection for processed end products that are utilized in the State, rather than the Federal inspection. Such inspections assure that plants maintain wholesomeness and sanitation requirements, and that labeling requirements are met.

(c) *Commingling of donated foods and commercially purchased foods.* The processor may commingle donated

foods and commercially purchased foods, unless the processing agreement specifically requires separation of donated foods from commercially purchased foods, or the donated foods have been backhauled from a recipient agency. However, such commingling must be performed in a manner that ensures the safe and efficient use of donated foods, as well as compliance with substitution requirements in § 250.34, and with reporting of donated food inventories on performance reports, as required in § 250.37. The processor must also ensure that commingling of processed end products and other food products by the distributor ensures the sale and delivery of end products that meet substitution requirements.

(d) *Limitations on donated food inventories.* The processor may not maintain donated food inventories in excess of a six-month supply, based on an average amount of donated foods utilized for that period. However, the distributing agency may provide written approval to the processor to maintain a larger amount of donated foods in inventory if it determines that the processor may efficiently store and process such an amount. Unless such approval has been granted, the distributing agency may not order donated foods for delivery to a processor if it would result in excessive donated food inventories.

(e) *Excess donated food inventories.* The distributing agency may permit the processor to carry over donated food inventories in excess of allowed levels into the next year of its agreement, if it determines that the processor may efficiently process such foods. The distributing agency may also direct the processor to transfer or redonate such donated foods to other distributing or recipient agencies or processors, in accordance with § 250.13. Redonation of donated foods may not be performed without FNS approval, in accordance with § 250.13(h). However, if these actions are not practical, the distributing agency must require the processor to pay it for the donated foods held in excess of allowed levels, at the replacement value of the donated foods.

(f) *Disposition of donated food inventories upon agreement termination.* When an agreement terminates, and is not extended or renewed, the processor must take one of the actions indicated in this paragraph (f) with respect to remaining donated food inventories, as directed by the distributing agency. The processor must pay the cost of transporting any donated foods when the agreement is terminated at the processor's request, or as a result of the processor's failure to comply with the requirements of this part. The processor must:

(1) Return the donated foods, or commercially purchased foods that meet the substitution requirements in § 250.34, to the distributing or recipient agency, as appropriate;

(2) Transfer or redonate the donated foods, or commercially purchased foods that meet the substitution requirements in § 250.34, to another distributing or recipient agency with which it has a processing agreement; or

(3) Pay the distributing or recipient agency, as appropriate, for the donated foods, at the processing agreement value or replacement value of the donated foods, whichever is higher.

§ 250.36 End product sales and crediting for the value of donated foods.

(a) *Methods of end product sales.* To ensure that the distributing or recipient agency, as appropriate, receives credit for the value of donated foods contained in end products, the sale of end products must be performed using one of the systems of end product sales described in this section. All systems of sales utilized must provide clear documentation of crediting for the value of the donated foods contained in the end products.

(b) *Refund or rebate.* Under this system, the processor sells end products to the distributing or recipient agency, as appropriate, at the commercial, or gross, price, and must provide a refund or rebate for the value of the donated food contained in the end products. The processor may also deliver end products to a commercial distributor for sale to distributing or recipient agencies under this system. In both cases, the processor must provide a refund to the appropriate agency within 30 days of receiving a request for a refund from that agency. The refund request must be in writing but may be by e-mail or other electronic submission.

(c) *Direct discount.* Under this system, the processor must sell end products to the distributing or recipient agency, as appropriate, at a net price that provides a discount from the commercial case price for the value of donated food contained in the end products.

(d) *Indirect discount.* Under this system, the processor delivers end products to a commercial distributor, which must sell the end products to an eligible distributing or recipient agency, as appropriate, at a net price that provides a discount from the commercial case price for the value of donated food contained in the end products. The processor must require the distributor to notify it of such sales, on a monthly basis, through automated sales reports or other electronic or written submission. The processor then compensates the distributor for the value of the discount provided to the distributing or recipient agency.

(e) *Fee-for-service.* Under this system, the processor must sell end products to the distributing or recipient agency, as appropriate, at a fee-for-service, which includes all costs to produce the end products minus the value of the donated food used in production. The processor must identify any charge for delivery of end products separately from the fee-for-service on its invoice. If the processor provides end products sold under fee-for-service to a distributor for delivery to the distributing or recipient agency, the processor must identify the distributor's delivery charge separately from the fee-for-service on its invoice, or may permit the distributor to bill the appropriate agency separately for the delivery of end products. The processor may also provide written approval to the distributor to bill the distributing or recipient agency for the total case price (*i.e.*, including the fee-for-service and the delivery charge), but must ensure that the distributor identifies the fee-for-service and delivery charge separately on the invoice. The processor must require the distributor to notify it of such sales in writing, on a monthly basis, through automated sales reports, e-mail, or other electronic submission.

(f) *Approved alternate method.* The processor or distributor may sell end products under an alternate method approved by FNS and the distributing agency that ensures crediting for the value of donated foods.

(g) *Donated food value used in crediting.* In crediting for donated foods in end product sales, the processing agreement value of the donated foods, as defined in § 250.3, must be used.

(h) *Ensuring sale and delivery of end products to eligible recipient agencies.* In order to ensure the sale of end products to eligible recipient agencies, the distributing agency must provide the processor with a list of recipient agencies eligible to purchase end products, along with the quantity of raw donated food that is to be delivered to the processor for processing on behalf of each recipient agency. In order to ensure that the distributor sells end products only to eligible recipient agencies, the processor must provide the distributor with a list of eligible recipient agencies and the quantities of end products that they are eligible to receive.

§ 250.37 Reports, records, and reviews of processor performance.

(a) *Performance reports.* The processor must submit a performance report to the distributing agency on a monthly basis to describe its processing of donated foods. The report must include the information listed in this paragraph (a). Performance reports must be submitted not later than 30 days after the end of the reporting period; however, the final performance report must be submitted within 60 days of the end of the reporting period. The performance report must include the following information for the reporting period, with year-to-date totals:

(1) The quantity of donated foods in inventory at the beginning of the reporting period;

(2) The quantity of donated foods received;

(3) The quantity of donated foods transferred to the processor from another entity, or transferred by the processor to another entity;

(4) The quantity of end products delivered to each eligible recipient agency;

(5) The quantity of donated foods remaining at the end of the reporting period;

(6) Grading certificates, as applicable; and

(7) Other supporting documentation, as required by the distributing agency.

(b) *Reporting reductions in donated food inventories.* The processor may not report reductions in donated food inventories on performance reports until sales of end products have been made, or until sales of end products through distributors have been verified. When a distributor sells end products under a refund system, verification consists of the distributing or recipient agency's request for a refund. When a distributor sells end products under indirect discount or fee-for-service, verification consists of the receipt of the distributor's automated sales reports or other electronic or written reports submitted to the processor.

(c) *Summary performance report.* Along with the submission of performance reports to the distributing agency, a multi-State processor must submit a summary performance report to FNS, on a monthly basis, in accordance with its National Processing Agreement. The summary report must include an accounting of the processor's national inventory of donated foods, including the information listed in this paragraph (c). The report must be submitted not later than 30 days after the end of the reporting period; however, the final performance report must be submitted within 60 days of the end of the reporting period. The summary performance report must include the following information for the reporting period:

(1) The total donated food inventory by State and the national total at the beginning of the reporting period;

(2) The total quantity of donated food received by State, with year-to-date totals, and the national total of donated food received;

(3) The total quantity of donated food reduced from inventory by State, with year-to-date totals, and the national total of donated foods reduced from inventory; and

(4) The total quantity of donated foods remaining in inventory by State, and the national total, at the end of the reporting period.

(d) *Recordkeeping requirements for processors.* The processor must maintain the following records relating to the processing of donated foods:

(1) End product data schedules and summary end product data schedules, as applicable;

(2) Receipt of donated food shipments;

(3) Production, sale, and delivery of end products, including sales through distributors;

(4) Remittance of refunds, invoices, or other records that assure crediting for donated foods in end products, and for sale of byproducts;

(5) Documentation of Federal or State inspection of processing facilities, as appropriate, and of the maintenance of an effective quality control system;

(6) Documentation of substitution of commercial foods for donated foods, including grading certificates, as applicable;

(7) Waivers of grading requirements, as applicable; and

(8) Required reports.

(e) *Recordkeeping requirements for the distributing agency.* The distributing agency must maintain the following records relating to the processing of donated foods:

(1) Processing agreements;

(2) End product data schedules or summary end product data schedules, as applicable;

(3) Performance reports;

(4) Grading certificates, as applicable;

(5) Documentation that supports information on the performance report, including sales of end products and crediting for donated foods, as required by the distributing agency;

(6) Copies of audits of in-State processors and documentation of the correction of any deficiencies identified in such audits;

(7) The receipt of end products, as applicable; and

(8) Procurement documents, as applicable.

(f) *Recordkeeping requirements for the recipient agency.* The recipient agency must maintain the following records relating to the processing of donated foods:

(1) The receipt of end products purchased from processors or distributors;

(2) Crediting for donated foods included in end products;

(3) Recipient Processing Agreements, as applicable, and, in accordance with such agreements, other records included in paragraph (d) of this section, if not retained by the distributing agency; and

(4) Procurement documents, as applicable.

(g) *Review requirements for the distributing agency.* The distributing agency must review performance reports and its own records, as required in paragraph (e) of this section, and any other supporting documentation, to ensure that the processor:

(1) Receives donated food shipments;

(2) Delivers end products to eligible recipient agencies, in the types and quantities for which they are eligible;

(3) Meets the required processing yields for donated foods under guaranteed minimum yield; and

(4) Accurately reports donated food inventory activity, and maintains inventories within approved levels.

§ 250.38 Provisions of agreements.

(a) *National Processing Agreement.* A National Processing Agreement includes provisions to ensure that a multi-State processor complies with all of the applicable requirements in this part relating to the processing of donated foods.

(b) *Required provisions for State Participation Agreement.* A State Participation Agreement with a multi-State processor must include the following provisions:

(1) Contact information for all appropriate parties to the agreement;

(2) The effective dates of the agreement;

(3) A list of recipient agencies eligible to receive end products;

(4) Summary end product data schedules, with end products that may be sold in the State;

(5) Assurance that the processor will not substitute or commingle backhauled donated foods, and will provide end products processed from such donated foods only to the recipient agency from which the foods were received;

(6) Any applicable labeling requirements;

(7) Other processing requirements implemented by the distributing agency,

in accordance with the requirements in 7 CFR Part 250, such as the specific method(s) of end product sales permitted;

(8) A statement that the agreement may be terminated by either party upon 30 days' written notice; and

(9) A statement that the agreement may be terminated immediately if the processor has not complied with its terms and conditions.

(c) *Required provisions for State Processing Agreement.* A State Processing Agreement must include the following provisions or attachments:

(1) Contact information for all appropriate parties to the agreement;

(2) The effective dates of the agreement;

(3) A list of recipient agencies eligible to receive end products, as applicable;

(4) In the event that subcontracting is allowed, the specific activities that will be performed under subcontracts;

(5) Assurance that the processor will provide a performance bond or irrevocable letter of credit to protect the value of donated foods it is expected to maintain in inventory, in accordance with § 250.32;

(6) End product data schedules for all end products, with all required information, in accordance with § 250.33;

(7) Assurance that the processor will meet processing yields for donated foods, in accordance with § 250.33;

(8) Assurance that the processor will compensate the distributing or recipient agency, as appropriate, for any loss of donated foods, in accordance with § 250.33;

(9) Any applicable labeling requirements;

(10) Assurance that the processor will meet requirements for the substitution of commercially purchased foods for donated foods, including grading requirements, in accordance with § 250.34;

(11) Assurance that the processor will not substitute or commingle backhauled donated foods, and will provide end products processed from such donated foods only to the recipient agency from which the foods were received, as applicable;

(12) Assurance that the processor will provide for the safe and effective storage of donated foods, meet inspection requirements, and maintain an effective quality control system at its processing facilities;

(13) Assurance that the processor will report donated food inventory activity and maintain inventories within approved levels;

(14) Assurance that the processor will return, transfer, or pay for, donated food inventories remaining upon termination of the agreement, in accordance with § 250.35;

(15) The specific method(s) of end product sales permitted, in accordance with § 250.36;

(16) Assurance that the processor will credit recipient agencies for all donated foods, in accordance with § 250.36;

(17) Assurance that the processor will submit performance reports and meet other reporting and recordkeeping requirements, in accordance with § 250.37;

(18) Assurance that the processor will obtain independent CPA audits, and will correct any deficiencies identified in such audits, in accordance with § 250.18;

(19) A statement that the distributing agency, subdistributing agency, or recipient agency, the Comptroller General, the Department of Agriculture, or their duly authorized representatives, may perform on-site reviews of the processor's operation to ensure that all activities relating to donated foods are performed in accordance with the requirements in 7 CFR Part 250;

(20) A statement that the agreement may be terminated by either party upon 30 days' written notice;

(21) A statement that the agreement may be terminated immediately if the processor has not complied with its terms and conditions; and

(22) A statement that extensions or renewals of the agreement, if applicable, are contingent upon the fulfillment of all agreement provisions.

(d) *Required provisions for Recipient Processing Agreement.* The Recipient Processing Agreement must contain the same provisions as a State Processing Agreement, to the extent that the distributing agency permits the recipient agency to monitor compliance with the applicable processing requirements (e.g., approval of end product data schedules or review of performance reports). However, a list of recipient agencies eligible to receive end products need not be included.

(e) *Noncompliance with processing requirements.* If the processor has not complied with processing requirements, the distributing or recipient agency, as appropriate, must not extend or renew the agreement, and may immediately terminate it.

§ 250.39 Miscellaneous provisions.

(a) *Waiver of processing requirements.* The Department may waive any of the requirements of this part for the purpose of conducting demonstration projects to determine if processing of donated foods may be performed more efficiently or effectively by other means.

(b) *Guidance or information.* Guidance or information relating to the processing of donated foods is included on the FNS Web site at *http://www.fns.usda.gov/fdd*, or may otherwise be obtained from FNS. Such guidance or information includes, for example, program regulations and policies, the processing handbook, the FNS Audit Guide, National Processing Agreement prototypes, and summary end product data schedule prototypes.

Dated: August 11, 2006.

Roberto Salazar,

Administrator, Food and Nutrition Service.

[FR Doc. 06–7073 Filed 8–23–06; 8:45 am]

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Federal Register

Thursday,
August 24, 2006

Part VI

Department of Transportation

Federal Railroad Administration

49 CFR Parts 223 and 238

Passenger Train Emergency Systems; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 223 and 238

[Docket No. FRA–2006–25273, Notice No. 1]

RIN 2130–AB72

Passenger Train Emergency Systems

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This NPRM is intended to further the safety of passenger train occupants through both enhancements and additions to FRA's existing requirements for emergency systems on passenger trains. In this NPRM, FRA proposes to enhance existing requirements for emergency window exits and to establish requirements for rescue access windows to evacuate passenger train occupants. FRA also proposes to enhance passenger train emergency system requirements by expanding the application of requirements that are currently applicable only to passenger trains operating at speeds in excess of 125 mph (Tier II passenger trains) to passenger trains operating at speeds at or below 125 mph (Tier I passenger trains); these proposed enhancements would require that Tier I passenger trains be equipped with public address and intercom systems for emergency communication and that passenger cars provide emergency roof access for use by emergency responders. FRA is proposing to apply certain of the requirements to both existing and new passenger equipment, while other requirements would apply to new passenger equipment only.

DATES: (1) Written comments must be received by October 23, 2006. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

(2) FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However, if FRA receives a specific request for a public, oral hearing prior to September 25, 2006, one will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: *Comments:* Comments related to Docket No. FRA–2006–25273 may be submitted by any of the following methods:

- Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 202–493–2251.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.
- Federal eRulemaking Portal: Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *http://dms.dot.gov* including any personal information. Please see the Privacy Act heading in the ''Supplementary Information'' section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Brenda J. Moscoso, Office of Safety, Operations Research Analyst, RRS–23, Mail Stop 25, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590 (telephone 202–493–6282); Daniel L. Alpert, Trial Attorney, Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590 (telephone 202–493–6026); or Anna Nassif Winkle, Trial Attorney, Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590 (telephone 202–493–6166).

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I. Statutory Background

In September of 1994, the Secretary of Transportation convened a meeting of representatives from all sectors of the rail industry with the goal of enhancing rail safety. As one of the initiatives arising from this Rail Safety Summit, the Secretary announced that DOT would begin developing safety standards for rail passenger equipment over a 5-year period. In November of 1994, Congress adopted the Secretary's schedule for implementing rail passenger equipment safety regulations and included it in the Federal Railroad Safety Authorization Act of 1994 (the Act), Public Law No. 103–440, 108 Stat. 4619, 4623–4624 (November 2, 1994). Congress also authorized the Secretary to consult with various organizations involved in passenger train operations for purposes of prescribing and amending these regulations, as well as issuing orders pursuant to them. Section 215 of the Act is codified at 49 U.S.C. 20133.

II. Proceedings to Date

The Secretary of Transportation delegated these rulemaking responsibilities to the Federal Railroad Administrator, *see* 49 CFR 1.49(m), and FRA formed the Passenger Equipment Safety Standards Working Group to provide FRA advice in developing the regulations. On June 17, 1996, FRA published an advance notice of proposed rulemaking (ANPRM) concerning the establishment of

comprehensive safety standards for railroad passenger equipment. *See* 61 FR 30672. The ANPRM provided background information on the need for such standards, offered preliminary ideas on approaching passenger safety issues, and presented questions on various passenger safety topics. Following consideration of comments received on the ANPRM and advice from FRA's Passenger Equipment Safety Standards Working Group, FRA published an NPRM on September 23, 1997, to establish comprehensive safety standards for railroad passenger equipment. *See* 62 FR 49728. In addition to requesting written comment on the NPRM, FRA also solicited oral comment at a public hearing held on November 21, 1997. FRA considered the comments received on the NPRM and prepared a final rule establishing comprehensive safety standards for passenger equipment, which was published on May 12, 1999. *See* 64 FR 25540.

After publication of the final rule, interested parties filed petitions seeking FRA's reconsideration of certain requirements contained in the rule. These petitions generally related to the following subject areas: structural design; fire safety; training; inspection, testing, and maintenance; and movement of defective equipment. To address the petitions, FRA grouped issues together and published in the **Federal Register** three sets of amendments to the final rule. Each set of amendments summarized the petition requests at issue, explained what action, if any, FRA decided to take in response to the issues raised, and described FRA's justifications for its decisions and any action taken. Specifically, on July 3, 2000, FRA issued a response to the petitions for reconsideration relating to the inspection, testing, and maintenance of passenger equipment, the movement of defective passenger equipment, and other miscellaneous provisions related to mechanical issues contained in the final rule. *See* 65 FR 41284. On April 23, 2002, FRA responded to all remaining issues raised in the petitions for reconsideration, with the exception of those relating to fire safety. *See* 67 FR 19970. Finally, on June 25, 2002, FRA completed its response to the petitions for reconsideration by publishing a response to the petitions for reconsideration concerning the fire safety portion of the rule. *See* 67 FR 42892. (For more detailed information on the petitions for reconsideration and FRA's response to them, please see these three rulemaking documents.) The product of this rulemaking was codified primarily at 49 CFR part 238 and secondarily at 49 CFR parts 216, 223, 229, 231, and 232.

Meanwhile, another rulemaking on passenger train emergency preparedness produced a final rule codified at 49 CFR part 239. *See* 63 FR 24629; May 4, 1998. The rule addresses passenger train emergencies of various kinds, including security situations, and requires the preparation, adoption, and implementation of emergency preparedness plans by railroads connected with the operation of passenger trains. The emergency preparedness plans must include elements such as communication, employee training and qualification, joint operations, tunnel safety, liaison with emergency responders, on-board emergency equipment, and passenger safety information. The rule requires each affected railroad to instruct its employees on the applicable provisions of its plan, and the plan adopted by each railroad is subject to formal review and approval by FRA. The rule also requires each railroad operating passenger train service to conduct emergency simulations to determine its capability to execute the emergency preparedness plan under the variety of emergency scenarios that could reasonably be expected to occur. In addition, among the rule's other requirements, the rule provides that (i) all emergency window exits and all windows intended for rescue access by emergency responders be marked and that instructions be provided for their use (*see* 49 CFR 223.9(d)); and (ii) all door exits intended for egress be lighted or marked, all door exits intended for rescue access by emergency responders be marked, and that instructions be provided for the use of both (*see* 49 CFR 239.107(a)).

Although FRA had completed these rulemakings, FRA had identified various issues for possible future rulemaking, including those to be addressed following the completion of additional research, the gathering of additional operating experience, or the development of industry standards, or all three. One such issue concerned expanding the application of emergency system requirements applicable to Tier II passenger equipment to Tier I passenger equipment as well. FRA and interested industry members also began identifying other issues related to the new passenger equipment safety standards and the passenger train emergency preparedness regulations. FRA decided to address these issues with the assistance of FRA's Railroad Safety Advisory Committee.

A. Railroad Safety Advisory Committee (RSAC) Overview

In March 1996, FRA established RSAC, which provides a forum for developing consensus recommendations to FRA's Administrator on rulemakings and other safety program issues. The Committee includes representation from all of the agency's major customer groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of member groups follows:

American Association of Private Railroad Car Owners (AARPCO);
American Association of State Highway & Transportation Officials (AASHTO);
American Public Transportation Association (APTA);
American Short Line and Regional Railroad Association (ASLRRA);
American Train Dispatchers Association (ATDA);
Association of American Railroads (AAR);
Association of Railway Museums (ARM);
Association of State Rail Safety Managers (ASRSM);
Brotherhood of Locomotive Engineers and Trainmen (BLET);
Brotherhood of Maintenance of Way Employees Division (BMWED);
Brotherhood of Railroad Signalmen (BRS);
Federal Transit Administration (FTA)*;
High Speed Ground Transportation Association (HSGTA);
International Association of Machinists and Aerospace Workers;
International Brotherhood of Electrical Workers (IBEW);
Labor Council for Latin American Advancement (LCLAA)*;
League of Railway Industry Women*;
National Association of Railroad Passengers (NARP);
National Association of Railway Business Women*;
National Conference of Firemen & Oilers;
National Railroad Construction and Maintenance Association;
National Railroad Passenger Corporation (Amtrak);
National Transportation Safety Board (NTSB)*;
Railway Supply Institute (RSI);
Safe Travel America (STA);
Secretaria de Comunicaciones y Transporte*;
Sheet Metal Workers International Association (SMWIA);
Tourist Railway Association Inc.;
Transport Canada*;
Transport Workers Union of America (TWU);
Transportation Communications International Union/BRC (TCIU/BRC); and

United Transportation Union (UTU).

*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If the task is accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The task force then provides that information to the working group for consideration. If a working group comes to unanimous consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation, and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA moves ahead to resolve the issue through traditional rulemaking proceedings.

B. Establishment of the Passenger Safety Working Group

On May 20, 2003, FRA presented, and RSAC accepted, the task of reviewing existing passenger equipment safety needs and programs and recommending consideration of specific actions that could be useful in advancing the safety of rail passenger service. The RSAC established the Passenger Safety Working Group (Working Group) to handle this task and develop recommendations for the full RSAC to consider. Members of the Working Group, in addition to FRA, include the following:

- AAR, including members from BNSF Railway Company (BNSF), CSX Transportation, Incorporated (CSX), and Union Pacific Railroad Company (UP);
- AAPRCO;
- AASHTO;
- Amtrak;
- APTA, including members from Long Island Rail Road (LIRR), Metro-North Railroad (MNR), Northeast Illinois Regional Commuter Railroad Corporation (Metra), Southeastern Pennsylvania Transportation Authority (SEPTA), Southern California Regional Rail Authority (Metrolink), Saint Gobian Sully NA, LDK Engineering, and Herzog Transit Services, Incorporated;
- BLET;
- BRS;
- FTA;
- HSGTA;
- IBEW;
- NARP;
- RSI;
- SMWIA;
- STA;
- TCIU/BRC;
- TWU; and
- UTU.

Staff from DOT's John A. Volpe National Transportation Systems Center (Volpe Center) attended all of the meetings and contributed to the technical discussions. In addition, staff from the NTSB met with the Working Group when possible. The Working Group met on the following dates at the following locations:

- September 9–10, 2003, in Washington, DC;
- November 6, 2003, in Philadelphia, PA;
- May 11, 2004, in Schaumburg, IL;
- October 26–27, 2004 in Linthicum/Baltimore, MD;
- March 9–10, 2005, in Ft. Lauderdale, FL; and
- September 7, 2005 in Chicago, IL.

