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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

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3. The important elements of typical Federal Register documents.

4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, June 12, 2007
9:00 a.m.–Noon

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

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.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS–2006–0169]

Pine Shoot Beetle; Additions to Quarantined Areas

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 pine shoot beetle regulations by adding the entire State of Iowa and two counties in New Jersey, Morris and Somerset, to the list of quarantined areas. We took that action following the detection of pine shoot beetle in these areas. The interim rule was necessary to prevent the spread of pine shoot beetle, a pest of pine trees, into noninfested areas of the United States.

DATES: Effective on June 12, 2007, we are adopting as a final rule the interim rule that was published at 72 FR 6433–6435 on February 12, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. Weyman Fussell, Pine Shoot Beetle Program Manager, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1231; (301) 734–5705.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR 301.50 through 301.50–10 (referred to below as the regulations) restrict the interstate movement of certain regulated articles from quarantined areas in order to prevent the spread of pine shoot beetle into noninfested areas of the United States.

In an interim rule [1] effective and published in the **Federal Register** on February 12, 2007 (72 FR 6433–6435, Docket No. APHIS–2006–0169), we amended the pine shoot beetle regulations in § 301.50–3(c) by adding the entire State of Iowa and two counties, Morris and Somerset, in New Jersey to the list of quarantined areas.

Comments on the interim rule were required to be received on or before April 13, 2007. We did not receive any comments. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule.

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, for this action, the Office of Management and Budget has waived its review under Executive Order 12866.

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

PART 301—DOMESTIC QUARANTINE NOTICES

■ Accordingly, we are adopting as a final rule, without change, the interim rule that amended 7 CFR part 301 and that was published at 72 FR 6433–6435 on February 12, 2007.

Done in Washington, DC, this 6th day of June 2007.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E7–11276 Filed 6–11–07; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the interim rule, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2006–0169.*

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. APHIS–2007–0072]

Black Stem Rust; Addition of Rust-Resistant Varieties

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Direct final rule.

SUMMARY: We are amending the black stem rust quarantine and regulations by adding four varieties to the list of rust-resistant *Berberis* species or cultivars in the regulations. This action will allow for the interstate movement of these newly developed varieties without unnecessary restrictions.

DATES: This rule will be effective on August 13, 2007, unless we receive written adverse comments or written notice of intent to submit adverse comments on or before July 12, 2007. If we receive written adverse comments or written notice of intent to submit adverse comments, we will publish a document in the **Federal Register** withdrawing this rule before the effective date.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*, select ''Animal and Plant Health Inspection Service'' from the agency drop-down menu, then click ''Submit.'' In the Docket ID column, select APHIS–2007–0072 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–2007–0072, 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–2007–0072.

Reading Room: You may read 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. Vedpal Malik, Agriculturalist, Invasive Species and Pest Management, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236; (301) 734–6774.

SUPPLEMENTARY INFORMATION:

Background

Black stem rust is one of the most destructive plant diseases of small grains that is known to exist in the United States. The disease is caused by a fungus that reduces the quality and yield of infected wheat, oat, barley, and rye crops by robbing host plants of food and water. In addition to infecting small grains, the fungus lives on a variety of alternate host plants that are species of the genera *Berberis, Mahoberberis,* and *Mahonia*. The fungus is spread from host to host by windborne spores.

The black stem rust quarantine and regulations, which are contained in 7 CFR 301.38 through 301.38–8 (referred to below as the regulations), quarantine the conterminous 48 States and the District of Columbia and govern the interstate movement of certain plants of the genera *Berberis, Mahoberberis,* and *Mahonia*, known as barberry plants. The species of these plants are categorized as either rust-resistant or rust-susceptible. Rust-resistant plants do not pose a risk of spreading black stem rust or of contributing to the development of new races of the rust; rust-susceptible plants do pose such risks. Section 301.38–2 of the regulations includes a listing of regulated articles and indicates those species and varieties of the genera *Berberis, Mahoberberis,* and *Mahonia* that are known to be rust-resistant. Although rust-resistant species are included as regulated articles, they may be moved into or through protected areas if accompanied by a certificate. In accordance with the procedures described below under ''Effective Date,'' this direct final rule will add *Berberis thunbergii atropurpurea* 'Moretti Select', *B. thunbergii* 'Fireball', *B. thunbergii* 'Orange Rocket', and *B. thunbergii* 'Sparkler' to the list of rust-resistant *Berberis* species in § 301.38–2(a)(1).