At the meetings in Ft. Lauderdale and Chicago, FRA met with representatives of Tri-County Commuter Rail and Metra, respectively, and toured their passenger equipment. The visits, which included demonstrations of emergency system features, were open to all members of the Working Group, and FRA believes they have added to the collective understanding of the Group in identifying and addressing passenger train emergency system issues.

C. Establishment of the Emergency Preparedness Task Force

Due to the variety of issues involved, at its November 2003 meeting the Working Group established four smaller task forces, with specific expertise, to develop recommendations on those issues within each group's particular area of expertise. Members of the task forces include various representatives from the respective organizations that were part of the larger Working Group. One of these task forces was assigned the job of identifying and developing issues and recommendations specifically related to the inspection, testing, and operation of passenger equipment as well as concerns related to the attachment of safety appliances on passenger equipment, and helped to develop an NPRM on these topics that was published on December 8, 2005. *See* 70 FR 73069. Another of these task forces, the Emergency Preparedness Task Force (Task Force), was established to identify issues and develop recommendations related to emergency systems, procedures, and equipment. Specifically, the Task Force was charged with evaluating APTA's standards for emergency systems for their incorporation by reference as Federal standards and requirements. These APTA standards are aimed at promoting the ability of passenger car occupants to reach, identify, and operate emergency exits under various conditions. The Task Force was also given the responsibility of addressing a number of other emergency system issues and to recommend any research necessary to facilitate their resolution. Members of the Task Force, in addition to FRA, include the following:

- Amtrak;
- APTA, including members from Bombardier, Ellcon National, Interfleet, Jacobs Civil Engineering, Jessup Manufacturing Company, Kawasaki Rail Car, Inc., LDK Engineering, LIRR, LTK, Luminator, Maryland Transit Administration, Massachusetts Bay Commuter Rail Corporation (MBCR), Metrolink, MNR, Northern Indiana Commuter Transit District (NICTD), SEPTA, San Diego Northern Commuter Railroad (Coaster), Permalight, PO's Ability USA, Inc, Prolink, Transit Design Group (TDG), Transit Safety Management (TSM), Translite, and STV Inc.;
- BLET;
- California Department of Transportation (Caltrans);
- NARP;
- RSI, including Globe Transportation Graphics; and
- UTU.

While not voting members of the Task Force, representatives from the NTSB and from the Transportation Security Administration (TSA) of the U.S. Department of Homeland Security (DHS) attended certain of the meetings and contributed to the discussions of the Task Force. In addition, staff from the Volpe Center attended all of the

meetings and contributed to the technical discussions through their comments and presentations and by setting up various lighting, marking, and signage demonstrations.

The Task Force met on the following dates at the following locations:

- February 25–26, 2004, in Los Angeles, CA;
- April 14–15, 2004, in Cambridge, MA;
- July 7–8, 2004, in Washington, DC;
- September 13–14, 2004, in New York, NY;
- December 1–2, 2004, in San Diego, CA;
- February 16–17, 2005, in Philadelphia, PA;
- April 19–20, 2005, in Cambridge, MA;
- August 2–3, 2005, in Cambridge, MA; and
- December 13–14, 2005, in Baltimore, MD.

At the meetings in Los Angeles, Cambridge, Washington, New York, San Diego, and Philadelphia, FRA met with representatives of Metrolink, MBCR, Amtrak, LIRR, Coaster, and SEPTA, respectively, and toured their passenger equipment. The visits were open to all members of the Task Force and included demonstration of emergency system features. As in the case of the Working Group visits, FRA believes they have added to the collective understanding of the Task Force in identifying and addressing passenger train emergency system issues.

D. Development of the NPRM

This NPRM was developed to address a number of the concerns raised and issues discussed during the various Task Force and Working Group meetings. Minutes of each of these meetings have been made part of the docket in this proceeding and are available for public inspection. The Working Group reached full consensus on all the regulatory provisions contained in this proposal at its meetings in March and September 2005. After the March 2005 meeting, the Working Group presented its recommendations to the full RSAC for concurrence at its meeting in May 2005. All of the members of the full RSAC in attendance at its May 2005 meeting accepted the regulatory recommendations submitted by the Working Group. Thus, the Working Group's recommendations became the full RSAC's recommendations to FRA in this matter. In October 2005, the full RSAC also recommended that FRA adopt a further recommendation from the Working Group at its September 2005 meeting: That FRA grant additional time for compliance with the proposal on rescue access windows. After reviewing the full RSAC's recommendations, FRA agreed that the recommendations provided a sound basis for a proposed rule and adopted the recommendations with generally minor changes for purposes of clarity and formatting in the **Federal Register**.

This NPRM is the product of FRA's review, consideration, and acceptance of the recommendations of the Task Force, Working Group, and full RSAC. Throughout the preamble discussion of this proposal, FRA refers to comments, views, suggestions, or recommendations made by members of the Task Force, Working Group, and full RSAC, as they are identified or contained in the minutes of their meetings. FRA does so to show the origin of certain issues and the nature of discussions concerning those issues at the Task Force, Working Group, and full RSAC level. FRA believes this serves to illuminate factors it has weighed in making its regulatory decisions, as well as the logic behind those decisions. The reader should keep in mind, of course, that only the full RSAC makes recommendations to FRA, and it is the consensus recommendation of the full RSAC on which FRA is acting. However, as noted above, FRA is in no way bound to follow the recommendation, and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements.

III. Technical Background

Trends in new passenger car orders, recent experience with train accidents, concern about emergency communication, and technological advances in emergency systems provided the main impetus for these proposed enhancements and additions to FRA's standards for passenger train emergency systems, as highlighted below.

A. Change in Passenger Car Fleet Composition

While FRA was developing regulations on Passenger Equipment Safety Standards and Passenger Train Emergency Preparedness in the 1990s, the operation of multi-level passenger cars having two seating levels for passengers (*i.e.*, bi-level cars) was common. However, the operation of multi-level passengers cars having three seating levels for passengers (*i.e.*, cars with intermediate (or mezzanine) seating levels) was not as prevalent in the U.S. as it is today. As a result, in those rulemakings there was less focus on the need for applying emergency system safety standards to intermediate seating levels of multi-level passenger cars.

Since that time, the composition of the Nation's commuter rail fleet has changed. Multi-level passenger cars with passenger seating in intermediate levels have become more prevalent and now account for over 15 percent of all passenger cars. The intermediate seating levels in these multi-level passenger cars are normally located at the far ends of the cars and are connected to the upper and lower seating levels by stairs. Exterior side doors are also normally located toward the ends of these cars to facilitate boarding and de-boarding. Given the constraint posed by station platform lengths and the desire to minimize station dwell time, railroads have turned to multi-level passenger cars with intermediate seating levels to meet much of the increased demand for service, to the extent vertical clearances permit their operation.

In light of the growing use of multi-level passenger cars with intermediate seating levels, this NPRM addresses the need to provide more explicit emergency system safety standards for these passenger cars.

B. NTSB Safety Recommendation on Windows

On April 23, 2002, a BNSF freight train collided head on with a standing Metrolink passenger train near Placentia, CA, resulting in two fatalities and numerous injuries on the Metrolink train. Though not a contributing factor to the fatalities or injuries, the force of the collision blocked the rear end door and also blocked the rear stairway linking the upper and lower seating levels to the seating area on the intermediate level at the rear of the Metrolink cab car. Although passengers in that intermediate level seating area did exit through an emergency window, no windows on the intermediate level had been designated for rescue access, and consequently no instructions for emergency responders to gain access to the intermediate level through a window had been posted. Concerned with the extent of Federal requirements relating to rescuing passengers from the intermediate level of a multi-level passenger car, the NTSB issued Safety Recommendation R–03–21 to FRA on November 6, 2003. Safety Recommendation R–03–21 provides in full as follows:

> Revise the language of 49 Code of Federal Regulations 238.113(a)(1) to reflect that appropriate exterior instructional signage describing the emergency removal procedure

be required at emergency windows on all levels of a multiple-level passenger railcar.

In a February 20, 2004 letter to the NTSB, FRA noted that its existing regulations do require that windows intended for emergency responder access on every level of a multi-level passenger car be clearly marked and that clear and understandable instructions for their removal be posted at or near the windows on the car's exterior. *See* 49 CFR 223.9(d)(2). FRA also sent a letter to passenger railroads to make this clear in the event there was any confusion about these requirements. Nevertheless, the NTSB's recommendation highlighted the fact that several related concerns were not specifically addressed in FRA's regulations. One of these concerns was specifying minimum numbers and locations of windows intended for emergency responder access to passenger cars, as 49 CFR 223.9(d)(2) addresses only marking and instruction requirements and does not provide any express requirement that any such rescue access windows exist. A second prominent issue concerned specifying minimum numbers and locations of emergency window exits on any level of a multi-level passenger car—not just main levels, as provided in 49 CFR 238.113(a)(1).

FRA informed the NTSB that it was reviewing and considering the necessity of making amendments to its safety standards for passenger trains through the RSAC process and that these and other passenger safety issues would be presented to the Working Group and the Task Force for their consideration. Therefore, FRA asked that the NTSB classify Safety Recommendation R–03–21 as ''Open—Acceptable Response,'' pending the results of this effort. (The NTSB classification ''Open—Acceptable Response'' means a ''[r]esponse by recipient indicates a planned action that would comply with the safety recommendation when completed.'') By letter dated June 2, 2004, the NTSB formally classified the recommendation as FRA requested.

The Task Force reviewed the NTSB's recommendation and the related issues FRA presented to it and agreed to address emergency window exits and rescue access windows on a broad basis, with the goal that windows for emergency egress and rescue access would be available on every level of a passenger car in the event that a stairway or interior door is compromised and access to the primary means of exit (doors) is blocked. To this end, the Task Force agreed to develop requirements for emergency window exits on non-main levels of multi-level passenger cars, and rescue access windows on all levels of these cars, thus addressing requirements for every seating level of a passenger car.

C. Need for Emergency Communication Systems

Traditionally, conductors and assistant conductors have been relied upon to relay information to passengers in both normal and emergency situations through face-to-face communication or by use of the PA system. However, with smaller crew sizes, passengers may not be able to communicate to the crew a medical emergency, report a fire on board the train, or provide notification of other safety issues as quickly as may be necessary. For instance, a passenger in the last car of a train needing to report an emergency situation could potentially have to walk the entire length of the train to communicate with the conductor (assuming the crew is composed of an engineer and only one conductor). Further, if the conductor became incapacitated, passengers would need to communicate directly with the engineer.

FRA also notes that the NTSB accident investigation report of the February 9, 1996 collision near Secaucus, NJ, that involved two New Jersey Transit Rail Operations (NJTR) trains and resulted in three fatalities and numerous injuries, touches on the importance of emergency communications to prevent panic and further injuries. According to the NTSB report of the accident investigation,

> [a]lthough the train crews said that they went from car to car instructing passengers to remain seated, passengers said that they were not told about the severity of the situation and were concerned about a possible fire or being struck by an oncoming train. They therefore left the train and wandered around the tracks waiting for guidance, potentially posing a greater hazard because of the leaking fuel from train 1107.
>
> No crewmember used the public address system to communicate with passengers. By using the public address system, all passengers would have received the same message in less time than it would have taken the NJT employees to walk from car to car.

The report also stated that

> [i]nformation about the possibility of a fire or a collision with an oncoming train could have been provided to passengers over the public address system to address their concerns and prevent them from leaving the train. The Safety Board concludes that the lack of public announcements addressing the passengers' concerns caused them to act independently, evacuate the train, and wander along the tracks, thus potentially contributing to the dangerous conditions at the collision site. NTSB/RAR–97/01, at p. 27.

In 1998, APTA recognized the importance of emergency communications when it issued APTA SS–PS–001–98, ''Standard for Passenger Railroad Emergency Communications,'' noting that the establishment and execution of communications among train crews, operations control personnel and train passengers are of the utmost importance under normal circumstances. According to the APTA standard, during emergency situations such communications take on added importance in the task of assuring the safety of all involved.

While the Passenger Equipment Safety Standards issued in 1999 by FRA contain requirements for two-way emergency communication systems for Tier II passenger equipment (trains operating at speeds exceeding 125 mph, but not exceeding 150 mph), there are no requirements that Tier I passenger cars be equipped with any emergency communication system. In that rulemaking, concern had been raised about the practicality of applying such requirements to Tier I passenger equipment because of the interoperability of such equipment and the possible incompatibility of communications equipment in a Tier I passenger train. *See* 64 FR 25540, 25641; May 12, 1999. Nevertheless, today most existing passenger cars are equipped with PA systems, and intercom systems are common in new passenger cars.

FRA notes that, while there are many possible ways for an emergency situation to arise on a passenger train, an emergency system may be useful in many situations, regardless of the origin of the emergency. In this regard, emergency communication systems provide the added benefit of conveying information about security threats and handling security concerns. According to TSA, terrorists have considered attacks on subways and trains in the U.S., and TSA has found that passenger railroads and subways in the U.S. are particularly high-consequence targets in terms of potential loss of life and economic disruption. DHS, including TSA, as well as DOT's FRA and FTA have been actively engaged in responding to the threat of terrorism to our Nation's rail system, and the initiatives that have been undertaken to do so are too numerous to detail in this NPRM. Consistent with this response, the ability of passengers to timely report suspicious items and suspicious activity onboard passenger trains to appropriate personnel increases the likelihood of

detecting a terrorist attack and thwarting it, or at least disrupting it and minimizing its consequences. This would also be facilitated by the ability of the train crew to timely communicate emergency information and instructions to passengers in response to a security threat.

FRA also notes that emergency system requirements for such features as emergency window exits and emergency lighting, which were not specifically developed to address security threats, may play a critical role in minimizing the consequences of a terrorist attack on board a passenger train. The safety and security functions that passenger train emergency systems may serve make them vital, and further enhancements and additions to emergency systems should be explored both to minimize the risk of a terrorist attack to passenger trains, to reduce the death, injuries, and other consequences of such an attack if it occurs, and to promote passenger train safety overall.

D. Window Technology

A ''zip-strip'' is a strip of rubber gasketing that holds a window panel in place and is capable of being pulled, or pried and then pulled, like a zipper from the panel it holds. Use of zip-strips for window removal has been around for some time. Yet, the introduction of windows using zips-strips on both faces of the same window has allowed railroads to designate for rescue access those windows that are best suited for that purpose without impacting the selection of emergency window exits, or compromising compliance with safety glazing requirements. Before this technology was available, railroads that used zip-strips for window removal had to decide which windows would be designated for emergency egress and which would be designated for rescue access, as there was only one zip-strip available to open. Equipping cars with more rescue access windows with zip-strips meant having fewer emergency window exits, all things being equal, even though it would be preferable to have more emergency window exits than rescue access windows as occupants should normally begin to self-evacuate via emergency window exits before emergency responders arrive to assist. Whereas railroads could generally designate any window for rescue access by providing instructions for removal using tools normally available to emergency responders to pop out a window, such as a sledge hammer or a fire axe, some railroads prefer to equip windows with exterior zips-strips for rescue access because they allow for window removal with less effort.

Although FRA is not proposing to require the use of zip-strips for rescue access windows, FRA is proposing to recognize ''dual-function windows,'' which serve as both emergency exit and rescue access windows, through the use of zip-strips on both faces of the window. This recognition would afford railroads more flexibility in the location of their windows, as it would not require railroads to find locations for emergency window exits distinct from the locations specified for rescue access windows, and vice versa.

E. APTA's Standard for Emergency Evacuation Units

As FRA noted in the preamble to the final rule promulgating the Passenger Equipment Safety Standards, FRA has had under consideration a performance standard for emergency evacuation similar to that used in commercial aviation where a sufficient number of emergency exits must be provided to evacuate the maximum passenger load in a specified time for various types of emergency situations. *See* 64 FR 25550. FRA further noted that it would evaluate whether an APTA performance standard for emergency egress, then under development in APTA's PRESS Task Force, should be incorporated into FRA's standards. 64 FR 25551. FRA's intent is that such a performance standard would serve to supplement, as necessary, FRA's minimum requirements for emergency window exits and door exits.

In 1999, APTA issued APTA SS–PS–003–98, ''Standard for Emergency Evacuation Units for Rail Passenger Cars.'' This standard assigns to doors and window exits a numerical value, referred to as an ''emergency evacuation unit'' (EEU), that is intended to correlate to the speed and ease of passenger egress. Each emergency window exit is assigned an EEU of 1, and each door leaf an EEU of 2. It defines the ''usable exit path'' (UXP) as the number of emergency window and door exits that can be used by passengers after an incident that requires emergency egress from the vehicle, and requires that it be calculated as ''the sum of EEUs for one side of the car less 50% of car end doors.'' The APTA standard requires railroads to assign to each new passenger car a ''capacity exit factor'' (CXF), which is a value equal to the seating capacity of the car divided by 17 and rounded up to the next whole number, and to designate a sufficient number of exits to achieve a total EEU value equal to the larger of the CXF or the UXP.

Although the basic approach to establishing egress requirements based on car configuration and occupant capacity was widely accepted, during development of the APTA standard several organizations raised issues regarding the methodology for assigning EEU values to exits. For instance, Volpe Center staff suggested that point values for windows be reduced to numbers that are approximately in proportion to estimated passenger flow rates as compared with low-platform doors without steps, and that upper-level windows receive no credit toward the minimum EEU criterion but still be required to provide exit paths for certain rare accident scenarios. It was also questioned whether egress rates through windows could be half as great as through single-leaf doors, as implied by the standard.

The Emergency Preparedness Task Force reviewed the APTA standard and recommended the continuation of evacuation tests and research to establish relative exit flow rates using different types of exits at distinct locations in the car, prior to considering adoption of the APTA standard into FRA's standards. To this end, the Volpe Center is conducting a series of evacuations tests. FRA does note that the emergency evacuation approach underlying the proposals in this NPRM is consistent with the basic approach taken in developing APTA's standard, as FRA proposals do take into consideration car configuration and occupant capacity.

IV. General Overview of Proposed Requirements

A. Emergency Window Exits and Rescue Access Windows

Among the most prominent issues identified for consideration by the Working Group were those involving emergency window exits and rescue access windows and how these windows relate to the emergency systems requirements overall. Emergency window exits are intended to supplement door exits, which serve as the preferred means of egress in an emergency situation, and provide an alternative means of emergency egress in life-threatening situations, should doors be rendered inaccessible or inoperable. Existing regulations require that each single-level car and each main level of a multi-level passenger car have a minimum of four emergency window exits, either in a staggered configuration where practical or with one exit located in each side of each end, on each level. These windows must be designed to permit rapid and easy removal during

an emergency without the use of a tool or other implement. Conspicuous photo-luminescent marking of the windows, as well as instructions for their use, are also required. Windows intended for rescue access must be marked with retroreflective material, and instructions for their use must also be provided. However, FRA's regulations currently do not require any minimum number of rescue access windows for passenger cars.

One of the basic principles underlying the proposed requirements for both emergency window exits and rescue access windows has been to locate these windows in such a manner that passengers would be able to exit from, and emergency responders would be able to gain direct access to, each passenger compartment without requiring that they first go to another level of a car or through an interior door. Optimally, there would be a sufficient number of windows for passengers to exit from, and for emergency responders to get access to, the following: (i) Every level with passenger seating of a multiple-level passenger railcar; (ii) both sides of the car, in the event of a derailment where the exits on one side are compromised; and (iii) each end (half) of the car, in the event that one end is crushed or the exits on that end are otherwise rendered inaccessible or inoperable. A constraint for both new and existing intermediate levels of multi-level passenger car designs is that there is limited space for side windows due to the presence of bathrooms, equipment closets, and side door exits. Thus, the Task Force agreed to make the proposed requirements flexible and consistent with existing car designs and, in certain cases, provide for exceptions. The exceptions for new equipment are limited to situations that arise from the need to provide accessible accommodations under the Americans with Disabilities Act of 1990 in compartments where there are no more than four seats and a suitable alternative is provided. The Task Force recommended greater flexibility for existing equipment to avoid costly window installations where none had previously existed (*e.g.*, relocating an electrical closet so that a space large enough to accommodate a new window could be cut into the side of the car).

During Task Force discussions, it became apparent that the phrase ''rapid and easy'' in the emergency window exit regulation was being interpreted in different ways by commuter railroads and car manufacturers. Some believed that only the removal of the gasket had to be rapid and easy; however, FRA clarified that while FRA may have cited examples of gaskets that were becoming stuck and were therefore not removable in a rapid and easy fashion, the central goal of this provision was to create an opening that could be used for egress, which necessarily includes removal of the window panel as well. If the removal of the gasket is rapid and easy, but the removal of the window panel is not, the opening becomes less useful in an emergency situation, or in some cases, effectively non-existent. Several members of the Task Force also expressed their concern that the phrase ''rapid and easy'' was too subjective and not quantifiable. They requested that FRA adopt a more measurable performance-based standard instead. Yet, various proposals to do so based on a specific allotment of time to open the window were not adopted, as consensus was not reached on how that time would be determined. Variables such as height, weight, strength, and awareness of emergency exit operation and procedures all could affect the ease of opening a window. For example, a railroad maintenance employee who installs emergency window exits or is otherwise trained on their use should be able to open a window more quickly than many passengers would be able to do. While there was general agreement that a time-performance standard should be based on the time taken by a representative sample of people to open the window, the Task Force was not in a position to specify that sample.

Although unsuccessful at reaching consensus on an actual measure of ''rapid and easy,'' the Task Force was able to agree that promoting ''rapid and easy'' removal of emergency windows is desirable. A combination of fixtures, such as headrests and luggage racks, as well as larger and heavier windows, can create a situation where the most effective and efficient method for removing a window is not immediately apparent. As a step towards promoting rapid and easy removal of the window and to address the situation of particular concern, the Task Force recommended requiring that instructions specifically take into account potential hindrances. The instructions may be in written or pictorial format, since including pictorials depicting the window removal method as part of the instructions can be extremely helpful.

As for rescue access windows, the Task Force generally recommended requiring two windows on each level of a passenger car for rescue access (versus four as is required for emergency exit). The principal reason for requiring only two windows for rescue access is that rescue access windows are the third means of egress in the overall emergency evacuation approach, in which door exits serve as the first (preferred) means of egress and emergency window exits serve as the second. Rescue access windows have this tertiary role because they would be used as a means of last resort when passengers cannot evacuate themselves and require aid from emergency responders. The design of window gaskets also affects how many rescue access windows can be placed in a car, especially on levels where there is limited space for windows. For instance, on certain types of cars, zip-strips installed to facilitate rapid and easy removal of a window can be installed either on the interior or the exterior of the car, but not on both. In this case, if FRA were to require four rescue access windows, then a railroad that has cars with additional emergency window exits (*i.e.*, beyond the minimum of four per main level) would likely just replace some of its emergency window exits with rescue access windows, resulting in fewer emergency window exits, and thereby limiting the more preferred means of egress. For the above reasons, as well as for the cost of retrofitting existing equipment, flexibility for locating rescue access windows in side doors was added for existing equipment.

FRA is not proposing changes to existing requirements for emergency window exits in sleeping compartments or similar private compartments. Yet, FRA is proposing rescue access window requirements for such compartments. Although this proposal would establish new requirements, the proposal reflects current practice.

B. Emergency Communication Systems—Public Address and Intercom Systems

As discussed above, while the Passenger Equipment Safety Standards issued in 1999 by FRA contain requirements for two-way emergency communication systems for Tier II passenger equipment, there are currently no requirements that Tier I passenger cars be equipped with any emergency communication system. Nevertheless, today most existing passenger cars are equipped with PA systems, and after discussing the benefits of PA systems in light of the challenge and expense of retrofitting older, existing passenger equipment with limited service life, the Task Force agreed that all passenger cars should, at a minimum, have functioning PA systems. The PA system would allow the train crew to keep their passengers informed in an emergency situation and provide guidance to all passengers in a

timely manner, thereby reducing the likelihood that passengers would take an action that could place them in any greater danger.

The Task Force also agreed that emergency communication systems in all new passenger cars should include intercom systems that would enable passengers to quickly communicate in emergency situations with the train crew. During the discussions concerning whether to require intercom systems on Tier I passenger equipment, some Task Force members expressed concern that if intercom systems were added at each end of a car, were conspicuously marked, and had instructions provided for their use, passengers may use them in non-emergency situations. Amtrak and various commuter railroads that operate cars with intercom systems indicated that they have successfully implemented measures to deter misuse, however, such as by placing the intercom transmission button under a protective covering (which also prevents accidental operation by a passenger leaning against it) and by marking it ''FOR EMERGENCY USE ONLY.''

The recommended emergency communication system requirements developed by the Task Force generally reflect current practice for Tier I passenger equipment operating with intercom systems and existing requirements for Tier II passenger equipment. FRA understands that those Tier I passenger cars that currently do not have PA systems are scheduled to be retired from service before the proposed requirement to have PA systems on existing Tier I passenger equipment would become effective.

C. Emergency Roof Access Locations

Emergency roof access locations (roof hatches or structural weak points) can be especially useful in emergency situations where passenger cars have rolled onto their sides following certain collision and derailment scenarios. In such situations, doors, which are the preferred means of egress and access under normal circumstances, may be rendered inoperable due to structural damage to the door or the door pocket, or extremely difficult to use because the car is no longer upright. Moreover, although emergency responders may be able to enter a car that is on its side via a rescue access window, the removal of an injured occupant through a side window in such circumstances would likewise be difficult or complicated, especially depending upon the condition of the occupant.

Existing FRA regulations require emergency roof access locations for Tier II passenger equipment, but not for Tier I passenger equipment. The Task Force examined these requirements and APTA PRESS recommended practice RP–C&S–001–98, ''Recommended Practice for Passenger Equipment Roof Emergency Access,'' in recommending that emergency roof access requirements be applied to Tier I passenger equipment. FRA adopted the Task Force's recommendation and, in general, is proposing that each new passenger car (both Tier I and Tier II) have a minimum of two emergency roof access locations. Existing Tier I passenger cars would not be subject to the proposed requirements, while existing Tier II passenger cars would continue to be subject to existing requirements. For further discussion and explanation of the proposed requirements, please see the Section-by-Section Analysis of this preamble at Section V.

D. Inspection, Testing, and Maintenance

FRA is proposing to modify §§ 238.17, 238.303, and 238.305 (which contain standards for movement of passenger equipment with other than power brake defects, for inspection of passenger equipment, and for repair of passenger equipment) to include requirements for the inspection, testing, maintenance and repair of emergency communication systems, emergency roof access points, and rescue access markings. To allow railroads sufficient time to repair the equipment with minimal disruption to normal operations, flexibility would be provided for operating equipment in passenger service with certain non-compliant conditions. In affording this flexibility, the rule would require the railroad to adhere to specified procedures for the safe operation of the equipment.

V. Section-by-Section Analysis

Proposed Amendments to 49 CFR Part 223, Safety Glazing Standards—Locomotives, Passenger Cars and Cabooses

Subpart A—General

Section 223.5 Definitions

This section, which contains a set of definitions relevant to the regulations contained in part 223, would be modified to clarify a definition, and to delete two definitions that would no longer be relevant due to proposed modifications of this part, specifically, the deletion of § 223.9(d)(2).

The definition of ''emergency window'' would be revised to clarify that the purpose of an emergency window is for egress, and thus needs to be removable only from the inside of a passenger car. Accordingly, FRA proposes to revise the definition of ''emergency window'' to mean that segment of a side-facing glazing panel which has been designed to permit rapid and easy removal from inside a passenger car in an emergency situation. FRA is also proposing that the terms ''emergency responder'' and ''passenger train service'' be deleted in accordance with the proposal to delete § 223.9(d)(2), the only section in part 223 that references these terms. The term ''emergency responder'' would be moved to part 238.

Subpart B—Specific Requirements

Section 223.9 Requirements for new or rebuilt equipment

In the discussion of § 223.5, FRA noted that the definition of ''emergency window'' would be amended to clarify that the purpose of the windows is for egress, and thus would need to be removable only from the inside of a passenger car. Section 223.9(c) currently requires ''at least four emergency opening windows.'' As the term ''emergency opening window'' is not specifically defined—but has been understood to mean ''emergency window''—FRA believed that it would be best to modify the rule text in § 223.9(c) to require ''at least four emergency windows'' in order to provide more clarity.

FRA is proposing to delete the requirements in § 223.9(d) and merge them into §§ 238.113 and 238.114 of part 238. The requirements in § 223.9(d) were added by FRA's May 4, 1998 final rule on Passenger Train Emergency Preparedness. *See* 63 FR 24629, 24643. The Passenger Train Emergency Preparedness final rule required the marking of both emergency window exits and windows intended for rescue access, and also required that instructions be provided their use. However, the requirements applied only to ''each railroad providing passenger train service,'' a class of train service purposefully narrower than the general application section in part 223. *See* § 223.3. Because FRA is proposing to address marking and instruction requirements for such windows in this train service in part 238, and because the requirements of § 223.9(d) do not apply to other equipment covered by part 223, they may be removed from part 223, along with the corresponding definition of ''emergency responder'' and ''passenger train service.'' Further, deletion of § 223.9(d) would avoid creating any confusion due to duplication of the marking and instruction requirements in two different parts of the CFR, especially

since the proposed marking requirements in part 238 that were adopted by the full RSAC vary somewhat from the ones currently found in § 223.9(d). Nevertheless, § 223.8 will continue to alert the reader to additional requirements for emergency window exits for ''passenger equipment'' in part 238, as defined in that part.

However, because the general application section of part 223 is broader than that in part 238, FRA has been mindful not to alter the application of those requirements unaffected by the May 4, 1998 amendments. Part 238 does not apply to ''tourist, scenic, historic, or excursion operations, whether on or off the general railroad system of transportation,'' *see* § 238.3(c)(3); whereas, part 223 does not apply to ''locomotives, passenger cars and cabooses that are historical or antiquated equipment'' and are also ''used only for excursion, educational, recreational purposes or private transportation purposes,'' *see* § 223.3(b)(3). As a result, to the extent tourist equipment is covered by part 223 because the equipment is not historical or antiquated and is required to be equipped with certified glazing in all windows pursuant to §§ 223.9(c) or 223.15(c), such equipment would still be required to have four emergency windows (emergency window exits), despite its exclusion from the part 238 requirements.

Appendix B to Part 223—Schedule of Civil Penalties

This appendix contains a schedule of civil penalties to be used in connection with this part. Because such penalty schedules are statements of agency policy, notice and comment are not required prior to their issuance. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, as discussed above, FRA is proposing that the requirements of § 223.9(d) be merged into §§ 238.113 and 238.114 of part 238. Thus, FRA is proposing that the schedule of civil penalties in appendix B to part 223 be modified accordingly, by deleting the entries for paragraphs (d)(1)(i), (d)(1)(ii), (d)(2)(i), and (d)(2)(ii) and the associated penalties.

Proposed Amendments to 49 CFR Part 238, Passenger Equipment Safety Standards

Subpart A—General

Section 238.5 Definitions

This section, which contains a set of definitions relevant to the regulations contained in part 238, would be modified to include new definitions relevant to the proposed modifications to part 238.

FRA proposes to add the definition of ''dual-function window'' to mean a window that is intended to serve as both an emergency window exit and a rescue access window. This term generally refers to a window that has a zip-strip, which is a strip in a window gasket that can be pulled from end to end to unlock the gasket and thus release the glazing, on both faces so that it can be opened from both the inside of the car and the outside. (This definition would also cover other methods of opening the same window from both the inside of the car and the outside.) The term is being added because it is referenced in § 238.114(a)(5) as an exception to the requirements on the location of rescue access windows set forth in § 238.114. Dual-function windows installed to meet the minimum requirements proposed in § 238.113 would not be required to meet the § 238.114 location requirements, in order to recognize that a railroad that installs four compliant emergency window exits that are the dual-function type has also installed twice the number of rescue access windows that would be required.

FRA proposes to revise the definition of ''emergency window'' to clarify that the purpose of an emergency window is for egress, and thus only needs to be removable from the inside of a passenger car. Accordingly, FRA proposes to revise the definition to mean that segment of a side-facing glazing panel which has been designed to permit rapid and easy removal from inside a passenger car in an emergency situation. FRA is also proposing to revise the definition of this term in § 223.5 for consistency and clarity.

FRA proposes to add the definition of ''intercom'' to mean a device through which voice communication can be transmitted and received. A transmission unit normally has a button, which has to be depressed to begin transmission or notify the crew on the receiving end of the intention to communicate using the system. An intercom may be a telephone apparatus. FRA is also proposing to add the definition of ''intercom system'' (or ''intercommunication system'') to mean a two-way, voice communication system. This system allows a passenger to communicate with a crew member, typically by depressing a button, or lifting a telephone handset, or both.

FRA proposes to add the definition of ''intermediate level'' to mean a level of a multi-level passenger car that is used for passenger seating and is normally located between two main levels. An intermediate level normally contains two, separate seating areas, one at each end of the car, and is normally connected to each main level by stairs. The term ''intermediate level'' is intended to distinguish a level used for passenger seating of a multi-level passenger car from a ''main level'' of such as car, as FRA is proposing to apply different requirements to the different passenger seating levels. Please see the discussion of ''main level.''

Currently, the regulatory text of part 238 does not define the term ''main level,'' as used in § 238.113. However, in the preamble to the April 23, 2002 final rule, FRA explained that the term ''main level'' was intended to exclude a level of a car that is ''principally used for passage between the door exits and passenger seating areas, or between seating areas,'' and noted that such an area is not ''principally used for seating'' and includes a stairwell landing. *See* 67 FR 19973. This distinction raised some concerns with respect to intermediate levels because their designation as main levels would hinge upon an interpretation of ''principally used'' for passenger seating. Some Task Force members believed that these levels were principally used for passenger seating because passengers who are seated there are spending more time on that level than the passengers who simply use that level to reach the upper level (or lower level). Others believed that the intermediate level was principally used for passage between levels because there was a greater volume of passengers passing through that level to reach the upper level (or passing through to reach the lower level, or both) than there were passengers seated on that level. In light of the concern raised, FRA is proposing to define ''intermediate level,'' as discussed above, and is also proposing to define ''main level'' as a level of a passenger car that contains a passenger compartment whose length is equal to or greater than half the length of the car. This definition would establish a more direct relationship between the number of occupants on a level of a car and the number of emergency window exits required on that level. The longer a level is, the more seats and exterior side windows it is able to accommodate. Since passenger cars are normally about 85 to 90 feet in length, a main level in such a car would be a level that contains a passenger compartment whose length is approximately 42.5 feet or more. Accordingly, there should be sufficient space for the required number of emergency window exits on a main level of a passenger car, whether or not there is a bathroom, kitchen, or

equipment closet located on the same level.

FRA proposes to add the definition ''passenger compartment'' to mean an area of a passenger car that consists of a seating area and any vestibule that is connected to the seating area by an open passageway. If a door separates the seating area from the vestibule, the vestibule is not part of the passenger compartment. *See* Figure 1c to subpart B. This definition was necessary to solidify the concept that passengers should not have to go through an interior door, which could get jammed, or to another level in order to reach an emergency window exit, and likewise, emergency responders should be able to directly access passengers in need of aid in each such compartment.

FRA proposes to add the definition ''PA system'' or ''public address system'' to mean a one-way, voice communication system. Such a system is used by train crew members to make announcements to passengers in both normal and emergency situations. On some railroads, crew members use the PA system to make station announcements. Other railroads limit its use to communicate information regarding unusual occurrences, such as unexpected delays and emergencies. Some PA systems have speakers located on the exterior of cars that are used to make announcements to persons in the vicinity of the train (*e.g.*, passengers on a station platform).

Consistent with the proposed amendments to part 223, discussed above, FRA proposes to define ''rescue access window'' as a side-facing exterior window intended for use by emergency responders to gain access to passengers in an emergency situation. In some passenger cars, all windows may be capable of serving as both emergency window exits and rescue access windows. However, a railroad may choose not to designate one or more of these windows for rescue access for various reasons, including the presence of a third-rail shoe that could pose an electrocution hazard, or a high seat back next to the window that may pose a potential hindrance to window removal for windows that are designed to open by being pushed into the car.

Some rescue access windows are designed with a zip-strip to release the window panel from its frame. In some cars, side-facing glazing systems are designed so that there is a zip-strip on only one side of the window panel. It is common for railroads to install such systems with a zip-strip on the exterior of the car for rescue access use, and also have one in the interior of the car for emergency egress use. However, to the extent that there may be only one zip-strip for a single glazing system, the railroad must decide whether to place the zip-strip on the exterior of the car for use in rescue access, or in the interior of the car for use in emergency egress.

Although use of zip-strips in rescue access windows is common, FRA makes clear that they would not be required. The proposed definition is a performance standard, and a rescue access window may be opened by other means, such as by shattering the window (if glass) or popping the window out by applying force at one corner.

Throughout the discussion of rescue access windows, Task Force members repeatedly emphasized, as the definition reflects, that these windows are intended for use by emergency responders to gain access to passengers in an emergency situation. In the process of reviewing the definitions in parts 223, 238, and 239 in composing this NPRM, FRA noted that the term ''emergency responder'' is defined in parts 223 and 239, but not in part 238. As the proposed part 238 definition of ''rescue access window'' includes the term ''emergency responder,'' FRA believes it is appropriate to add ''emergency responder'' to part 238. The term would be defined to mean a member of a police or fire department, or other organization involved with public safety charged with providing or coordinating emergency services, who responds to a passenger train emergency.

FRA proposes to add a definition of ''seating area'' to mean an area of a passenger car that normally contains passenger seating. An area with no actual seats but with anchors for securing wheel chairs would be considered a seating area.

FRA notes that the term ''vestibule'' is currently defined in part 238 to mean an area of a passenger car that normally does not contain seating and is used in passing from the seating area to the side exit doors. Although FRA is not revising the definition of ''vestibule,'' FRA makes clear that for purposes of part 238, a vestibule may be located anywhere along a car. The location of a vestibule is not restricted to the far ends of a car but may be elsewhere, such as in the middle of the car. As a result, what some in the passenger rail industry commonly refer to as an entranceway, by virtue of where its located in a car, is considered a vestibule for purposes of this part.

Section 238.17 Movement of Passenger Equipment With Other Than Power Brake Defects

This section contains the requirements related to the movement of passenger equipment with a condition not in compliance with part 238, excluding a power brake defect, without civil penalty liability under this part. FRA proposes to modify paragraphs (b) and (c) of this section to include a reference to the specific provisions being added to the exterior, calendar day mechanical inspection in proposed § 238.303(e)(18) regarding rescue-access-related markings, signage, and instructions. Proposed § 238.303(e)(18) would require that all rescue-access-related exterior markings, signage, and instructions required by proposed § 238.114 (rescue access windows) and § 239.107(a)(2) be in place and, as applicable, conspicuous, and/or legible, and that certain conditions be met for continued use of the cars with defective markings, signage, or instructions. As these proposed provisions contain specific requirements related to the continued use in passenger service of passenger cars found with defective rescue access signs, markings, or instructions, recognition of these specific limitations needs to be included in both paragraphs (b) and (c) of this section. The proposed requirements in § 238.303(e)(18) and the proposed conditions for continued use of passenger equipment with non-complying conditions are discussed in detail below.

FRA notes that it is considering moving the emergency exit marking requirements contained in § 239.107(a) into part 238. Since § 239.107(a) contains door exit marking, signage, and operating instruction requirements, the requirements of this section may more logically be situated in the very sections containing requirements for doors in part 238, namely, §§ 238.235 and 238.439. If the requirements in § 239.107(a) are moved into part 238, FRA would make any necessary conforming changes to part 238, and modify this proposed section in publishing the final rule. FRA invites comment whether the requirements of § 239.107(a) should be moved into part 238.

Subpart B—Safety Planning and General Requirements

Section 238.113 Emergency Window Exits

This section currently contains requirements for emergency window exits in single-level passenger cars and main levels of multi-level passenger

cars. Emergency window exits are intended to supplement door exits, which are normally the preferred means of egress in an emergency situation. Emergency windows provide an alternative means of emergency egress should doors be rendered inoperable or inaccessible. They also provide an additional means of egress in life-threatening situations requiring very rapid exit, such as a fire on board or submergence of the car in a body of water.

To ensure that emergency window exit requirements apply to every level with passenger seating, FRA is proposing to revise this section to expressly include emergency window exit requirements for any level with passenger seating in a multi-level passenger car. FRA is also proposing to revise this section to require that emergency window exit operating instructions specifically address the presence of interior fixtures that may hinder the removal of the window panel, to facilitate its rapid and easy removal.

Paragraph (a), which applies to both new and existing passenger cars, would be modified to specify requirements for the number and location of emergency window exits on any level with passenger seating in a passenger car. The requirements for single-level passenger cars in proposed paragraph (a)(1), and for main levels of multi-level passenger cars in proposed paragraph (a)(2), would effectively remain unchanged. The current requirements for single-level passenger cars require a minimum of four emergency window exits, located ''either in a staggered configuration where practical or with one located in each end of each side of each level.'' FRA is proposing to slightly modify this language by replacing the word ''end'' with ''end (half)'' to clarify that the term ''end'' does not refer to the extreme forward and rear ends of a car, but merely the front half and rear halves of the car. *See* Figure 1 to subpart B. Additionally, the text would be reorganized to emphasize that a window would be required in each end (half) of each side of the car and that, if practical, the windows would also be in a staggered configuration. This clarification would remove any ambiguity in the current rule text that wrongly suggests that one could choose to simply stagger the windows without regard to having one window in each side of each end. To illustrate the requirements of paragraph (a)(2), FRA is proposing to add Figure 1 to subpart B, as referenced above. FRA invites comment on whether this and other figures proposed in this NPRM for inclusion in part 238 would be helpful in understanding the requirements of this part, and, if so, whether any additional figures should be included. FRA also notes that the proposed figures, which are not drawn to scale, represent possible ways of complying with the proposed requirements and should not be construed as depicting the only way to comply.

Paragraph (a)(3) would contain the requirements for emergency window exits on non-main levels with seating areas of multi-level passenger cars, including intermediate (or mezzanine) seating levels. The general intent of the proposal is to have at least one emergency window exit that is accessible to passengers in each side of a passenger seating area without requiring the passengers to move to another level of the car or pass through a door. This would help ensure that, if a car rolled onto its side or if there was a hazard on one side of the train, an emergency window exit on the opposite side would be available to passengers and crew members for emergency egress. Nevertheless, as further discussed below, a constraint for intermediate levels of both new and existing multi-level passenger car designs is limited space due to the presence of bathrooms, equipment closets, and side door exits. Accordingly, the requirements proposed for the number and location of emergency window exits in paragraph (a)(3) provide flexibility for, and are consistent with, existing passenger car designs.

FRA notes that in light of the proposed definition of ''main level,'' some passenger cars would no longer have main levels. Such cars would thus be subject to the proposed requirements for other levels with seating areas contained in paragraph (a)(3). For instance, none of the levels in a gallery-style car (a multi-level passenger car with a full-height, enclosed vestibule in the center) would meet the proposed definition of a ''main level.'' Yet, each of the four, separate seating areas in such a car would be subject to the emergency window exit number and location requirements proposed in paragraph (a)(3). Further, the proposed requirements are consistent with the number and location of emergency windows on existing gallery-style passenger cars, would not impact current operations, and would not diminish the effect of FRA's existing requirements.

Paragraph (a)(3)(i) would require that non-main levels that are used for passenger seating have at least two emergency window exits that are accessible to passengers in each seating area without requiring the passengers to move to another level of the car or pass through an interior door. This proposal is intended to address situations in which stairways could become structurally deformed and interior doors could be rendered inoperable as a result of a collision, derailment, or other accident, obstructing access to an emergency window exit or a side door exit on another level or in a vestibule area that is separated from the seating area by an interior door. Similarly, the proposal is intended to address situations in which a passenger car has rolled onto its side as a result of a collision, derailment, or other accident, by providing that at least one of these emergency window exits would be required in each side of the passenger car, except as provided below. *See* Figures 2, 2a, and 2b to subpart B.

The proposed rule provides flexibility for locating an emergency window exit within an exterior side door in the passenger compartment of a non-main level, if it is not ''practical'' to place the window exit in the side of the seating area. It should be noted that, by definition, a side door would not be considered located within the ''passenger compartment'' if an interior door separates the seating area from the area where the side doors are located. The provision would require that there be an open passageway between the seating area and the vestibule, in such a circumstance. Use of the word ''practical'' would allow railroads and car builders some discretion regarding the location of an emergency window exit in a non-main level of a car. For instance, this provision could be used to address situations where a window in a door in the same passenger compartment may be better suited for emergency egress than one in the seating area. In some cars, removal of the windows in the seating area may be hindered by seat backs or other fixtures, while windows in the exterior side doors could be more easily and rapidly removed. Since there would still be two accessible side windows in a passenger compartment, one on each side, there would be no limitation on the number of seats that may be in the compartment. Moreover, the door itself is a means of emergency egress that, if operable, would allow more rapid and safe egress than exiting through a window. Nevertheless, because having two emergency exits at the very same location could result in both exits being rendered inoperable (as by car crush) or inaccessible (as by fire), FRA is not proposing to allow the unrestricted

placement of emergency window exits in side doors. FRA makes clear that, all things being equal, emergency window exits should be placed in a separate location from side door exits. See Figure 2b to subpart B; compare to Figure 2a to subpart B.

In determining the appropriate applicability date for the proposed requirement to have emergency window exits in non-main levels of multi-level passenger cars, it was noted that, while some passenger cars already have windows in each side of an intermediate level seating area, these windows are not necessarily emergency window exits. Consequently, some time would be needed to change out the existing windows with emergency window exits or otherwise retrofit the windows with pull-handles and make any other modification necessary so that the windows would meet the requirements for emergency window exits. The proposal takes this into account, and otherwise would afford railroads sufficient time to come into compliance regardless of the state of the existing windows, by phasing the requirement in over an 18-month period from the date of publication of the final rule.

Paragraph (a)(3)(ii) contains a proposed exception for non-main levels of multi-level passenger cars that would require only one emergency window exit in a seating area in a passenger compartment with no more than four seats, if it would not be practical to place an emergency window exit in a side of the passenger compartment due to the need to provide accessible accommodations under the ADA and a suitable, alternate arrangement for emergency egress is provided. This proposed exception would address concerns involving multi-level passenger cars serving passenger stations with high-platforms, such as on the Northeast Corridor. Because all passengers enter the cars on the intermediate level, and disabled passengers would not be able to access accommodations on another level of the cars, any accommodations provided to passengers would have to be located on the intermediate level. The proposal recognizes this need, and the proposed exception would apply to both existing and new passenger cars but would be limited to situations that arise from the need to provide accessible accommodations under the ADA and limited to passenger compartments where there are no more than four seats and a suitable alternative for egress is provided. FRA makes clear that use of the word ''practical'' in paragraph (a)(3)(ii) would extend flexibility to car builders to locate an electrical locker or other equipment closet in a side of an intermediate level at one end of a passenger car without being required to place an emergency window exit in the same side at that location, provided the placement of the locker or closet is related to placement of ADA-accessible accommodations in the intermediate level at the other end of the car. The limitation concerning the maximum number of seats in the passenger compartment is consistent with the maximum number of seats in existing designs for cars that are being manufactured with emergency window exits in only one side of each passenger compartment in an intermediate level.

The proposal would also require that a suitable, alternative arrangement for emergency egress be provided. Such an arrangement should not require the use of a tool or implement to operate, and should be comparable to an emergency window exit in terms of being rapid and easy to use. As part of the Task Force's discussion during the development of the proposed rule, Kawasaki presented a car design with a seating area separated from a vestibule by an interior door and an alternative arrangement for emergency egress. The interior door would be designed with a removable window panel (with pull-handles on both sides) to allow passengers access to the vestibule, if the door itself were inoperable. Further, in the vestibule the exterior side door located on the same side as the one in the seating area without the emergency window exit would itself contain an emergency window exit. As a result, a means of exiting the car from that side would be available to passengers. FRA notes that a combination of several factors would render this arrangement a suitable, alternate means of emergency egress. First, the alternate emergency exit location would provide a measure of redundancy, *i.e.*, a safety factor, in that there would both be an exterior side door and an emergency window exit in the same door. The door, if operable, should allow passengers and crew members to exit more expeditiously than through a window. In the event that this door would be rendered inoperable, a window meeting the minimum dimension requirements in proposed paragraph (c) would then be available. To the extent both the door and its window were rendered inoperable, the exterior side door exits in the adjacent car's vestibule would then be next in sequence for use since this car design has no end-frame doors separating adjoining cars. Should the end of the car become uncoupled from the adjacent car, the vestibule would be open at the end, allowing passengers direct access to the outside. Further, the panel in the interior door leading to the vestibule would not be glass but a polycarbonate, which is significantly lighter than glass and thus easier to remove, and the opening in the interior door would be large enough for a person to pass through it relatively quickly.

Paragraph (a)(3)(iii) would require passenger cars ordered both prior to 14 months after the publication of the final rule and placed in service prior to 38 months after the publication of the final rule to have a minimum of only one emergency window exit in a non-main level seating area in a passenger compartment with no more than eight seats, if it is not ''practicable'' to place a window exit in a side of the passenger compartment (due to the presence of such structures as a bathroom, electrical locker, or kitchen). This exception would be broader than the one in paragraph (a)(3)(ii) as it would apply to non-main levels with more seats and would not be dependent on providing accessible accommodations under the ADA. However, it would not apply to new cars. New car designs should take into consideration the need to provide an emergency window exit in each side of a passenger compartment.

Use of the word ''practicable'' would limit railroad discretion so that a car would be required to have an emergency window exit in a side of a seating area, if a window were already located there. Nevertheless, FRA notes that a railroad would be under no obligation to install a window in a side of a passenger compartment for purposes of providing an emergency window exit, if an emergency window exit were located in either (i) the other side of the same compartment or (ii) an exterior side door located in the same side of the compartment. Cutting through a side panel in an existing passenger car to install an emergency window exit would not be required.

Requirements for cars with sleeping compartments or similar private compartments would be clarified and moved from existing paragraph (a)(2) to proposed paragraph (a)(4). Each level of a passenger car with a sleeping compartment or a similar private compartment intended to be occupied by a passenger or train crew member would continue to be required to have at least one emergency window exit in each such compartment. A private seating area (such as one found on certain European trains or on some antiquated American trains) is a private compartment. FRA notes that, in a passenger car with only sleeping compartments, if all the sleeping

compartment doors are locked, passengers in a compartment without an egress window would not be able to get into another compartment to use an emergency window exit. The rule would clarify that, for purposes of this paragraph, a kitchen, locomotive cab, or bathroom—whether public or private—is not considered a ''private compartment,'' however. In particular, bathrooms are distinguishable from sleeping compartments because a passenger could leave a private bathroom to access an emergency window exit in the sleeping compartment, and a passenger can leave a public bathroom to access an emergency window exit in the passenger compartment.

As part of the proposed revision and reorganization of this section, paragraph (b) would contain the same requirements for ease of operability of emergency window exits that are currently stated in paragraph (a)(3) of the existing regulation. The only modification would be that the applicability date of November 8, 1999, which is currently stated in the introductory text of paragraph (a), be added directly to this paragraph. FRA notes that the Task Force considered alternatives to the existing standard for the ease of operating emergency window exits—one that would be capable of more objective quantification. One such alternative that was considered involved specifying a maximum pull-force for removing window gaskets and glazing, but the Task Force found it difficult to specify a uniform standard that would account for varying operating environments and weather conditions. Further discussion relating to the requirements of proposed paragraph (b) is found below in the paragraph discussing proposed requirements for marking emergency window exits.

Consistent with the proposed reorganization and revision of this section, FRA is proposing to move existing requirements for the dimensions of emergency window exits from paragraph (b) to paragraph (c). The applicability date of the dimension requirements is unchanged from current paragraph (b); thus the requirements continue to apply to each passenger car ordered on or after September 8, 2000, or first placed in service on or after September 9, 2002. FRA is proposing a slight modification to the requirements to allow an emergency window exit with an unobstructed opening of at least 24 inches horizontally by 26 inches vertically to be located within an exterior side door, in accordance with the proposed requirements of paragraph (a)(3)(i) of this section. FRA makes clear that, for purposes of determining compliance with the emergency window exit dimension requirements, the dimensions of the unobstructed opening are measured after the emergency window exit has been opened. The transparent area of the window for viewing use by passengers may be several inches smaller than the opening created once the window is removed, and that would be acceptable.

FRA notes that a window exit in a passenger car ordered on or after September 8, 2000, or placed in service for the first time on or after September 9, 2002, that does not create an unobstructed opening meeting the minimum dimension requirements of this paragraph may not be considered an ''emergency window exit'' for purposes of this section and may not be marked as an ''emergency window exit.'' Nevertheless, FRA is not seeking to require that such a window exit be modified or removed, provided the passenger car is otherwise in compliance with all applicable emergency window exit requirements. For example, FRA is aware of window exits that do not create openings of the required dimensions because of the presence of seat backs that do not manually recline, and may therefore obstruct passage through the window of a stretcher or an emergency responder with a self-contained breathing apparatus but not a passenger or crewmember. It is not FRA's intent to discourage a railroad from retaining these additional window exits in its passenger cars, for circumstances such as those present in the derailment of an Amtrak train near Mobile, Alabama in 1993. There, six passenger cars fell into a bayou and submerged, drowning 42 passengers and two crewmembers in those cars, and killing all three crewmembers in the locomotive. In what has been the U.S.'s deadliest passenger train accident in over 50 years, train occupants needed to evacuate the cars as quickly as possible, potentially making the number of window exits more critical than their precise dimensions. (FRA is not suggesting that the cars lacked a sufficient number of exits, or that their dimensions were too small.)

Nevertheless, FRA is inviting comment on window exits in passenger cars ordered on or after September 8, 2000, or placed in service for the first time on or after September 9, 2002, that have unobstructed openings not meeting the minimum dimension requirements of this paragraph. As FRA has noted, these window exits are not ''emergency window exits,'' and may not be identified as emergency window exits. However, FRA is not seeking to have these window exits removed, and is instead considering that pull-handles on these window exits may state or retain instructional markings such as ''pull to open.'' FRA invites comment on whether these window exits should or should not be removed, and, to the extent that they should not be removed, whether any instructional marking on these windows should be permitted. Since these windows could be used for emergency egress, if they are not removed, FRA also invites comment as to whether they should have to be tested periodically to ensure that they operate properly. Railroads are currently required to test emergency window exits no less frequently than every 180 days using commonly accepted sampling techniques to determine how many windows to test. In general, these principles require that the greater the percentage of window exits that a railroad finds defective, the greater the percentage of windows that the railroad will have to test. Specifically, sampling must be conducted to meet a 95-percent confidence level that no defective units remain and be in accord with either Military Standard MIL–STD–105(D), ''Sampling for Attributes,'' or American National Standards Institute ANSI–ASQC Z1.4–1993, ''Sampling Procedures for Inspections by Attributes.'' Although testing these window exits would appear desirable, a testing requirement may discourage railroads from retaining these windows at all.

As the final part of the proposed reorganization and revision of this section, paragraph (d) would contain the requirements for marking emergency window exits, as well as providing operating instructions for their use. Marking and operating instruction requirements for emergency window exits are currently contained in § 223.9(d)(1) of this chapter, and are currently referenced in paragraph (c) of this section. The requirements in § 223.9(d)(1) would be moved to proposed paragraph (d) of this section and be modified. This paragraph would require that each emergency window exit be conspicuously marked with luminescent material on the inside of each car, and that legible and understandable operating instructions, including instructions for removing the window panel, be posted at or near each such window exit.

Notably, proposed paragraph (d) would specifically require that emergency window exit operating instructions address potential hindrances to removal of the window

panel due to the presence of fixtures in the car. As discussed above, FRA became aware that the phrase ''rapid and easy'' in the requirement for emergency window exit ease of operability was not being interpreted uniformly. Central to the issue was the actual removal of the window panel in light of the weight of the window panel and the presence of interior fixtures near the window. It is not uncommon for a seatback to be located adjacent to an emergency window exit and for a luggage rack to be located above the exit. Even if the seat back does not affect compliance with the dimensions required for an unobstructed opening (especially in the case of a large window panel), it could, together with the presence of the luggage rack, hinder removal of the window. This combination of fixtures could create a situation where the most effective and efficient method for operating an emergency window exit would not be immediately apparent to a passenger, especially if the window were large and heavy. As a result, to promote the rapid and easy removal of the window panel, the Task Force recommended requiring that emergency window exit operating instructions specifically take into account such potential hindrances. Accordingly, if window removal may be hindered by the presence of a seatback, headrest, luggage rack, or other fixture, the instructions would be required to state the method for allowing rapid and easy removal of the window panel, taking into account the fixture(s). This particular portion of the instructions would be allowed to be in written or pictorial format to provide railroads the flexibility to convey the appropriate information to passengers, especially since a picture (pictogram) or pictures (pictograms) may potentially convey the information more readily than written instructions.

FRA also notes that § 223.9(d)(1) currently requires that the operating instructions for emergency window exits be ''clear and legible.'' FRA proposes to modify this requirement by replacing the word ''clear'' with the word ''understandable,'' so that railroads would be required to post ''legible and understandable'' operating instructions. Use of the word ''clear'' in § 223.9(d) has created some confusion since it can have more than one meaning, and FRA believes the proposal would eliminate any further confusion.

Finally, FRA notes that existing requirements in parts 223 and 239 for the marking of emergency exits, as well as existing requirements in part 238 for the marking of emergency communications transmission points, specify the use of luminescent materials. (Door exits intended for emergency egress may also be lighted, in accordance with § 239.107(a)(1).) Part 238 defines ''luminescent material'' as material that absorbs light energy when ambient levels of light are high and emits this stored energy when ambient levels of light are low, making the material appear to glow in the dark. *See* § 238.5. Proposed paragraph (d) would continue to require that luminescent material be used to mark emergency window exits. However, as further discussed below, the Task Force has been considering incorporating an APTA standard that would establish specific criteria for this material, including how bright the material must be and how long the material must stay luminescent.

FRA's requirements to mark emergency window exits and other emergency exits originated with FRA Emergency Order No. 20. *See* 61 FR 6876, Feb. 22, 1996; and 61 FR 8703, Mar. 5, 1996. Among its provisions, the Emergency Order required that ''no later than April 20, 1996, commuter and intercity passenger railroads ensure that each emergency exit location is marked inside the car for passenger and crew information.'' In an effort to respond to this requirement as effectively as possible within the short timeframe required, affected railroads began to install photo-luminescent emergency exit markings that were available at the time. Many railroads installed signs made of zinc-sulfide, which were capable of providing luminance for a period of less than 10 minutes only in many cases. Following this, photo-luminescent sign technology evolved, and materials, such as strontium-aluminate, which is capable of providing high levels of luminance for much longer periods, began to be used. Prices for such signage also decreased, making the cost of such ''high-performance, photo-luminescent'' (HPPL) signs comparable to that of the signs installed initially. Thus, in 1999, APTA issued APTA SS–PS–002–98, ''Standard for Emergency Signage for Egress/Access of Passenger Rail Equipment,'' requiring the use of HPPL materials for all newly installed passive emergency exit signs and for the retrofit of existing cars at their remanufacture. According to Revision 2 of this APTA standard, issued in 2003, following a charge of five foot-candles for one hour, photo-luminescent markings that are installed must emit a minimum of not less than 7.5 milli-candela per square meter (7.5 mcd/m^2) for 90 minutes after removal of the charging source. The duration period of 90 minutes corresponds with the 90-minute duration requirement for emergency lighting contained in § 238.115 for new passenger cars and is based on a reasonable amount of time for passengers and crew members to wait for the arrival of emergency responders to remote accident sites. Depending on the circumstances, it could take more than an hour for crewmembers to evaluate an emergency situation, coordinate with the control center and emergency responders, notify passengers on the appropriate action(s) to take, and if necessary, begin to evacuate the train. It is also possible for a seemingly minor emergency situation to evolve into a more significant one requiring evacuation. In conditions of darkness, a brighter sign is more easily recognizable and facilitates identification of emergency exits. These points have been discussed within the Task Force, and the Task Force has been focusing on revisions to the APTA standard for purposes of incorporating it into FRA's regulations. FRA is considering incorporating elements of this APTA standard into the final rule arising from this NPRM so that emergency exit signs in passenger cars would be required to be made of HPPL material, and FRA invites comment on doing so. FRA will evaluate the comments received in considering what standard should be established in the final rule.

Section 238.114 Rescue Access Windows

FRA is proposing to establish a new section that would contain requirements for rescue access windows for both new and existing passenger cars. As discussed in detail, above, this proposed section was prompted in part by the April 23, 2002 collision involving a Metrolink passenger train near Placentia, CA, and the ensuing NTSB Safety Recommendation (R–03–21) to FRA, which illustrated the potential importance of having rescue access windows on each level of a passenger car. The general intent of the proposal is to provide a means of rescue access by emergency responders through a window directly into every passenger compartment on every level of a passenger car, in the event that a stairway or interior door is compromised and exterior doors are blocked.

Paragraph (a) would contain requirements specifying the minimum number and location of rescue access windows. These requirements would apply on or after the effective date of the final rule to all passenger cars, except

for certain, existing single-level cars. As noted above, FRA's current regulations do not specifically require any minimum number of rescue access windows for passenger cars; however, they do require that windows that are intended for rescue access be marked and that instructions be provided for their operation. *See* § 223.9(d)(2).

Paragraph (a)(1) would contain the number and location requirements for rescue access windows in single-level passenger cars. FRA is proposing that each single-level passenger car be required to have a minimum of two rescue access windows. At least one rescue access window would have to be located in each side of the car, entirely within 15 feet of the centerline of the car, or entirely within 7½ feet of the centerline if the car does not exceed 45 feet in length. As discussed above, the Task Force recommended requiring two windows for rescue access (versus four, as is required for emergency exit) mainly because rescue access windows are the third means of egress in the overall emergency systems approach, with doors and emergency windows being the first and second means of emergency exit.

Rescue access windows in a single-level passenger car would be required to be located ''as close to the center of the car as possible,'' unlike emergency window exits which should be in a staggered configuration to the extent practical. *See* Figure 1a to subpart B; see also Figures 1b and 1c to subpart B. Staggering the location of emergency window exits is intended to: (i) Ensure that a window exit is available for egress in the event of crush at one end of the car by making available window exits throughout the rest of the car; (ii) optimize the rate of egress, as passengers have less distance to walk to reach a window exit; and (iii) avoid congestion that could occur if the window exits were all located adjacent to or directly opposite one another. Since, in general, a minimum of only one rescue access window per side, per level of a single-level passenger car would be required, the best way to ensure that a window would be available for access in the event that one end of a car is crushed would be to locate the window in the center portion of the car, which is generally less vulnerable to crush in the event of a collision. Congestion should likely not be an issue for rescue access window usage as car occupants should have likely begun to self-evacuate through doors and emergency window exits to the extent possible prior to the arrival of emergency responders.

To ensure that railroads have sufficient flexibility to select those window locations best suited for rescue access, a 30-foot section along the center of a typical 85- to 90-foot-long passenger car would be designated for their location. This flexibility would allow railroads to take into consideration the location of external hazards (such as third-rail shoes); potential hindrances created by interior fixtures for those rescue access windows intended to be opened by being pushed inward into the passenger compartment; the location of emergency window exits in passenger cars without dual-function windows; and other factors that a railroad may deem relevant. For passenger cars not longer than 45 feet, approximately half the length of a standard passenger car, railroads would have the flexibility to select a rescue access window from among approximately three windows along a 15-foot section in the center of the car.

If the seating level is obstructed by an interior door or otherwise partitioned into separate seating areas, the proposal would require that each separate seating area have at least one rescue access window in each side of the seating area, located as near to the center of the car as practical. This proposed requirement is consistent with the general objective of having at least one rescue access window on each side of a passenger seating area or passenger compartment. Nevertheless, FRA is not aware of any such single-level car in current operation in the United States to which this proposed requirement would apply.

FRA notes that on some single level passenger cars, polycarbonate windows are installed in a channel in the window mask, which is itself installed in the car body with the frame compressed over the window to secure it. Removal of the window would require removal of the frame, which would be very difficult in an emergency situation. In addition, it would be costly for these cars to be retrofitted with glass windows (so that they could be shattered) or with zip-strip systems to literally un-zip the window panel from its frame and gasketing. On this type of equipment, the location requirement would be met by having a rescue access window available on each side of each end of the same passenger compartment, including in exterior side doors. An exception was crafted that would permit the location of the rescue access windows in four exterior side doors, and it was approved by the Task Force, Working Group, and the full RSAC. Although the recommended text was silent as to whether the windows were required to be located within 15 feet of the car's centerline, FRA makes clear that no such restriction was intended to apply. As a result, FRA is expressly proposing that these windows could be located farther than 15 feet from the car's centerline, provided that there would be at least one such window in each side of each end (half) of the same passenger compartment—a minimum of four rescue access windows, overall. FRA believes that effectively requiring a minimum of four rescue access windows, instead of two, would be appropriate for granting flexibility for installing rescue access windows on existing equipment in side doors.

Proposed paragraph (a)(1)(ii) would address the number and location requirements for rescue access windows for single-level passenger cars that were ordered prior to September 8, 2000, and placed in service prior to September 9, 2002, if equipped with manual door releases for at least two exterior side doors (or door leaves) in diagonally opposite quadrants of the cars. The manual door release would have to be capable of releasing the door (or door leaf) to permit it to be opened without power from outside the car, be located adjacent to the door (or door leaf) which it controls, and be designed and maintained so that an emergency responder could access the release from outside the car without requiring the use of a tool or other implement. The requirements of proposed paragraph (a)(1)(ii) would become effective 18 months after publication of the final rule. FRA decided to propose to allow this additional time to install rescue access windows at least in part because these passenger cars are equipped with manual releases capable of opening side doors from outside of the car, as provided in § 238.235(b), even though such releases are not required for such older passenger cars by that section.

This proposed paragraph would also address those passenger cars equipped with compressed frame window systems in which rescue access windows would need to be retrofitted in the four side doors by replacing the polycarbonate glazing with glass that could be broken to gain access into the car. The 18-month implementation period would allow for the time necessary to plan and carry out the retrofit without disrupting train service. In the interim, emergency responders would continue to rely on the manual door releases to open the side doors for rescue access purposes should the need arise.

In paragraph (a)(2) FRA is proposing minimum requirements for the number and location of rescue access windows in main levels of multi-level passenger cars. Each main level in a multi-level

passenger car would be subject to the same, minimum requirements proposed for single-level passenger cars in paragraph (a)(1) of this section.

In paragraph (a)(3) FRA is proposing minimum requirements for the number and location of rescue access windows in non-main levels of multi-level passenger cars with seating areas. These proposed requirements and exceptions for non-main levels with passenger seating would also be the same as those for emergency window exits on non-main levels with passenger seating. Specifically, paragraph (a)(3)(i) would require that any other level used for passenger seating in a multi-level passenger car have at least two rescue access windows in each seating area to permit emergency responders to reach occupants without requiring movement through an interior door or to another level of the car. At least one rescue access window would have to be located in each side of the seating area. A rescue access window could be located within an exterior side door in the passenger compartment if it is not practical to place the rescue access window in the side of the seating area. *See* Figure 2a to subpart B; compare to Figure 2b to subpart B.

Paragraph (a)(3)(ii) would require only one rescue access window in a seating area in a passenger compartment of a non-main level if it is not practical to place a rescue access window in a side of the passenger compartment due to the need to provide accessible accommodations under the ADA; there are no more than four seats in the seating area; and a suitable, alternate arrangement for rescue access is provided. The rationale for this exception is the same as the one for emergency window exits in non-main levels of multi-level passenger cars in proposed § 238.113(a)(3)(ii), as discussed above.

Proposed paragraph (a)(3)(iii) would provide that passenger cars both ordered prior to 14 months after publication of the final rule and placed in service prior to 38 months after publication of the final rule be required to have only one rescue access window in a seating area in a passenger compartment of a non-main level if it is not practicable to place a rescue access window in a side of the passenger compartment (due to the presence of such structures as a bathroom, electrical locker, or kitchen) and there are no more than eight seats in the seating area. For more background on this proposal, please see the related discussion above for emergency window exits in such seating areas.

In paragraph (a)(4) FRA is proposing minimum requirements for the number and location of rescue access windows for passengers cars with a sleeping compartment or similar private compartment. Each level of a passenger car with a sleeping compartment or a similar private compartment intended to be occupied by passengers or train crewmembers would be required to have a minimum of one rescue access window in each such compartment. For purposes of this paragraph, a bathroom, kitchen, and locomotive cab are not considered a ''compartment.'' These proposed requirements reflect current practice. Amtrak cars with sleeping compartments are already equipped with a window in each such compartment that is capable of being used for both emergency egress and rescue access.

Proposed paragraph (a)(5) would address the use of dual-function windows as rescue access windows. If on any level of a passenger car the emergency window exits installed to meet the minimum requirements of § 238.113 are intended to function as rescue access windows, the requirements of paragraphs (a)(1) through (a)(4) of this section for the number and location of rescue access windows would be met for that level. Under this provision, four rescue access windows would be required for cars with dual-function windows that do not have at least one rescue access window in each side within 15 feet of the centerline of the car.

Proposed paragraph (b) would contain the requirements for the ease of operability of rescue access windows. The requirements would apply on or after the effective date of the final rule, and would require that each rescue access window be capable of being removed without undue delay by an emergency responder using either a provided external mechanism, or tools or implements that are commonly available to the responder in a passenger train emergency, such as a sledge hammer or a pry bar. FRA notes that the proposed performance requirement for removing windows ''without undue delay'' is intended to be less stringent than the performance requirement of ''rapid and easy'' for emergency window exits. For example, using a sledge hammer to shatter a glass window would be considered removal without undue delay. Windows that are not made of glass may also be designed to be removed without undue delay by an emergency responder, through use of an axe, sledge hammer or similar large impact tool to strike the window at an appropriate point so that the window panel will push inward.

Proposed paragraph (c) would contain the requirements for the dimensions of rescue access windows. Each rescue access window in a passenger car, including a sleeping car, ordered on or after 14 months after publication of the final rule, or placed in service for the first time on or after 38 months after publication of the final rule, would be required to have an unobstructed opening with minimum dimensions of 26 inches horizontally by 24 inches vertically. A rescue access window located within an exterior side door, in accordance with the requirements of proposed paragraph (a)(3)(i) of this section, would be permitted to have an unobstructed opening with minimum dimensions of 24 inches horizontally by 26 inches vertically. A seatback would not be considered an obstruction if it could be moved away from the window opening without requiring the use of a tool or other implement. The proposed dimensions for rescue access window unobstructed openings would be the same as those for emergency window exit unobstructed openings. Accordingly, FRA's reasoning for proposing these minimum dimensions for emergency window exits applies here. These minimum dimensions should allow an emergency responder equipped with a self-contained breathing apparatus to pass through the window, as well as allow a person to be carried through the window on a stretcher of common size.

As discussed above, FRA is proposing that existing rescue access window marking and operating instruction requirements, which are contained in § 223.9(d)(2), be modified and moved to paragraph (d) of § 238.114. Each rescue access window is currently required to be ''marked with a retroreflective, unique, and easily recognizable symbol or other clear'' marking. FRA is proposing to restate these requirements to make clear that rescue access windows must be marked with retroreflective material. Second, FRA is making clear that a unique and easily recognizable symbol, sign, or other conspicuous marking must be used to identify each rescue access window. FRA would replace the word ''clear'' in the existing requirements with the word ''conspicuous'' and add the word ''sign'' as another example of a conspicuous marking. This revision would make clear that use of retroreflective material to mark a rescue access window is a distinct requirement in itself, to enable emergency responders to quickly identify rescue access windows under conditions of darkness by shining a

flashlight on a car. Second, the revision would make clear that the window must also be marked by a unique and easily recognized symbol, a sign (such as ''RESCUE ACCESS''), or other conspicuous marking (such as delineation of the window by means of a contrasting color). Both requirements could be met by the same marking. Current regulations also require that each railroad post ''clear and understandable'' window access instructions either at each rescue access window or at each end of the car. FRA is proposing that the word ''clear'' be replaced with the word ''legible,'' so that railroads would be required to post ''legible and understandable'' operating instructions. Use of the word ''clear'' in § 223.9(d) has created some confusion since it can have more than one meaning, and FRA believes the proposal would eliminate any further confusion.

As noted above in the discussion of emergency window exits, the Task Force has been focusing on draft revisions to APTA SS–PS–002–98, Rev. 2, ''Standard for Emergency Signage for Egress/Access of Passenger Rail Equipment,'' in order to recommend whether some or all of its contents should be incorporated into FRA's regulations. This APTA Standard also contains detailed criteria for marking rescue access windows, including the use of retroreflective material. FRA invites comment on whether the criteria in the APTA Standard or in draft revisions to this Standard for marking rescue access windows are appropriate for use in the final rule.

FRA is also proposing to modify current requirements so that it would no longer be permissible to have window access instructions solely at the end of the car. Instead, legible and understandable rescue access window instructions, including instructions for removing the window, would be required to be posted at or near each rescue access window. The Task Force agreed that rescue access efforts could be unduly delayed by posting rescue access window operating instructions at the end of a car, potentially more than 40 feet away from the rescue access window to which the instructions apply.

Section 238.117 Emergency Communications

Currently, § 238.117 contains requirements for ''protection against personal injury,'' *e.g.*, installing guards on moving parts of passenger equipment. FRA is proposing to redesignate this § 238.117 as § 238.121. In its place, FRA is proposing that this section contain the requirements for systems that may be used for passenger and crew communication in the event of an emergency. This would keep the emergency system requirements together in section numbering sequence for benefit of the reader. This proposed section would establish emergency communication requirements for Tier I passenger equipment and replace the current emergency communication's requirements in § 238.437 for Tier II passenger equipment. Overall, the proposed requirements generally reflect current practice for Tier I passenger equipment and existing requirements for Tier II passenger equipment.

Paragraph (a) contains proposed requirements for public address (PA) systems for both existing and new Tier I and Tier II passenger cars. Most passenger cars used in commuter and intercity service are equipped with PA systems that train crews often use to notify passengers of the nature and expected duration of delays. If a person requires immediate medical attention, the crew may also use the PA to request assistance from someone onboard with medical training. Railroad representatives on the Task Force noted that PA systems are particularly beneficial in the immediate aftermath of an accident to provide instructions for appropriate passenger action. In light of a security threat or other emergency situation requiring rapid evacuation of an area, crews may also use the PA system to instruct passengers to deboard as quickly as possible. If there is a hazard on one end of the train or one side of the train, crews may use the PA system to notify passengers of the hazard and direct them to use the appropriate exit route(s) that would avoid or minimize their exposure to the hazard. Of course, all things being equal, the safest place for passengers is to remain onboard the train. Deboarding could aggravate an emergency situation, particularly if passengers step onto the right-of-way. Accordingly, the crew must have the means to provide passengers with appropriate instructions as soon as possible.

Paragraph (a)(1) would require that on or after January 1, 2012, each Tier I passenger car be equipped with a PA system that provides a means for a crewmember to communicate to all train passengers in an emergency situation. FRA understands that existing Tier I passenger cars that currently do not have PA systems are scheduled to be retired before 2012 and thus would be removed from service before the requirement would apply.

FRA notes that APTA's PRESS Task Force is currently evaluating the feasibility of a wireless, two-way communication system that would function independently of the train line, *i.e.*, not rely on the train line for power. The wireless system is intended to provide a means of two-way communication in the event that the train line is broken, as may occur as a result of certain collisions or derailments. However, FRA makes clear that it is not currently proposing to require in this section that the communication system be wireless; communication through use of a train line would be permitted.

Paragraph (a)(2) contains proposed requirements for new Tier I and all Tier II passenger cars. As is stated for existing Tier I passenger cars in proposed paragraph (a)(1), this paragraph would require that each Tier I passenger car ordered on or after 60 days after publication of the final rule, or placed in service for the first time on or after 26 months after publication of the final rule, and all Tier II passenger cars be equipped with a PA system that provides a means for a crewmember to communicate to all train passengers in an emergency situation. In addition, PA systems in new Tier I and all Tier II passenger cars would be required to provide a means for a crewmember to communicate in an emergency situation to persons in the immediate vicinity of the train (*e.g.*, on the station platform). These proposed requirements include the basic features of PA systems installed in most recently-manufactured Tier I passenger cars and in all existing Tier II passenger trains.

Finally, it should be noted that the PA system may be part of the same system as the intercom system. A shared configuration is quite common on cars equipped with both PA and intercom systems.

Paragraph (b) contains the proposed requirements for intercom systems. Traditionally, conductors and assistant conductors have been relied upon to relay information to passengers in both normal and emergency situations through face-to-face interaction or by use of a PA system. However, with smaller crew sizes, such face-to-face communication may not be possible for passengers to quickly communicate to the crew a medical emergency, safety concern, or security threat requiring immediate attention. For instance, a passenger in the last car of a train who needs to communicate a safety or security threat to a crewmember could potentially have to walk the entire length of the train to do so (assuming the crew is composed of an engineer and one conductor, who in this circumstance would be in the first car at the time). Furthermore, if the

conductor were incapacitated, passengers would need to communicate with the engineer. The Task Force therefore recommended that emergency communication systems in new passenger cars should include intercom systems to enable passengers to quickly communicate emergency situations to the train crew. These proposed requirements reflect common intercom system configurations for new passenger cars.

Specifically, paragraph (b)(1) contains the proposed intercom system requirements for new Tier I and all Tier II passenger cars. Each Tier I passenger car ordered on or after 60 days after publication of the final rule, or placed in service for the first time on or after 26 months after publication of the final rule, and all Tier II passenger cars would be required to be equipped with an intercom system that provides a means for passengers and crewmembers to communicate with each other in an emergency situation. Passenger cars that are at least 45 feet in length would be required to have a minimum of one intercom in each end (half) of each car that is accessible to passengers without requiring the use of a tool or other implement. Although some passenger cars currently equipped with intercom systems have one located in each end, others have only one per car. An intercom in each half of a car is proposed so that passengers would have access to an intercom within half a car length, which is normally 42 to 45 feet, and would not have to pass into an adjoining car. As long as intercoms are accessible to passengers, they may be placed anywhere in each end (half) of the car and not necessarily in the far ends.

Proposed paragraph (b)(1) would continue the logic of existing § 238.437 by requiring only one intercom for a passenger car that does not exceed 45 feet in length, such as the Talgo passenger cars operated by Amtrak. As the length of a conventional passenger is typically between 85 and 90 feet, FRA believes it appropriate to require a car not more than half that length to have only one intercom location. This proposed paragraph would also continue to require, as § 238.437 currently does, that a Tier II passenger car ordered prior to May 12, 1999, be equipped with only one intercom. This exception corresponds to the current requirements for Tier II passenger equipment, as discussed in the April 23, 2002, final rule. *See* 67 FR 19986. The preamble to that rule explained that after FRA had proposed that intercoms be located at each end of a Tier II passenger car, Amtrak indicated that not all passenger cars in its high-speed trainsets had intercom transmission locations at each end of the cars, and further noted that the intercoms would be difficult to install at the non-vestibule ends of the cars. As these trainsets were in development in advance of both the then-proposed and final rules, FRA made an exception for all cars ordered prior to May 12, 1999.

Some Task Force members were concerned that making the intercoms accessible to passengers without requiring the use of a tool or other implement could lead to misuse that could unnecessarily distract the train operator. However, representatives from Amtrak and various commuter railroads that operate cars with intercom systems indicated that they have successfully implemented measures to deter misuse. For instance, on some passenger cars, the intercom transmission device is located in a safety compartment designated and marked for emergency communications only. FRA invites comment on whether passenger misuse of intercom systems has been identified as a problem, and, if so, FRA invites suggestions for measures that could curb such misuse without rendering the systems inaccessible to passengers in an emergency. FRA makes clear that intercoms would need to be accessible to passengers with disabilities to the extent required by the ADA and its implementing regulations.

Paragraph (b)(2) would require that the location of each intercom intended for passenger use be clearly marked with luminescent material and that legible and understandable operating instructions be posted at or near each such intercom to facilitate passenger use. These requirements would apply to each Tier I passenger car on or after 26 months after publication of the final rule, and continue to apply to each Tier II passenger car. Some railroad representatives noted that although instructions are currently posted at the intercom locations on their cars, there are no luminescent markings. Thus, luminescent marking of each intercom location is proposed to ensure that the intercom can be easily identified for use in the event that both normal and emergency lighting are not functioning. The posted operating instructions, however, would not need to be luminescent under the proposal, as some Task Force members have indicated that the instructions may be easier to read when not luminescent.

As noted in the discussion concerning emergency window exit signage, above, APTA SS–PS–002–98, Rev. 2, ''Standard for Emergency Signage for Egress/Access of Passenger Rail Equipment,'' contains specific criteria for luminescent markings. The Task Force has been focusing on additional revisions to this APTA Standard in order to recommend whether to incorporate some or all of its contents into part 238 by reference and thereby require that luminescent markings for intercoms comply with the Standard as it relates to luminescent markings. APTA PRESS has also indicated that they will revise APTA SS–PS–001–98, ''Standard for Passenger Railroad Emergency Communications,'' to include more specific requirements for marking emergency communication systems. In the meantime, FRA invites comment whether the luminescent material that would be required by this proposed paragraph should be HPPL material. FRA will evaluate any comments received in considering whether a requirement for use of HPPL material should be established in the final rule.

Paragraph (c) would continue to require that PA and intercom systems on Tier II passenger trains have back-up power for a minimum period of 90 minutes. *See* § 238.437(d). An example of a back-up power source is a passenger car battery. The Task Force approved a recommendation for a back-up power requirement for new Tier I passenger cars, similar to the requirements contained in § 238.115(b)(4) for emergency lighting back-up power systems. That is, the back-up power system would have to be capable of operating in: all equipment orientations within 45 degrees of vertical; after the initial shock of a collision or derailment resulting in individually applied accelerations of 8g longitudinally, 4g laterally, and 4g vertically; and for at least 90 minutes. Yet, this recommendation was not forwarded to the Working Group, due to an oversight. Given that backup power to the PA and intercom systems could be supplied by the same source as that for the emergency lighting system, and that the amount of power required would likely be only a fraction of that required for the emergency lighting system, FRA has no reason to believe that this recommendation would not have received the full support of the Working Group or full RSAC. As a result, FRA is considering inserting in the final rule a back-up power system requirement containing the provisions recommended by the Task Force, and FRA invites comment on doing so. In particular, FRA seeks comment whether the system needs to be capable of providing continuous communication over the 90-minute period, or only intermittent

communication, which would draw less battery power. Providing the means to communicate continually for a 90-minute period may not be necessary, and FRA invites comment as to how many minutes of intermittent communication would need to be provided.

Section 238.118 Emergency Roof Access

This section, which is being proposed for addition to part 238, contains emergency roof access requirements for Tier I and Tier II passenger cars ordered on or after 14 months after publication of the final rule, or placed in service for the first time on or after 38 months after publication of the final rule. Requirements for Tier II power cars and existing Tier II passenger cars remain in § 238.441, as discussed below. The emergency roof access requirements for Tier II passenger equipment contained in § 238.441 and APTA PRESS recommended practice RP–C&S–001–98, ''Recommended Practice for Passenger Equipment Roof Emergency Access,'' served as the basis for the proposed requirements in this section.

Emergency roof access locations (roof hatches or structural weak points) can be especially useful in emergency situations where passenger cars have rolled onto their sides following certain collision and derailment scenarios. All things being equal, car rollover or tilt should result in more severe injuries than when a car remains upright, as occupants may be thrown greater distances inside the car. This increases the potential need for rescue access of the car's occupants by correspondingly reducing the likelihood that the occupants can evacuate the car on their own. In such a situation, doors, which are the preferred means of access under normal circumstances, may be rendered inoperable due to structural damage to the door or the door pocket, as a result of the incident. In particular, end doors, which due to the direction they face would normally be better suited for use than side doors when a car has tilted or rolled onto its side, may also be blocked, jammed, or otherwise unavailable for use. Moreover, although emergency responders may be able to enter a car that is on its side via a rescue access window, the removal of an injured occupant through a side window in such circumstances can be difficult or complicated, especially depending upon the condition of the occupant.

Paragraph (a) contains proposed requirements for the number and dimensions of emergency roof access locations. Each passenger car ordered on or after 14 months after publication of the final rule, or placed in service for the first time on or after 38 months after publication of the final rule, must have a minimum of two emergency roof access locations. Although Tier II passenger cars and power cars are currently required to have at least one roof hatch for emergency roof entry or at least one structural weak point for properly equipped emergency personnel to quickly access a car, many new Tier I multi-level passenger cars are currently being manufactured with up to four structural weak points in the roof. In determining the minimum number of access points needed for new Tier I and Tier II passenger cars, the Emergency Preparedness Task Force agreed it would be useful to protect the emergency roof access location against crush at either end of the car. To do so would require placement of the location away from the far ends of the car or, at a minimum, placement not in the same end (half) of the car in the event that the end with the access points becomes crushed. Second, the Task Force thought it prudent to facilitate rescue access by having the access points located within the bottom half of the car's roof, so that the bottom of the opening would be closer (lower) to the ground and thus, presumably, more easily accessible when the car is on its side. This would require having one access point on either side of the roof's longitudinal centerline. To accomplish both goals, the Task Force recommended having two access points located at diagonally opposite quadrants of the roof. *See* Figure 3 to subpart B.

Under the proposal, each roof access location would be required to have a minimum opening of 26 inches longitudinally (*i.e.*, parallel to the longitudinal axis of the car) by 24 inches laterally. These dimensions are consistent with the minimum dimension requirements for emergency window exits specified for new passenger cars in the 1999 Passenger Equipment Safety Standards final rule, *see* 64 FR 25673, and were based on specifying opening requirements necessary to allow passage of an emergency responder equipped with a self-contained breathing apparatus or fire gear, as well as to allow passage of a person being carried on a backboard or basket stretcher, *see* 64 FR 25595–25596.

In discussing the issue of appropriate dimensions for emergency roof access locations, Task Force members noted that in order to gain access to a car via a structural weak point, a responder would normally have to cut through the roof skin, which is usually steel, and then through the lining. In some cases, a responder may have to cut through additional non-rigid structures. If the outside dimensions are only 26 inches longitudinally by 24 inches laterally, and multiple cuts through car structures are required to gain access to the passenger compartment, this could present a problem for emergency responders, since each subsequent cut made using a saw would potentially result in a smaller opening. Consequently, railroads and car builders would need to take this into account when designing structural weak points and ensure that the dimensions of the final cut in such circumstances would still result in an opening meeting the minimum dimension requirements.

Paragraph (b) would provide that permissible means of emergency roof access include either a hatch, or a clearly marked structural weak point in the roof for access by properly equipped emergency response personnel. Structural weak points, commonly known as ''soft spots,'' are usually created by routing cables, wiring, and piping in the roof of the car around the location designated for roof access. The proposal would afford railroads the flexibility of installing either roof hatches or providing structural weak points in the roof, as each individual railroad would be in the best position to decide which one is preferable taking into consideration such factors as the car's intended use and the safety hazards presented by one versus the other. For example, although roof hatches could provide a means of self-evacuation in addition to a means of access, placing them in the roofs of multiple-unit (MU) locomotives which rely on overhead catenary systems for power could create an electrocution hazard for occupants attempting to self-evacuate in an emergency.

Paragraph (c) would require that emergency roof access points be located, insofar as practical, in such a manner that when a car is on its side: (i) One emergency roof access location is wholly within each half of the roof as divided top from bottom; and (ii) one emergency roof access location is wholly within each half of the roof as divided left from right. *See* Figure 3 to subpart B. Use of the word ''practical'' would allow railroads and car builders some discretion regarding the location of the access points and would be necessary to accommodate particular equipment types. For instance, some electric MU equipment has pantographs that take up a significant portion of one end of the rooftop, making it difficult to place one emergency access location wholly within each half of the car's roof.

Additionally, on some passenger cars that have luggage racks, it may be more practical to place the emergency access location so that it is not wholly within the bottom half of the car's roof (when the car is on its side) if doing so would facilitate rescue access by eliminating the need for emergency responders to cut through or maneuver around the luggage racks to get to passengers.

Paragraph (d) contains proposed requirements related to obstructions and would require that the ceiling space below each emergency roof access location be free from wire, cabling, conduit, and piping. Additionally, paragraph (d) would require that, where practicable, this space also be free of rigid secondary structure(s) (*e.g.*, diffusers and diffuser support, lighting back fixtures, mounted PA equipment, and luggage racks). In determining the placement of the emergency roof access locations, railroads and manufacturers would need to consider the requirements of § 238.118 as a whole. Use of the word ''practical'' in paragraph (c) is intended to allow more discretion than use of the word ''practicable'' in this paragraph (d). For example, in a situation where placement of an emergency roof access location wholly within the bottom half of a car's roof (when the car is on its side) would result in obstruction by a rigid secondary structure, a railroad would be required to place the roof access location elsewhere so as to avoid the obstruction, even though this may result in its placement partially in both sides of the roof, or otherwise not wholly within each half of the roof. In such a situation, the rule would recognize that avoidance of the rigid secondary structure would be more critical than the exact location of the emergency roof access location.

If emergency roof access is provided by means of a hatch, it must be possible to push interior panels or liners out of their retention devices and into the interior of the vehicle after removing the hatch. For example, for car interior aesthetics, it would not be uncommon to cover the area below the hatch with lining and use velcro to secure the lining in place. This type of cover and securement would make it possible for emergency responders to reach the interior of the vehicle by pushing in the lining after removing the hatch. This is just one example, and other types of covers and means of securement would be permissible provided emergency responders would be able to push through them to reach the interior of the vehicle after removing the hatch.

If emergency roof access is provided by means of a structural weak point, the proposal states that it shall be permissible to cut through interior panels, liners, or other non-rigid secondary structures after making the cutout hole in the roof. However, any such additional cutting that would be required must permit a minimum opening of the dimensions specified in paragraph (a) to be maintained. In this regard, having to make additional cuts could affect the size of the markings indicating the structural weak points, as proposed to be required in paragraph (e).

Paragraph (e) contains proposed requirements for providing markings of, and instructions for, emergency roof access locations. Each emergency roof access location would be required to be clearly marked with retroreflective material of contrasting color. The retroreflective material is intended to enable emergency responders to quickly identify the access locations by shining a light on the roof. FRA notes that APTA is in the process of revising APTA SS–PS–002–98, Rev. 2, ''Standard for Emergency Signage for Egress/Access of Passenger Rail Equipment,'' which contains more specific requirements for retroreflectivity than provided for in this NPRM. The Task Force has been reviewing draft revisions to this standard and intends to make a recommendation concerning its incorporation into part 238, once the standard is revised. As a result, the final rule may incorporate more detailed APTA retroreflectivity criteria for marking emergency roof access locations.

Paragraph (e) also proposes to require that legible and understandable instructions be posted at or near each emergency roof access location. These instructions would not need to be retroreflective for two principal reasons: it can be difficult to read writing on certain grades of retroreflective materials while shining light on them, and light used to identify the emergency rescue access locations would likely be available for reading the instructions as well. This proposal is consistent with the existing and proposed requirements for marking rescue access windows. As an additional requirement, paragraph (e) proposes that if emergency roof access is provided by means of a structural weak point, the line along which the roof skin would be cut would be required to be clearly marked with retroreflective material. The size of the border marking may have to be larger than 24 inches laterally by 26 inches longitudinally to ensure that any cuts in addition to the cut through the roof skin would retain the minimum dimensions required for the opening. Structural weak points would also be required to have a sign plate with a retroreflective border that states as follows:

CAUTION—DO NOT USE FLAME-CUTTING DEVICES.

CAUTION—WARN PASSENGERS BEFORE CUTTING.

CUT ALONG DASHED LINE TO GAIN ACCESS.

ROOF CONSTRUCTION—[STATE RELEVANT DETAILS].

In particular, the proposal would require providing a warning against use of a flame-cutting device during a rescue access attempt to avoid creation of a fire hazard. This is especially important since rescue access is usually a last resort for those who cannot self-evacuate due to being injured or disabled, as well as due to the lack of a viable exit. Emergency responders usually have a variety of tools available to them at the scene of an emergency, including a specialized saw which can be used to cut through steel, and do not have to rely on flame-cutting devices.

Section 238.121 Protection Against Personal Injury

As discussed above, FRA is proposing to redesignate current § 238.117 (''Protection against personal injury'') as § 238.121 with no substantive change to the section's requirements.

Subpart D—Inspection, Testing, and Maintenance Requirements for Tier I Passenger Equipment.

Section 238.303 Exterior Calendar Day Mechanical Inspection of Passenger Equipment

This section contains the proposed requirements related to the performance of exterior mechanical inspections of passenger cars (*e.g.*, passenger coaches, MU locomotives, and cab cars) and unpowered vehicles used in a passenger train each calendar day that the equipment is used in service. Paragraph (e) of this section identifies the various components that are required to be inspected as part of the exterior calendar day mechanical inspection.

FRA proposes to insert a new paragraph (e)(18) that would require that all rescue-access-related exterior markings, signage, and instructions required by proposed § 238.114 (rescue access windows) and existing § 239.107 (emergency exits) be in place and, as applicable, conspicuous, and/or legible. Proposed paragraph (e)(18)(i) would allow passenger cars with any required rescue-access-related exterior markings, signage, or instructions that are missing, illegible, or inconspicuous, as applicable, to remain in passenger service until the equipment's fourth

exterior calendar day mechanical inspection or next periodic mechanical inspection required under § 238.307, whichever occurs first, after the non-complying condition is discovered, where it would have to be repaired or removed from service.

The four-day repair flexibility is proposed to allow railroads to schedule repairs at locations where they can be performed safely and in a manner that would avoid disrupting normal operations. Railroad representatives on the Task Force noted that not all yards are properly equipped for personnel to safely, effectively, or efficiently remove and replace signage on the exterior of cars. For example, work on the upper levels of cars can be more safely performed at maintenance facilities that have platform ladders. In addition, various vendors noted that signs and markings must be applied on a dry, clean surface at temperatures of approximately 65 degrees Fahrenheit and must be allowed to set for up to two hours. Graffiti may render a sign, marking, or instruction illegible and thus in need of replacement. Proper removal of a sign can be a long and tedious process because the adhesives used are difficult to remove. This coupled with the conditions necessary for application of a sign may make it an unfeasible task for some railroads to perform during an exterior calendar day mechanical inspection. Furthermore, some long-distance intercity train trips take three or four days to complete and many of the en-route repair locations may not be appropriate places to make the repairs to signage. Removing a car from service for missing rescue access signage before it reaches its final destination could result in stranding passengers on platforms or require that the same number of passengers ride in a fewer number of cars, with fewer emergency exits available to them as a whole. Thus, the safety of both railroad employees and railroad passengers necessitates that some flexibility be provided that would allow equipment to continue to operate in service for a sufficient amount of time to reach a suitable repair location or the train's final destination.

In paragraph (e)(18)(ii), FRA proposes to provide even greater flexibility for use of passenger cars with required rescue-access-related exterior markings, signage, or instructions that are missing, illegible, or inconspicuous on a side of a level of a car that has more than 50 percent of the windows designated and properly marked for rescue access. Such a car would be permitted to remain in passenger service until no later than the car's next periodic mechanical inspection required under § 238.307, where it would have to be repaired or removed from service. FRA agrees with the Task Force recommendation that this added flexibility for these types of cars recognizes the extra effort that a railroad undertakes by designating and identifying a greater number of rescue-access windows than would be required under proposed § 238.114. A single act of vandalism may destroy multiple signs, markings, and instructions or render them illegible or inconspicuous. Placement or replacement of several signs could take more time than may be scheduled for maintenance of the car prior to the periodic mechanical inspection. FRA believes it would make little sense to require immediate repair of the damaged markings when more than a sufficient number meeting the requirements of proposed § 238.114 are still present on the equipment. Moreover, without such flexibility, railroads would likely be discouraged from designating more rescue-access windows than are proposed to be required by § 238.114.

Similarly, proposed paragraph (e)(18)(iii) would provide flexibility for the continued use of a sleeping car that has more than two consecutive windows with any required rescue-access-related exterior markings, signage, or instructions at or near their locations that are missing, illegible, or inconspicuous. Such a car may be operated in passenger service until the car's next periodic mechanical inspection required under § 238.307, where it would have to be repaired or removed from service. FRA believes this flexibility is necessary because each sleeping compartment intended to be occupied by passengers or train crewmembers would be required to have a minimum of one rescue access window in the compartment under proposed § 238.114 and most sleeping compartments have only one window. If two consecutive windows were missing exterior markings, signage, or instructions, an emergency responder would still be readily able to gain access via the window by relying on the signage, markings, or instructions posted at a nearby window.

Proposed paragraph (e)(18)(iv) requires that a record of any non-complying marking, signage, or instruction described in paragraphs (e)(18)(i) through (iii) be maintained. The record would have to contain the date and time that the defective condition was first discovered and be retained until all necessary repairs were completed. These records are necessary for purposes of tracking when the defect was first discovered and would be utilized in determining when repairs would have to be made on cars that remain in passenger service. Most commuter and intercity railroads already keep these type of records electronically.

Section 238.305 Interior Calendar Day Mechanical Inspection of Passenger Cars

This section contains the requirements related to the performance of interior calendar day mechanical inspections of passenger cars (*e.g.*, passenger coaches, MU locomotives, and cab cars) each calendar day that the equipment is used in service. Paragraph (c) identifies the various components that are required to be inspected as part of the interior calendar day mechanical inspection. Under the current rule, all en route-defects and all noncomplying conditions under this section must be repaired at the time of the daily interior inspection or the equipment is required to be locked-out and empty in order to be placed or remain in passenger service, with the exception of non-complying conditions related to paragraphs (c)(5) through (c)(10).

FRA is proposing to slightly modify existing paragraph (c)(10) in order to add a condition under which a car with non-compliant end doors and side doors may continue in passenger service pursuant to paragraph (d) of this section. The current conditions for such operation are: If at least one operative and accessible door is available on each side of the car; and a notice is prominently displayed directly on the defective door indicating that the door is defective. In addition to those conditions, FRA proposes to require that the train crew be provided written notification of the non-complying condition. This additional condition would ensure that crewmembers are aware of a door that may not be available for use in an emergency situation that requires the off-loading of passengers. Under the existing regulation, train crews may not realize a door is defective until they actually try to use it. If an emergency requiring the rapid off-loading of passengers should occur before the crew notices that the door is inoperative, then the crew might direct passengers to that door, which could unnecessarily delay the evacuation of the train.

FRA is also proposing to add new paragraph (c)(12) to cover the inspection of PA and intercom systems. Paragraph (c)(12) contains proposed requirements for ensuring that, on passenger cars so equipped, PA and intercom systems are operative and function as intended as part of the interior calendar day mechanical inspection. This paragraph

also proposes flexibility for handling non-complying equipment, provided the train crew is given written notification of the defect and a record of the time and date the defect was discovered is maintained. Thus, a passenger car with an inoperative or non-functioning PA or intercom system would be permitted to remain in passenger service until no later than the car's fourth interior calendar day mechanical inspection or next periodic mechanical inspection required under § 238.307, whichever occurs first, or for a passenger car used in long-distance intercity train service until the eighth interior calendar day mechanical inspection or next periodic mechanical inspection required under § 238.307, whichever occurs first, after the non-complying condition is discovered. At that time, the PA or intercom system, or both, would have to be repaired, or the car would have to be removed from service.

Railroad representatives on the Task Force noted that PA systems are currently inspected on a daily basis and any necessary repairs are made at the first convenient opportunity. The provision requiring that the train crew be given written notification of any non-compliant PA or intercom is proposed to ensure that the crew is aware of any non-functioning system(s) and will not rely upon any such system for communication in the event of an emergency situation. Without such notification, the train crew could mistakenly rely on a system that is inoperative, which could potentially hinder resolution of an emergency situation where the crew relies on using the PA or intercom system to communicate instructions or warnings of hazards to passengers.

In proposing to modify paragraph (c), FRA is reserving paragraph (c)(11) for a contemplated requirement that all low-location emergency exit path markings required by § 238.116 be in place and conspicuous as part of the interior calendar day mechanical inspection. Low-location emergency exit path markings provide a visual means for passenger car occupants to locate emergency door exits under conditions of limited visibility due to darkness or the presence of smoke, or both. FRA intends to propose minimum standards for low-location emergency exit path markings by a separate NPRM as new § 238.116, and this document proposes to reserve § 238.116 for inclusion of these minimum standards at a later time.

Finally, FRA notes that it is considering clarifying paragraph (c)(7), the interior calendar day inspection requirement that ''[a]ll safety-related signage is in place and legible.'' FRA is considering including in paragraph (c)(7) express references to signage, as well as markings and instructions, required by parts 238 and 239. FRA invites comment on whether such clarification should be provided in the final rule.

Section 238.307 Periodic Mechanical Inspection of Passenger Cars and Unpowered Vehicles Used in Passenger Trains

This section contains the requirements for performing periodic mechanical inspections on all passenger cars and all unpowered vehicles used in passenger trains. Paragraph (c) identifies the various components that are required to be inspected as part of the periodic mechanical inspection that is required to be conducted no less frequently than every 184 days. FRA proposes to modify paragraph (c)(5), which currently requires that emergency lighting systems be operational, to include other emergency systems such as emergency roof access markings and instructions. Specifically, paragraph (c)(5)(i) would continue to require that emergency lighting systems required under § 238.115 are in place and operational, and paragraph (c)(5)(iii) would require that emergency roof access markings and instructions required under proposed § 238.118(e) are in place and, as applicable, conspicuous, and/or legible. FRA does note that if emergency lighting is found to be defective at any time other than the periodic mechanical inspection, it must be brought into compliance pursuant to the provisions contained in § 238.17 related to non-running-gear defects.

In proposing the modification, FRA is reserving paragraph (c)(5)(ii) for a contemplated requirement that electrical low-location emergency exit path markings required by § 238.116 be in place and operational. As discussed above, FRA intends to propose minimum standards for low-location emergency exit path markings by a separate NPRM as new § 238.116.

Subpart E—Specific Requirements for Tier II Passenger Equipment

Section 238.437 [Reserved]

This section formerly contained the emergency communication requirements for Tier II passenger equipment. These requirements would be moved to new § 238.117 (''Emergency communications'') to be integrated with the new emergency communication requirements for Tier I passenger equipment, as stated above. This is consistent with FRA's desire to prescribe, to the extent possible, the same emergency system requirements for all passenger trains, regardless of train speed. Section 238.437 is therefore being removed and reserved. Please see § 238.117 for a discussion of the emergency communication requirements for Tier II passenger equipment.

Section 238.441 Emergency Roof Access

In issuing the Passenger Equipment Safety Standards, FRA required that Tier II passenger equipment have either a roof hatch or a clearly marked structural weak point in the roof to provide quick access for properly equipped emergency response personnel. *See* 64 FR 25689. FRA stated that the final rule did not contain such requirements for Tier I passenger equipment and that there was no consensus within the Passenger Equipment Safety Standards Working Group to do so. *See* 64 FR 25642. Nevertheless, FRA noted that it believed that APTA PRESS Task Force efforts would address requirements for Tier I passenger equipment and that FRA intended to reexamine the requirements of this section in future rulemaking with a view to applying emergency roof access requirements to Tier I passenger equipment. *Id.*

As discussed above, FRA is proposing in § 238.118 to apply emergency roof access requirements to Tier I passenger equipment and to make the requirements the same for new Tier I and Tier II passenger cars. In doing so, FRA is proposing to revise § 238.441, including the section heading, to reconcile the requirements of these sections and thereby limit the application of these separate requirements in § 238.441 to existing Tier II passenger cars and to any Tier II power car (whether existing or new). At the same time, FRA is proposing to increase the required dimensions of emergency roof access locations for existing Tier II passenger equipment and for any power car, and to provide general marking and instruction requirements for such equipment. FRA believes that existing Tier II passenger equipment would be in compliance with the proposed revisions to this section and that these revisions would more closely approximate the requirements proposed for new passenger equipment.

Specifically, paragraph (a) would be revised to limit its applicability to Tier II passenger cars both ordered prior to 14 months after publication of the final rule and placed in service for the first

time prior to 38 months after publication of the final rule, and to Tier II power cars. As specified in proposed paragraph (b), new Tier II passenger cars would be required to comply with the standards contained in proposed § 238.118, which were developed exclusively for passenger cars. Paragraph (a) would also be modified to revise the dimensions of the required opening from 18 inches by 24 inches, to 24 inches by 26 inches to be consistent with the proposed requirements for Tier I passenger equipment. In addition, paragraph (a) would be revised to require that each emergency roof access location be conspicuously marked, and that legible and understandable operating instructions be posted at or near each such location.

The fundamental differences between the requirements proposed in § 238.118 for new passenger cars and those proposed in revised paragraph (a) of § 238.441 for existing Tier I passenger cars and for Tier II power cars are as follows: the number of required emergency roof access locations—two in proposed § 238.118, and one in existing § 238.441—and the specifications for their location—detailed specifications are proposed in § 238.118, while more general requirements would be in § 238.441. These differences reflect the consideration given to existing equipment built in compliance with § 238.441 of the 1999 final rule, and also recognize that a requirement for two emergency roof access locations on a Tier II power car would not be reasonable given that the only normally occupied area in such a car is the cab compartment, in which only one emergency roof access location can be placed.

Paragraph (b) would be revised to make clear that each passenger car ordered on or after 14 months after publication of the final rule, or placed in service for the first time on or after 38 months after publication of the final rule, would be required to comply with the emergency roof access requirements specified in § 238.118. Section 238.118 proposes to subject new Tier I and Tier II passenger cars to the same emergency roof access requirements, and this revision to paragraph (b) is intended to conform with that proposal.

Appendix A to Part 238—Schedule of Civil Penalties

Appendix A to part 238 contains a schedule of civil penalties for use in connection with this part. FRA intends to revise the schedule of civil penalties in issuing the final rule to reflect revisions made to part 238. Because such penalty schedules are statements of agency policy, notice and comment are not required prior to their issuance. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, commenters are invited to submit suggestions to FRA describing the types of actions or omissions for each proposed regulatory section that would subject a person to the assessment of a civil penalty. Commenters are also invited to recommend what penalties may be appropriate, based upon the relative seriousness of each type of violation.

VI. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed 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 the DOT Central Docket Management Facility located in Room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC 20590. Access to the docket may also be obtained electronically through the Web site for the DOT Docket Management System at *http://dms.dot.gov*. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590; please refer to Docket No. FRA–2006–25273. FRA invites comments on the regulatory evaluation.

Certain of the proposed requirements reflect current industry practice, or restate existing regulations, or both. As a result, in calculating the costs of this proposed rule, FRA has neither included the costs of those actions that would be performed voluntarily in the absence of a regulation, nor has FRA included the costs of those actions that would be required by an existing regulation.

As presented in the following table, FRA estimates that the present value (PV) of the total 20-year costs which the industry would be expected to incur to comply with the requirements proposed in this rule is $15.4 million:

20-YEAR PV COSTS INCURRED

Description	20-year PV total
Costs:	
(238.113) Emergency Window Exits	
—Installation of pull handles/gaskets in two intermediate level windows	$4,050
—Replacement of instructions for window removal to ensure that potential hindrances are addressed	10,880
—Installation of pull handles/gaskets in four intermediate level windows	1,440
(238.114) Rescue Access Windows	
—Installation of two windows per car	163,880
—Marking and instructions	11,640
(238.117) Emergency Communications	
—Addition of second intercom transmission location	213,675
—Addition of outside speaker for public address system	101,526
(238.118) Emergency Roof Access	
—Structural weak points—engineering redesign	80,000
—Structural weak points—additional materials	117,250
(238.303, 238.305, and 238.307) Exterior, Interior, and Periodic Inspection, Testing, and Maintenance	14,717,246
Total Costs	15,421,507

If over the 20-year period covered by the regulatory evaluation the equivalent of 7.7 lives would be saved as a result of implementing the proposed requirements (from a combination of fatalities prevented, and injuries avoided or minimized), the proposed rule would be cost-justified by the safety benefits alone. FRA believes it is reasonable to expect that the safety benefits would exceed the costs of the proposed requirements. Although passenger railroads offer the traveling public one of the safest forms of transportation available, the potential for injuries and loss of life in certain situations is very high. Nevertheless, FRA cannot predict with reasonable confidence the actual numbers of lives that would be saved. The number and severity of each future passenger train accident or incident would determine the ultimate effectiveness of the proposed requirements; these cannot be forecasted with a level of precision that would allow us to predict the actual need for the measures proposed in the rule. Yet, FRA believes that the proposed requirements would protect passengers and crew members against known safety concerns in a cost-effective manner. These safety concerns are discussed in detail, above, in the preamble to this proposed rule.

In particular, as discussed in Section III.C., the proposed requirement for an intercom system on Tier I passenger trains is intended to allow passengers to communicate to the crew a medical emergency, report a fire onboard the train, or provide notification of other emergency situations as quickly as may be necessary. In fact, some passenger lives may have already been saved at least in part due to the availability of an intercom system because fellow passengers were able to use the intercom to alert a crew member that a passenger onboard their car was experiencing a medical emergency. This led the crew to call the dispatcher to arrange for prompt medical attention at a nearby station. FRA believes that over the next 20 years the availability of an intercom system to passengers may save the life of one or more passengers experiencing a medical emergency.

The availability of an intercom system to passengers may also save the life of one or more passengers in other emergency situations. For example, on December 7, 1993, a gunman opened fire onboard a LIRR commuter train traveling between New Hyde Park and Garden City, NY, killing 6 people and injuring 19 others before he was overpowered by passengers. No intercom system was available to the passengers, and the train crew was not aware of the situation until the train arrived at the next station where police happened to be present on the platform. The availability of an intercom system to passengers in such a situation could allow passengers to provide notification to the crew in a timely manner so that the crew could contact the appropriate authorities to obtain emergency assistance and take other necessary action. This may include providing a direct warning over the train's public address system both to passengers on the train as well as to passengers in the immediate vicinity of the train on the station platform. FRA is, of course, proposing to require that Tier I passenger trains be equipped with public address systems.

Further, over the past 20 years, other accidents and incidents have occurred where, if they were to recur, the availability of the safety features proposed in this rule may save lives or prevent or minimize injuries. For instance, eleven lives were lost in a February 16, 1996 collision between a Maryland Rail Commuter (MARC) train and an Amtrak passenger train in Silver Spring, Maryland. The collision breached a fuel tank of an Amtrak locomotive, spraying fuel into the lead vehicle of the MARC train, which erupted in fire. The fire and collision trapped a number of people in the lead vehicle. Having rescue access windows available to emergency responders on the scene of such a situation may facilitate the rescue of one or more passengers.

FRA notes that similar accidents and incidents have unique circumstances which ultimately determine their severity in terms of casualties, and again emphasizes that actual future events cannot be predicted with certainty. Nonetheless, it is possible that over the next 20 years the safety features proposed to be required by this rule would preserve life in a single event in an amount that exceeds the entire estimated costs of the rule.

FRA seeks comments and input from all interested parties regarding the estimates and statements contained in the regulatory evaluation developed in connection with this NPRM.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of proposed and final rules to assess their impact on small entities. FRA has prepared and placed in the docket an Analysis of Impact on Small Entities (AISE) that assesses the small entity impact of this proposal. Document inspection and copying facilities are available at the DOT's Central Docket Management Facility located in Room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC 20590. Docket material is also available for inspection on the Internet at *http://dms.dot.gov*. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590; please refer to Docket No. FRA–2005–23080.

The AISE developed in connection with this NPRM concludes that this proposed rule would not have a significant economic impact on a substantial number of small entities. The principal entities impacted by the rule would be governmental jurisdictions or transit authorities-none of which is small for purposes of the United States Small Business Administration (*i.e.*, no entity serves a locality with a population less than 50,000). These entities also receive Federal transportation funds. Although these entities are not small, the level of costs incurred by each entity should generally vary in proportion to either the size of the entity, or the extent to which the entity purchases newly manufactured passenger equipment, or both. Tourist, scenic, excursion, and historic passenger railroad operations would be exempt from the rule, and, therefore, these smaller operations would not incur any costs.

The rule would impact passenger car manufacturers. However, these entities are principally large international corporations that would not be considered small entities. Some manufacturers and suppliers of emergency signage and communication systems may be impacted by the rule, and these may be small entities. Yet, FRA believes that any impact on these entities would neither be significant nor negative, to the extent demand for products and services they provide actually increases.

Having made these determinations, FRA certifies that this proposed rule is not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act or Executive Order 13272.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) for review and approval in accordance with 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—49 CFR	Respondent universe (railroads)	Total annual responses	Average time per response (minutes)	Total annual burden hours	Total annual burden cost
238.113—Emergency Window Exits: Marking and Instructions.	22	482 markings	60/90/120	694	$27,760
238.114—Rescue Access Windows: Marking and Instructions.	22	964 markings	45	723	[1]0
238.117—Emergency Communications: Intercom System—Marking and Instructions.	22	116 markings	5	10	400
238.118—Emergency Roof Access: Marking and Instructions.	22	234 marked locations ...	30	117	4,680
238.303—Exterior Calendar Day Mechanical Inspection of Passenger Equipment:					
—Repair/Replacement of Non-complying Rescue Access Window Markings.	22	150 replacement markings.	20	50	2,000
—Records of Non-complying Rescue Access Window Markings.	22	150 records	2	5	200
238.305—Interior Calendar Day Mechanical Inspection of Passenger Cars:					
—Non-complying Conditions of End Doors and Side Doors.	22	260 notifications +260 notices.	1	9	360
—Written Notification to Train Crew of Inoperative/Non-functioning Public Address and Intercom Systems.	22	300 notifications	1	5	200
238.307—Periodic Mechanical Inspection of Passenger Cars: Replacement of Non-complying Emergency Roof Access Marking and Instructions.	22	260 replacement markings.	20	87	3,480

[1] Incl. in RIA.

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning the following issues: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan at (202) 493–6292.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan, Federal Railroad Administration, 1120 Vermont Avenue, NW., Mail Stop 17, Washington, DC 20590.

OMB is required to make a decision concerning the collection of information requirements contained in this NPRM 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. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

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 new information collection requirements resulting from this rulemaking action prior to the effective date of a final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132, issued on August 4, 1999, which directs Federal agencies to exercise great care in establishing policies that have federalism implications. *See* 64 FR 43255. This proposed rule 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 various levels of government.

One of the fundamental federalism principles, as stated in Section 2(a) of Executive Order 13132, is that ''[f]ederalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people.'' Congress expressed its intent that there be national uniformity of regulation concerning railroad safety matters when it issued 49 U.S.C. 20106, which 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 that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. This intent was expressed even more specifically in 49 U.S.C. 20133, which mandated that the Secretary of Transportation prescribe ''regulations establishing minimum standards for the safety of cars used by railroad carriers to transport passengers'' and consider such things as ''emergency response procedures and

equipment'' before prescribing such regulations. This proposed rule is intended to add to and enhance the regulations issued pursuant to 49 U.S.C. 20133.

FRA notes that the above factors have been considered throughout the development of this NPRM both internally and through consultation within the RSAC forum, as described in Section II of this preamble. The full RSAC, which reached consensus on the proposed rule text before recommending the proposal to FRA, has as permanent voting members two organizations representing State and local interests: AASHTO and ASRSM. As such, these State organizations concurred with the proposed requirements. The RSAC regularly provides recommendations to the FRA Administrator for solutions to regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the Federalism implications of this rulemaking from these representatives or from any other representative.

For the foregoing reasons, FRA believes that this proposed rule is in accordance with the principles and criteria contained in Executive Order 13132.

E. Environmental Impact

FRA has evaluated this proposed 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 proposed 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 28547, May 26, 1999. 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 proposed 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) [currently $120,700,000] 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 proposed rule would not result in the expenditure, in the aggregate, of $120,700,000 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 NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM 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.

H. Privacy Act

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov*.

List of Subjects

49 CFR Part 223

Glazing standards, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 238

Passenger equipment, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend parts 223 and 238 of chapter II, subtitle B of Title 49, Code of Federal Regulations, as follows:

PART 223—[AMENDED]

1. The authority citation for part 223 is revised to read as follows:

Authority: 49 U.S.C. 20102–03, 20133, 20701–02, 21301–02, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

Subpart A—General

2. Section 223.5 is amended by removing the definitions ''Emergency responder'' and ''Passenger train service''; and by revising the definition ''Emergency window'' to read as follows:

§ 223.5 Definitions.

* * * * *

Emergency window means that segment of a side-facing glazing panel which has been designed to permit rapid and easy removal from inside a passenger car in an emergency situation.

* * * * *

Subpart B—Specific Requirements

3. Section 223.9 is amended by removing paragraph (d); and by revising paragraph (c) to read as follows:

§ 223.9 Requirements for new or rebuilt equipment.

* * * * *

(c) Passenger cars, including self-propelled passenger cars, built or rebuilt after June 30, 1980, must be equipped with certified glazing in all windows and at least four emergency windows.

PART 238—[AMENDED]

4. The authority citation for part 238 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20133, 20141, 20302–20303, 20306, 20701–20702, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

Subpart A—General

5. Section 238.5 is amended by revising the definition ''Emergency window'' and by adding the definitions ''Emergency responder,'' ''Dual-function window,'' ''Intercom,'' ''Intercom system,'' ''Intermediate level,'' ''Main level,'' ''Passenger compartment,'' ''PA System,'' ''Rescue access window,'' and ''Seating area'' to read as follows:

§ 238.5 Definitions.

* * * * *

Dual-function window means a window that is intended to serve as both an emergency window exit and a rescue access window and that meets the applicable requirements set forth in both §§ 238.113 and 238.114.

* * * * *

Emergency responder means a member of a police or fire department, or other organization involved with public safety charged with providing or coordinating emergency services, who responds to a passenger train emergency.

Emergency window means that segment of a side-facing glazing panel which has been designed to permit rapid and easy removal from inside a passenger car in an emergency situation.

* * * * *

Intercom means a device through which voice communication is transmitted and received.

Intercom system means a two-way, voice communication system.

* * * * *

Intermediate level means a level of a multi-level passenger car that is used for passenger seating and is normally located between two main levels. An intermediate level normally contains two, separate seating areas, one at each end of the car, and is normally connected to each main level by stairs.

* * * * *

Main level means a level of a passenger car that contains a passenger compartment whose length is equal to or greater than half the length of the car.

* * * * *

PA system (or public address system) means a one-way, voice communication system.

* * * * *

Passenger compartment means an area of a passenger car that consists of a seating area and any vestibule that is connected to the seating area by an open passageway.

Rescue access window means a side-facing exterior window intended for use by emergency responders to gain access to passengers in an emergency situation.

* * * * *

Seating area means an area of a passenger car that normally contains passenger seating.

* * * * *

6. Section 238.17 is amended by revising the introductory text of paragraphs (b) and (c) to read as follows:

§ 238.17 Movement of passenger equipment with other than power brake defects.

* * * * *

(b) *Limitations on movement of passenger equipment containing defects found at time of calendar day inspection.* Except as provided in §§ 238.303(e)(15), (e)(17) and (e)(18), 238.305(c) and (d), and 238.307(c)(1), passenger equipment containing a condition not in conformity with this part at the time of its calendar day mechanical inspection may be moved from that location for repair if all of the following conditions are satisfied:

* * * * *

(c) *Limitations on movement of passenger equipment that develops defects en route.* Except as provided in §§ 238.303(e)(15), (e)(17) and (e)(18), 238.305(c), 238.307(c)(1), and 238.503(f), passenger equipment that develops en route to its destination, after its calendar day mechanical inspection is performed and before its next calendar day mechanical inspection is performed, any condition not in compliance with this part, other than a power brake defect, may be moved only if the railroad complies with all of the following requirements or, if applicable, the special requirements in paragraph (e) of this section:

* * * * *

Subpart B—Safety Planning and General Requirements

7. Section 238.113 is revised to read as follows:

§ 238.113 Emergency window exits.

(a) *Number and location.* Except as provided in paragraph (a)(3) of this section, the following requirements apply on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN **FEDERAL REGISTER**].

(1) *Single-level passenger cars.* Each single-level passenger car shall have a minimum of four emergency window exits. At least one emergency window exit shall be located in each side of each end (half) of the car, in a staggered configuration where practical. (See Figure 1 to this subpart; see also Figures 1b and 1c to this subpart.)

(2) *Multi-level passenger cars—main levels.* Each main level in a multi-level passenger car is subject to the same requirements specified for single-level passenger cars in paragraph (a)(1) of this section.

(3) *Multi-level passenger cars—levels with seating areas other than main levels.* (i) Except as provided below, on or after [DATE 18 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] any level other than a main level used for passenger seating in a multi-level passenger car, such as an intermediate level, shall have a minimum of two emergency window exits in each seating area. The emergency window exits shall be accessible to passengers in the seating area without requiring movement through an interior door or to another level of the car. At least one emergency window exit shall be located in each side of the seating area. An emergency window exit may be located within an exterior side door in the passenger compartment if it is not practical to place the window exit in the side of the seating area. (See Figures 2 and 2a to this subpart; compare to Figure 2b of this subpart.)

(ii) Only one emergency window exit is required in a seating area in a passenger compartment if:

(A) It is not practical to place an emergency window exit in a side of the passenger compartment due to the need to provide accessible accommodations under the Americans with Disabilities Act of 1990;

(B) There are no more than four seats in the seating area; and

(C) A suitable, alternate arrangement for emergency egress is provided.

(iii) For passenger cars ordered prior to [DATE 14 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], and placed in service prior to [DATE 38 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], only one emergency window exit is required in a seating area in a passenger compartment if it is not practicable to place a window exit in a side of the passenger compartment (due to the presence of such structures as a bathroom, electrical locker, or kitchen) and there are no more than eight seats in the seating area.

(4) *Cars with a sleeping compartment or similar private compartment.* Each level of a passenger car with a sleeping compartment or a similar private compartment intended to be occupied by a passengers or train crewmember shall have at least one emergency window exit in each such compartment. For purposes of this paragraph (a)(4), a bathroom, kitchen, or locomotive cab is not considered a ''compartment.''

(b) *Ease of operability.* On or after November 8, 1999, each emergency window exit shall be designed to permit rapid and easy removal from the inside of the car during an emergency situation without requiring the use of a tool or other implement.

(c) *Dimensions.* Each emergency window exit in a passenger car, including a sleeping car, ordered on or after September 8, 2000, or placed in service for the first time on or after September 9, 2002, shall have an unobstructed opening with minimum dimensions of 26 inches horizontally by 24 inches vertically. An emergency window exit located within an exterior side door, in accordance with the requirements of paragraph (a)(3)(i) of this section, may have an unobstructed opening with minimum dimensions of 24 inches horizontally by 26 inches vertically. A seatback is not an obstruction if it can be moved away from the window opening without requiring the use of a tool or other implement.

(d) *Marking and instructions.* (1) Each emergency window exit shall be conspicuously and legibly marked with luminescent material on the inside of each car to facilitate passenger egress.

(2) Legible and understandable operating instructions, including instructions for removing the window, shall be posted at or near each such window exit. If window removal may be hindered by the presence of a seatback, headrest, luggage rack, or other fixture, the instructions shall state the method for allowing rapid and easy removal of the window, taking into account the fixture(s), and this portion of the instructions may be in written or pictorial format.

8. Section 238.114 is added to read as follows:

§ 238.114 Rescue access windows.

(a) *Number and location.* Except as provided in paragraph (a)(1)(ii) of this section, the following requirements apply on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

(1) *Single-level passenger cars.* Except as provided in this paragraph (a)(1) and in paragraphs (a)(1)(i), (a)(1)(ii), and (a)(5) of this section, each single-level passenger car shall have a minimum of two rescue access windows. At least one rescue access window shall be located in each side of the car entirely within 15 feet of the car's centerline, or entirely within 7½ feet of the centerline if the car does not exceed 45 feet in length. (See Figure 1a to this subpart; see also Figures 1b and 1c to this subpart.) If the seating level is obstructed by an interior door or otherwise partitioned into separate seating areas, each separate seating area shall have a minimum of one rescue access window in each side of the seating area, located as near to the center of the car as practical.

(i) For a single-level passenger car ordered prior to [DATE 14 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], and placed in service prior to [DATE 38 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], rescue access windows may be located farther than the above prescribed distances from the car's centerline, or located within exterior side doors, or both, if at least one rescue access window is located within each side of each end (half) of the same passenger compartment.

(ii) For a single-level passenger car ordered prior to September 8, 2000, and placed in service prior to September 9, 2002, the requirements of paragraph (a)(1) of this section apply on or after [DATE 18 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] if the car has at least two exterior side doors (or door leaves), each with a manual override device, and such doors (or door leaves) are located one on each side of the car, in opposite ends (halves) of the car (*i.e.*, in diagonally opposite quadrants). The manual override device shall be:

(A) Capable of releasing the door (or door leaf) to permit it to be opened without power from outside the car;

(B) Located adjacent to the door (or door leaf) which it controls; and

(C) Designed and maintained so that a person may access the override device from outside the car without requiring the use of a tool or other implement.

(2) *Multi-level passenger cars—main levels.* Each main level in a multi-level passenger car is subject to the same requirements specified for single-level passenger cars in paragraph (a)(1) of this section, with the exception of paragraph (a)(1)(ii), which is not applicable.

(3) *Multi-level passenger cars—levels with seating areas other than main levels.* (i) Except as provided below, any level other than a main level used for passenger seating in a multi-level passenger car, such as an intermediate level, shall have a minimum of two rescue access windows in each seating area. The rescue access windows shall permit emergency responders to gain access to passengers in the seating area without requiring movement through an interior door or to another level of the car. At least one rescue access window shall be located in each side of the seating area. A rescue access window may be located within an exterior side door in the passenger compartment if it is not practical to place the access window in the side of the seating area. (See Figures 2 and 2a of this subpart; compare to Figure 2b of this subpart.)

(ii) Only one rescue access window is required in a seating area in a passenger compartment if:

(A) It is not practical to place a rescue access window in a side of the passenger compartment due to the need to provide accessible accommodations under the Americans with Disabilities Act of 1990;

(B) There are no more than four seats in the seating area; and

(C) A suitable, alternate arrangement for rescue access is provided.

(iii) For passenger cars ordered prior to [DATE 14 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], and placed in service prior to [DATE 38 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], only one rescue access window is required in a seating area in a passenger compartment if it is not practicable to place an access window in a side of the passenger compartment (due to the presence of such structures as a bathroom, electrical locker, or kitchen) and there are no more than eight seats in the seating area.

(4) *Cars with a sleeping compartment or similar private compartment.* Each level of a passenger car with a sleeping compartment or a similar private compartment intended to be occupied by a passenger or train crewmember shall have a minimum of one rescue access window in each such compartment. For purposes of this paragraph, a bathroom, kitchen, or locomotive cab is not considered a ''compartment.''

(5) *Dual-function windows.* If, on any level of a passenger car, the emergency window exits installed to meet the minimum requirements of § 238.113 of this part are also intended to function as rescue access windows, the minimum requirements for the number and location of rescue access windows in

paragraphs (a)(1) through (a)(4) of this section are also met for that level.

(b) *Ease of operability.* On or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], each rescue access window must be capable of being removed without undue delay by an emergency responder using either:

(1) A provided external mechanism; or

(2) Tools or implements that are commonly available to the responder in a passenger train emergency.

(c) *Dimensions.* Each rescue access window in a passenger car, including a sleeping car, ordered on or after [DATE 14 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], or placed in service for the first time on or after [DATE 38 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], shall have an unobstructed opening with minimum dimensions of 26 inches horizontally by 24 inches vertically. A rescue access window located within an exterior side door, in accordance with the requirements of paragraph (a)(3)(i) of this section, may have an unobstructed opening with minimum dimensions of 24 inches horizontally by 26 inches vertically. A seatback is not an obstruction if it can be moved away from the window opening without requiring the use of a tool or other implement.

(d) *Marking and instructions.* Each rescue access window shall be marked with retroreflective material. A unique and easily recognizable symbol, sign, or other conspicuous marking shall also be used to identify each such window. Legible and understandable window-access instructions, including instructions for removing the window, shall be posted at or near each rescue access window.

§ 238.117 [Redesignated as § 238.121]

9. Redesignate § 238.117 as § 238.121.

10. Add new § 238.117 to read as follows:

§ 238.117 Emergency communications.

(a) *PA system (public address system)*—(1) *Existing Tier I passenger cars.* On or after January 1, 2012, each Tier I passenger car shall be equipped with a PA system that provides a means for a crewmember to communicate to all train passengers in an emergency situation.

(2) *New Tier I and all Tier II passenger cars.* Each Tier I passenger car ordered on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], or placed in service for the first time [DATE 26 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], and all Tier II passenger cars shall be equipped with a PA system that provides a means for a crewmember to communicate to all train passengers in an emergency situation. The PA system shall also provide a means for a crewmember to communicate in an emergency situation to persons in the immediate vicinity of the train (*e.g.*, on the station platform). The PA system may be part of the same system as the intercom system.

(b) *Intercom system.*—(1) *New Tier I and all Tier II passenger cars.* Each Tier I passenger car ordered on or after [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], or placed in service for the first time on or after [DATE 26 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], and all Tier II passenger cars shall be equipped with an intercom system that provides a means for passengers and crewmembers to communicate with each other in an emergency situation. Except as further specified, at least one intercom that is accessible to passengers without requiring the use of a tool or other implement shall be located in each end (half) of each car. If any passenger car does not exceed 45 feet in length, or if a Tier II passenger car was ordered prior to May 12, 1999, only one such intercom is required. The intercom system may be part of the same system as the PA system.

(2) *Marking and instructions.* The following requirements to apply to each Tier I passenger car on or after [DATE 26 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] and to all Tier II passenger cars:

(i) The location of each intercom intended for passenger use shall be clearly marked with luminescent material; and

(ii) Legible and understandable operating instructions shall be posted at or near each such intercom.

(c) *Back-up power.* PA and intercom systems on Tier II passenger trains shall have back-up power for a minimum period of 90 minutes.

11. Section 238.118 is added to read as follows:

§ 238.118 Emergency roof access.

Except as provided in § 238.441—

(a) *Number and dimensions.* Each passenger car ordered on or after [DATE 14 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], or placed in service for the first time on or after [DATE 38 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], shall have a minimum of two emergency roof access locations, each with a minimum opening of 26 inches longitudinally (*i.e.*, parallel to the longitudinal axis of the car) by 24 inches laterally.

(b) *Means of access.* Emergency roof access shall be provided by means of a hatch, or a clearly marked structural weak point in the roof for access by properly equipped emergency response personnel.

(c) *Location.* Emergency roof access locations shall be situated as practical so that when a car is on its side:

(1) One emergency access location is wholly within each half of the roof as divided top from bottom; and

(2) One emergency access location is wholly within each half of the roof as divided left from right. (See Figure 3 to this subpart.)

(d) *Obstructions.* The ceiling space below each emergency roof access location shall be free from wire, cabling, conduit, and piping. This space shall also be free of any rigid secondary structure (*e.g.*, a diffuser or diffuser support, lighting back fixture, mounted PA equipment, luggage rack) where practicable. If emergency roof access is provided by means of a hatch, it shall be possible to push interior panels or liners out of their retention devices and into the interior of the vehicle after removing the hatch. If emergency roof access is provided by means of a structural weak point, it shall be permissible to cut through interior panels, liners, or other non-rigid secondary structures after making the cutout hole in the roof, provided any such additional cutting necessary to access the interior of the vehicle permits a minimum opening of the dimensions specified in paragraph (a) of this section to be maintained.

(e) *Marking and instructions.* Each emergency roof access location shall be conspicuously marked with retroreflective material of contrasting color. As further specified, legible and understandable instructions shall be posted at or near each such location. If emergency roof access is provided by means of a structural weak point:

(1) The retroreflective material shall conspicuously mark the line along which the roof skin shall be cut; and

(2) A sign plate with a retroreflective border shall also state:

CAUTION—DO NOT USE FLAME CUTTING DEVICES.

CAUTION—WARN PASSENGERS BEFORE CUTTING.

CUT ALONG DASHED LINE TO GAIN ACCESS.

ROOF CONSTRUCTION—[STATE RELEVANT DETAILS]

Subpart D—Inspection, Testing, and Maintenance Requirements for Tier I Passenger Equipment

12. Section 238.303 is amended by adding paragraph (e)(18) to read as follows:

§ 238.303 Exterior calendar day mechanical inspection of passenger equipment.

* * * * *

(e) * * *

(18) All rescue-access-related exterior markings, signage, and instructions required by § 238.114 and § 239.107(a) of this chapter shall be in place and, as applicable, conspicuous, or legible, or both.

(i) Except as provided in paragraphs (e)(18)(ii) and (iii) of this section, passenger equipment that has any required rescue-access-related exterior marking, signage, or instruction that is missing, illegible, or inconspicuous may remain in passenger service until no later than the equipment's fourth exterior calendar day mechanical inspection or next periodic mechanical inspection required under § 238.307, whichever occurs first, after the non-complying condition is discovered, where it shall be repaired or removed from service.

(ii) A passenger car having more than 50 percent of the windows on a side of a level of the car designated and properly marked for rescue access that has any required rescue-access-related exterior marking, signage, or instruction that is missing, illegible, or inconspicuous on any of the other windows on that side and level of the car may remain in passenger service until no later than the car's next periodic mechanical inspection required under § 238.307, where it shall be repaired or removed from service.

(iii) A passenger car that is a sleeping car that has more than two consecutive windows with any required rescue-access-related exterior marking, signage, or instruction at or near their locations that is missing, illegible, or inconspicuous may remain in passenger service until no later than the car's next periodic mechanical inspection required under § 238.307, where it shall be repaired or removed from service.

(iv) A record shall be maintained of any non-complying marking, signage, or instruction described in paragraphs (e)(18)(i) through (iii) of this section that contains the date and time that the defective condition was first discovered. This record shall be retained until all necessary repairs are completed.

* * * * *

13. Section 238.305 is amended by revising paragraphs (c) introductory text and (c)(10), and adding paragraphs (c)(11) and (c)(12) to read as follows:

§ 238.305 Interior calendar day mechanical inspection of passenger cars.

* * * * *

(c) As part of the interior calendar day interior mechanical inspection, the railroad shall verify conformity with the following conditions, and nonconformity with any such condition renders the car defective whenever discovered in service, except as provided in paragraphs (c)(5) through (c)(12), and paragraph (d) of this section.

* * * * *

(10) All end doors and side doors operate safely and as intended. A non-complying car may continue in passenger service pursuant to paragraph (d) of this section if at least one operative and accessible door is available on each side of the car; the train crew is provided written notification of the non-complying condition; and a notice is prominently displayed directly on the defective door indicating that the door is defective.

(11) [Reserved]

(12) On passenger cars so equipped, public address and intercom systems shall be operative and function as intended. A passenger car with an inoperative or non-functioning public address or intercom system may remain in passenger service until no later than the car's fourth interior calendar day mechanical inspection or next periodic mechanical inspection required under § 238.307, whichever occurs first, or for a passenger car used in long-distance intercity train service until the eighth interior calendar day mechanical inspection or next periodic mechanical inspection required under § 238.307, whichever occurs first, after the non-complying condition is discovered, where it shall be repaired or removed from service; provided, the train crew is given written notification of the non-complying condition, and all of the requirements contained in paragraph (d)(3) of this section are met.

* * * * *

14. Section 238.307 is amended by revising paragraphs (c) introductory text and (c)(5) to read as follows:

§ 238.307 Periodic mechanical inspection of passenger cars and unpowered vehicles used in passenger trains.

* * * * *

(c) The periodic mechanical inspection shall specifically include the following interior and exterior mechanical components, which shall be inspected not less frequently than every 184 days. At a minimum, this inspection shall determine that:

* * * * *

(5) With regard to the following emergency systems:

(i) Emergency lighting systems required under § 238.115 are in place and operational; and

(ii) [Reserved]

(iii) Emergency roof access markings and instructions required under § 238.118 (e) are in place and, as applicable, conspicuous, or legible, or both.

* * * * *

Subpart E—Specific Requirements for Tier II Passenger Equipment

§ 238.437 [Removed and Reserved]

15. Section 238.437 is removed and reserved.

16. Section 238.441 is revised to read as follows:

§ 238.441 Emergency roof access.

(a) Each passenger car ordered prior to [DATE 14 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] and placed in service for the first time prior to [DATE 38 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], and each power car shall have a minimum of one roof hatch emergency access location with a minimum opening of 26 inches by 24 inches, or at least one structural weak point in the roof providing a minimum opening of the same dimensions, to provide access for properly equipped emergency response personnel. Each emergency roof access location shall be conspicuously marked, and legible and understandable operating instructions shall be posted at or near each such location.

(b) Each passenger car ordered on or after [DATE 14 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], or placed in service for the first time on or after [DATE 38 MONTHS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**,] shall comply with the emergency roof access requirements specified in § 238.118.

Issued in Washington, DC, on August 17, 2006.

Joseph H. Boardman,

Federal Railroad Administrator.

BILLING CODE 4910–06–P

Figure 1 to Subpart B of Part 238—Example of Location and Staggering of Emergency Window Exits—§ 238.113

Top and Side View Depictions of a Single-Level Passenger Car

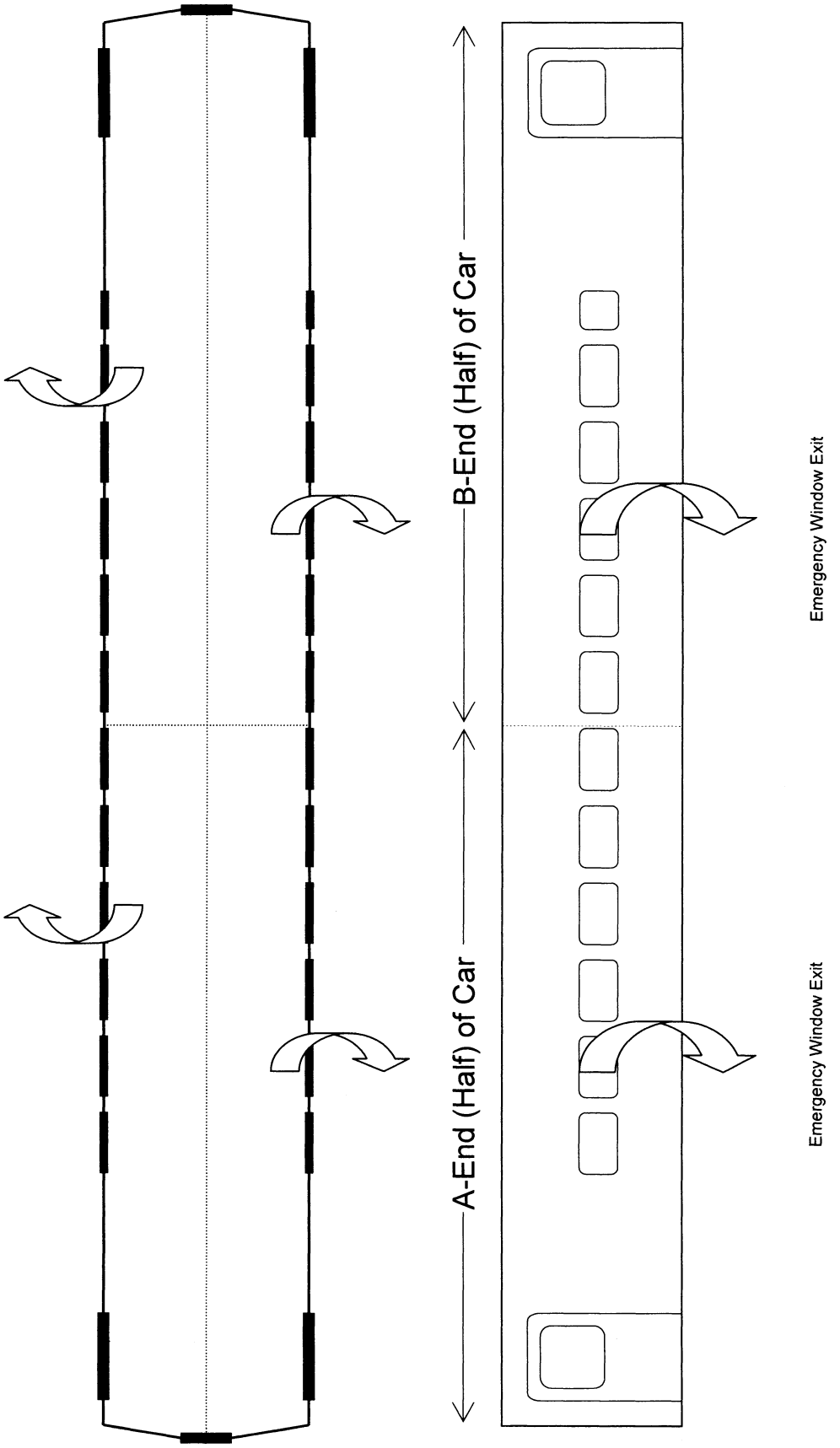


Figure 1a to Subpart B of Part 238—Example of Location of Rescue Access Windows—§ 238.114

Top and Side View Depictions of a Single-Level Passenger Car

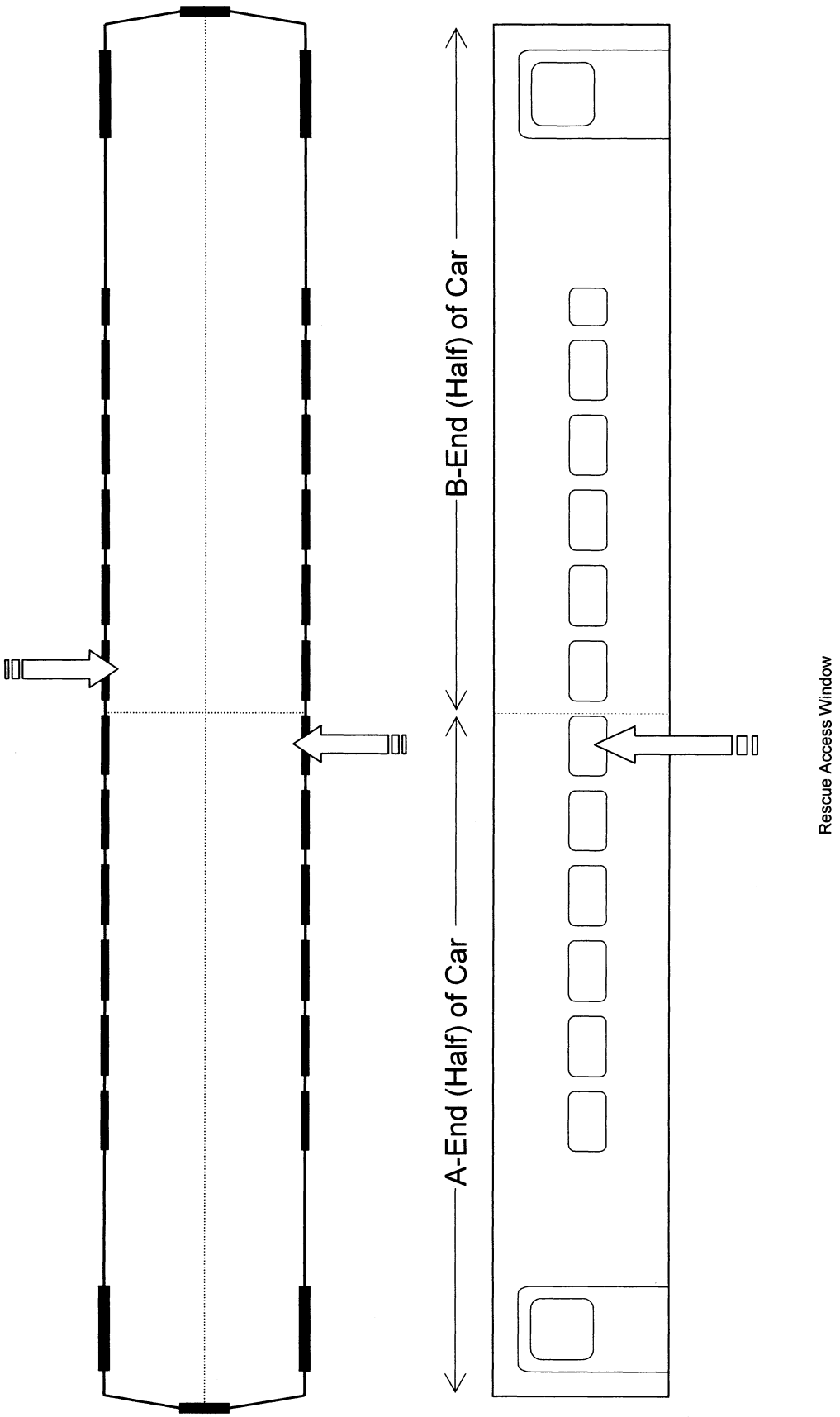


Figure 1b to Subpart B of Part 238—Example of Location and Staggering of Emergency Window Exits and Location of Rescue Access Windows—§§ 238.113 and 238.114

Top and Side View Depictions of a Single-Level Passenger Car

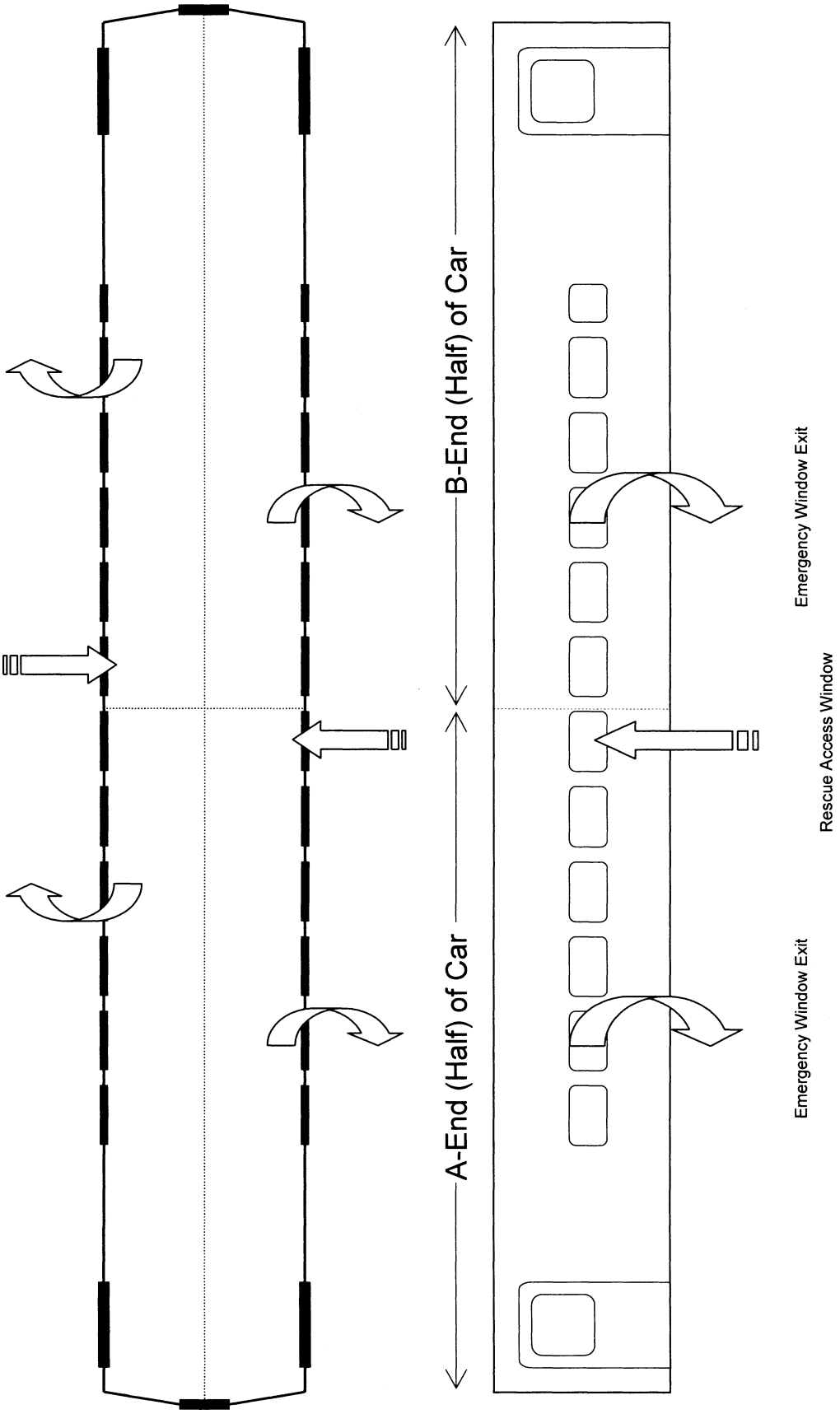


Figure 1c to Subpart B of Part 238—Example of a Passenger Compartment Including a Vestibule Connected by an Open Passageway and Excluding a Vestibule Separated by an Interior Door—§§ 238.113 and 238.114

Top and Side View Depictions of a Single-Level Passenger Car

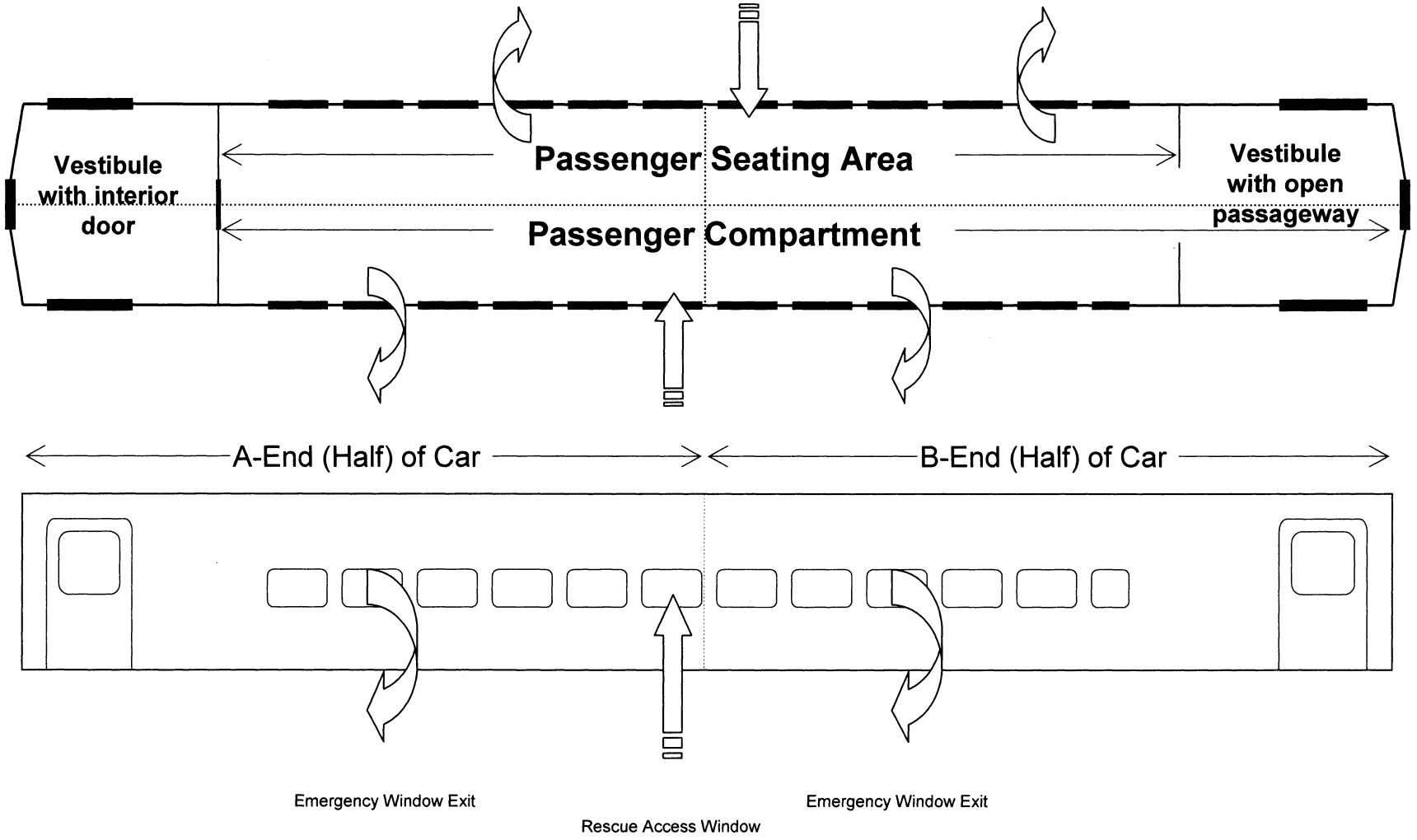
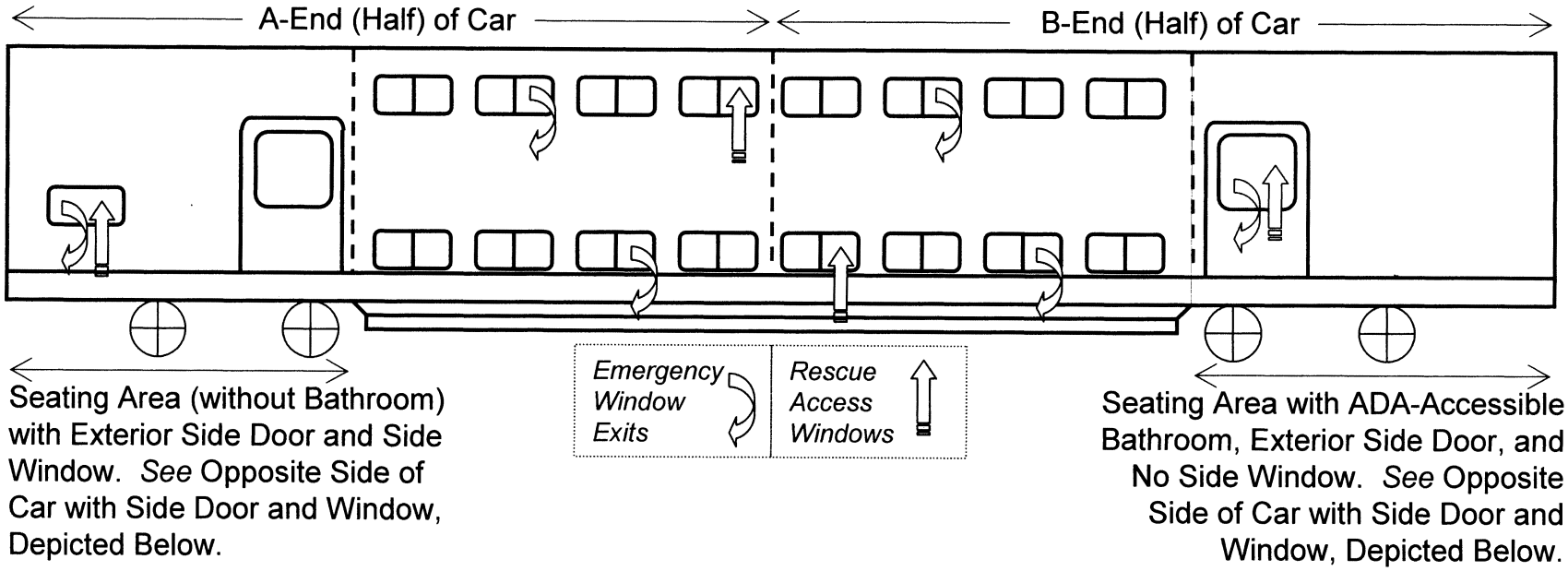


Figure 2 to Subpart B of Part 238—Example of a Multi-Level Car Complying with Window Location and Staggering Requirements—§§ 238.113 and 238.114

Side View Depiction with an ADA-Accessible Bathroom at One End on the Intermediate Level



Opposite Side View Depiction with One Side Window in Each Intermediate Level Seating Area

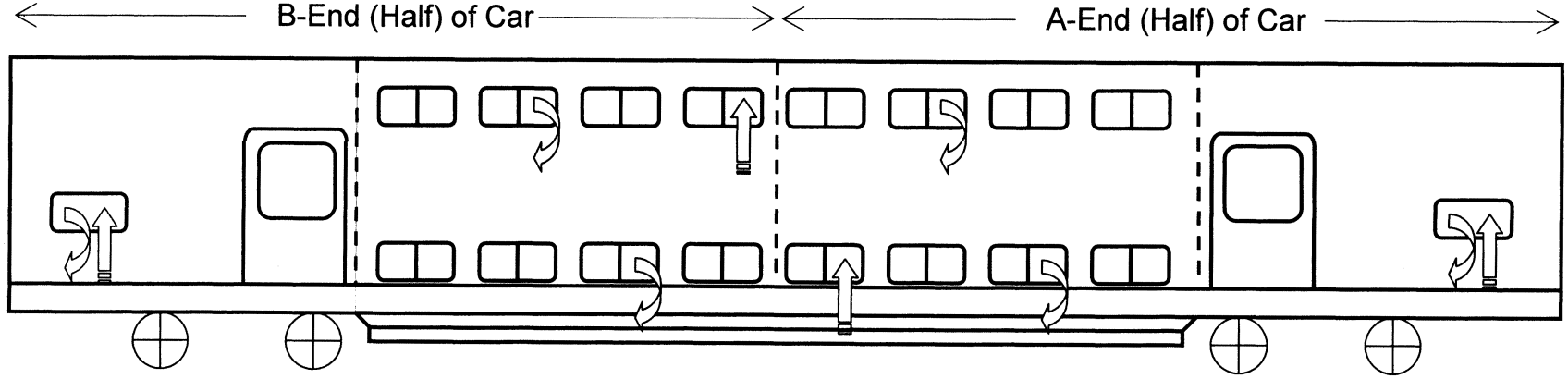
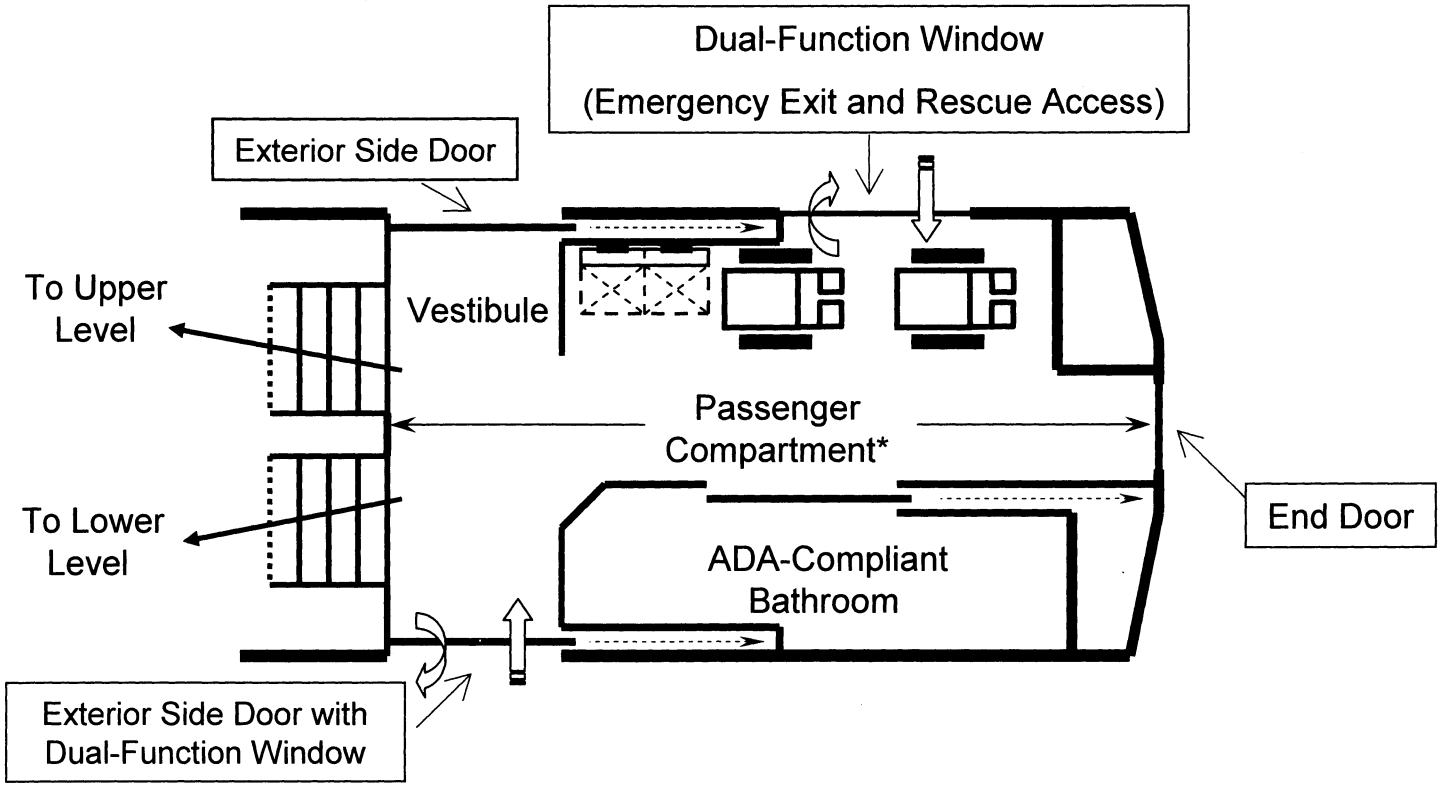


Figure 2a to Subpart B of Part 238—Example of an Intermediate Level Seating Area of a Multi-Level Car Complying with Window Location Requirements—§§ 238.113 and 238.114

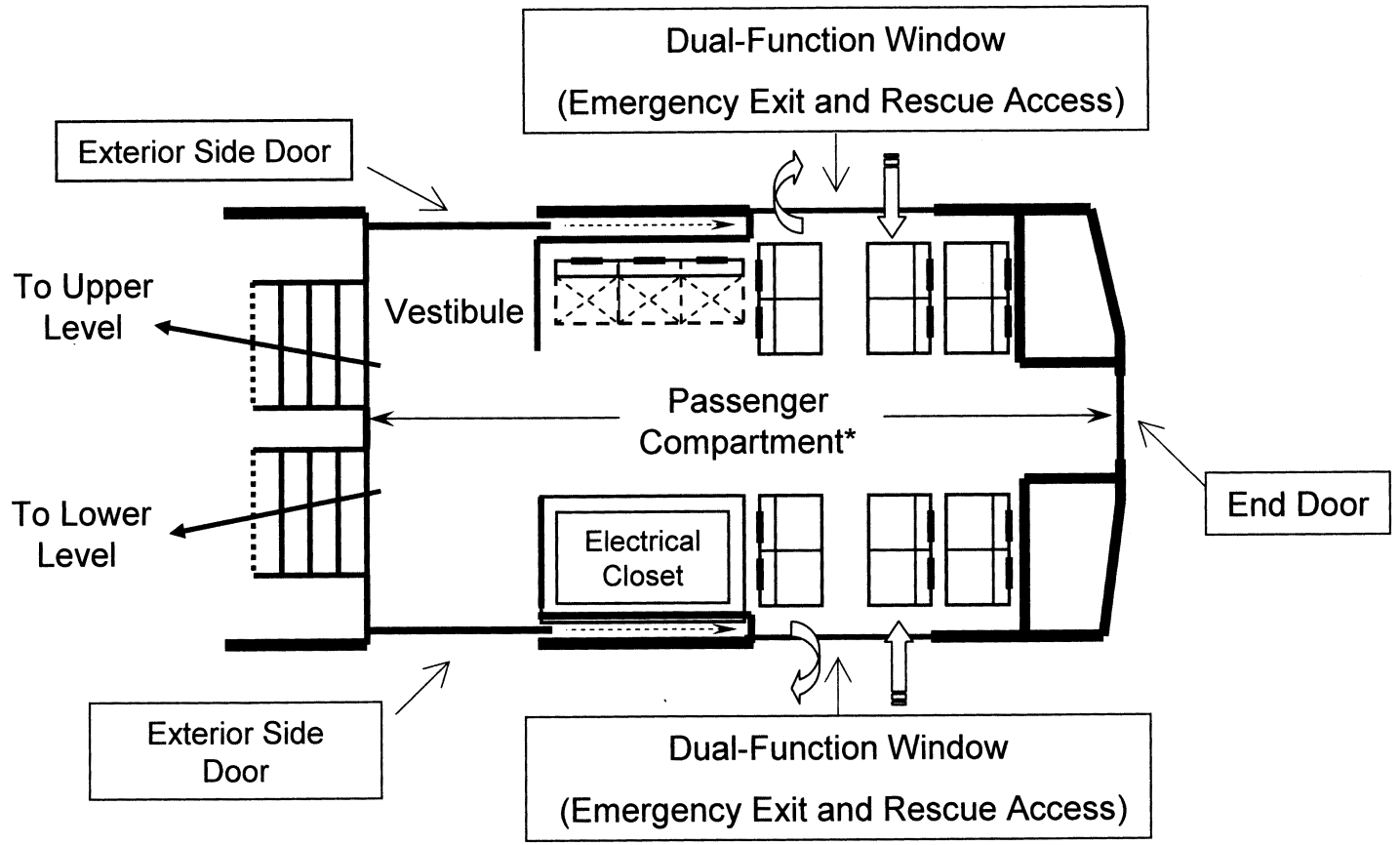
Top View Depiction of an Intermediate Level Seating Area with an ADA-Accessible Bathroom



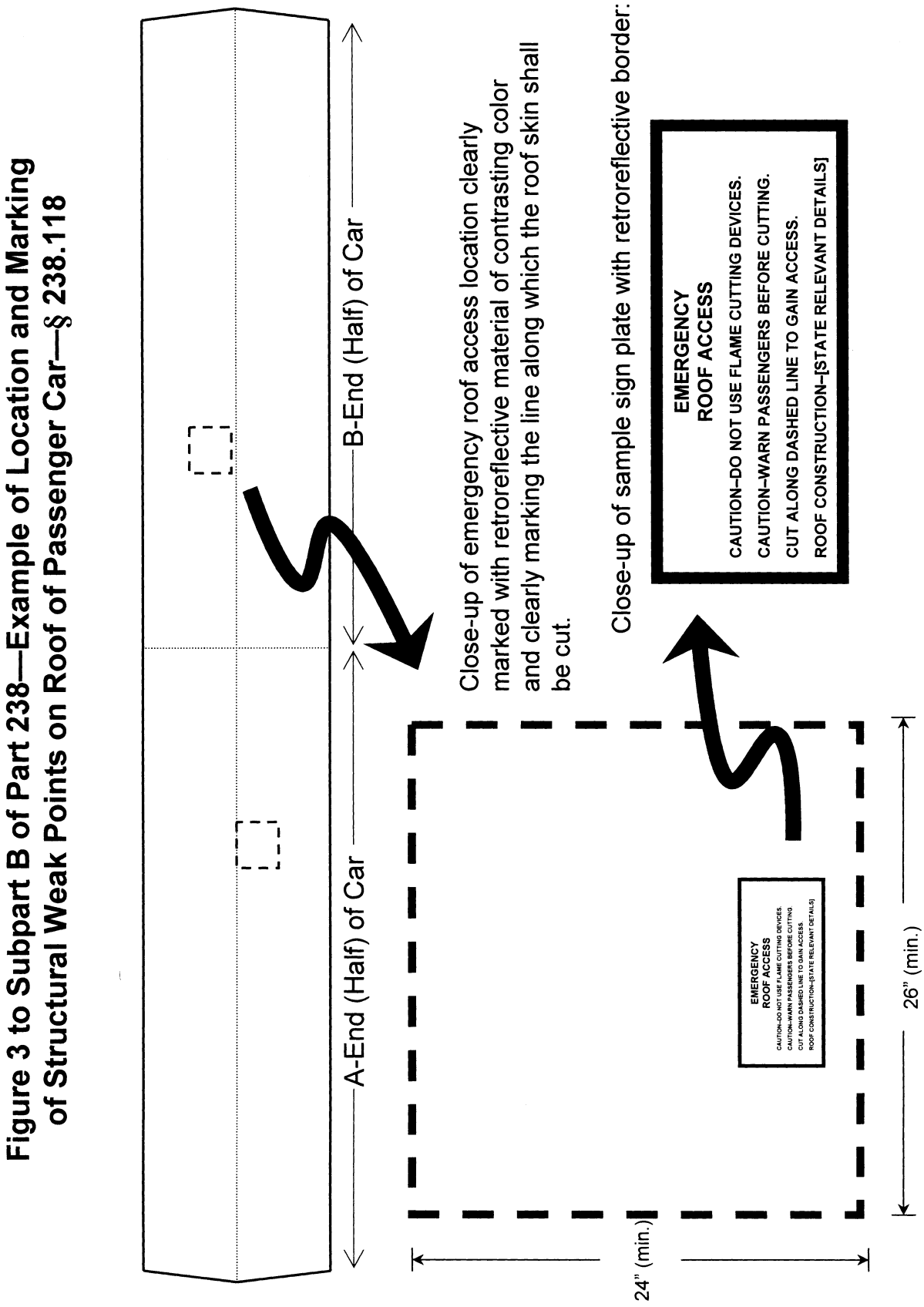
* The passenger compartment in this example includes the vestibule and extends to point where the stairs begin because there is an open passageway leading to the vestibule. If an interior door separates the vestibule from the seating area, the passenger compartment would only extend to the interior vestibule door.

Figure 2b to Subpart B of Part 238—Example of an Intermediate Level Seating Area of a Multi-Level Car Complying with Window Location Requirements—§§ 238.113 and 238.114

Top View Depiction of an Intermediate Level Seating Area with Two Side Windows



* The passenger compartment in this example includes the vestibule and extends to the point where the stairs begin because there is an open passageway leading to the vestibule. If an interior door separates the vestibule from the seating area, the passenger compartment would only extend to the interior vestibule door.



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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.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.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 4646/P.L. 109–273

To designate the facility of the United States Postal Service located at 7320 Reseda Boulevard in Reseda, California, as the "Coach John Wooden Post Office Building". (Aug. 17, 2006; 120 Stat. 773)

H.R. 4811/P.L. 109–274

To designate the facility of the United States Postal Service located at 215 West Industrial Park Road in Harrison, Arkansas, as the "John Paul Hammerschmidt Post Office Building". (Aug. 17, 2006; 120 Stat. 774)

H.R. 4962/P.L. 109–275

To designate the facility of the United States Postal Service located at 100 Pitcher Street in Utica, New York, as the "Captain George A. Wood Post Office Building". (Aug. 17, 2006; 120 Stat. 775)

H.R. 5104/P.L. 109–276

To designate the facility of the United States Postal Service located at 1750 16th Street South in St. Petersburg, Florida, as the "Morris W. Milton Post Office". (Aug. 17, 2006; 120 Stat. 776)

H.R. 5107/P.L. 109–277

To designate the facility of the United States Postal Service located at 1400 West Jordan Street in Pensacola, Florida, as the "Earl D. Hutto Post Office Building". (Aug. 17, 2006; 120 Stat. 777)

H.R. 5169/P.L. 109–278

To designate the facility of the United States Postal Service located at 1310 Highway 64 NW. in Ramsey, Indiana, as the "Wilfred Edward 'Cousin Willie' Sieg, Sr. Post Office". (Aug. 17, 2006; 120 Stat. 778)

H.R. 5540/P.L. 109–279

To designate the facility of the United States Postal Service located at 217 Southeast 2nd Street in Dimmitt, Texas, as the "Sergeant Jacob Dan Dones Post Office". (Aug. 17, 2006; 120 Stat. 779)

H.R. 4/P.L. 109–280

Pension Protection Act of 2006 (Aug. 17, 2006; 120 Stat. 780)

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