The addition of the species listed above to the list of rust-resistant *Berberis* species is based on recent testing to determine rust resistance conducted by the Agricultural Research Service (ARS) of the United States Department of Agriculture (USDA) at its Cereal Rust Laboratory in St. Paul, MN. The testing is performed in the following manner: In a greenhouse, the suspect plant or test subject is placed under a screen with a control plant—a known rust-susceptible species of *Berberis, Mahoberberis,* or *Mahonia*. Infected wheat stems, a primary host of black stem rust, are placed on top of the screen. The plants are moistened and maintained in 100 percent humidity. This causes the spores to swell and fall on the plants lying under the screen. The plants are then observed for 7 days at 20–80 percent relative humidity. If the rust-susceptible plant shows signs of infection after 7 days and the test plants do not, the test results indicate that the test plants are rust-resistant. This test must be performed 12 times, and all 12 tests must yield the same result before USDA can make a determination as to whether the test plants are rust-resistant. The test may be conducted on 12 individual plants, or it may be performed multiple times on fewer plants (*e.g.*, six plants tested twice or three plants tested four times). The tests must be performed on new growth, just as the leaves are unfolding. Therefore, the tests are usually conducted in the spring or fall, during the growing season. All 12 tests generally cannot be conducted on the same day because of the plants' different growth stages. Based on over 30 years of experience with this test, we believe that 12 is the reliable test sample size on which USDA can make its determination. We do not know of any plant that was subsequently discovered to be rust-susceptible after undergoing the test procedure 12 times and being determined by USDA to be rust-resistant.

Dates

We are publishing this rule without a prior proposal because we view this action as noncontroversial and anticipate no adverse public comment. This rule will be effective, as published in this document, on August 13, 2007, unless we receive written adverse comments or written notice of intent to submit adverse comments on or before July 12, 2007.

Adverse comments are comments that suggest the rule should not be adopted or that suggest the rule should be changed.

If we receive written adverse comments or written notice of intent to submit adverse comments, we will publish a document in the **Federal Register** withdrawing this rule before the effective date. We will then publish a proposed rule for public comment.

As discussed above, if we receive no written adverse comments or written notice of intent to submit adverse comments within 30 days of publication of this direct final rule, this direct final rule will become effective 60 days following its publication. We will publish a document in the **Federal Register**, before the effective date of this direct final rule, confirming that it is effective on the date indicated in this document.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review under Executive Order 12866.

We are amending the black stem rust quarantine and regulations by adding *B. thunbergii atropurpurea* 'Moretti Select', *B. thunbergii* 'Fireball', *B. thunbergii* 'Orange Rocket', and *B. thunbergii* 'Sparkler' to the list of rust-resistant species or cultivars in the regulations. This action will provide for the interstate movement of these newly developed rust-resistant *Berberis* varieties without unnecessary restrictions.

Following the Small Business Administration (SBA) guidelines, the potentially affected entities are classified within the following industries: Nursery and Tree Production (North American Industry Classification System [NAICS] 111421), and Floriculture Production (NAICS 111422). For these two categories, entities are considered small by SBA standards if their annual sales are $750,000 or less. According to the 2002 Census of Agriculture, there were 64,366 farms in both NAICS categories and this total represents 3 percent of the total farms in the United States. Over 92 percent of the farms have annual sales of less than $500,000 and by SBA standards are considered small.

Barberry plants are not one of the crops tracked by the Census and therefore data on production and number of producers are not available. However, because we are removing restrictions on the movement of additional rust-resistant varieties of barberry, it is not anticipated that any of the nurseries producing barberry plant

species and cultivars will experience a negative economic impact as a result of this rulemaking. Consumers will benefit from having a greater selection of barberry plants, and nurseries will benefit from being to able to market their product more quickly.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

■ Accordingly, 7 CFR part 301 is amended as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

■ 1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 issued under Sec. 204, Title II, Public Law 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 issued under Sec. 203, Title II, Public Law 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

■ 2. In § 301.38–2, paragraph (b) is amended by adding, in alphabetical order, the following rust-resistant Berberis species:

§ 310.38–2 Regulated articles.

(a) * * *

(1) * * *

* * * * *

B. thunbergii atropurpurea 'Moretti Select'

* * * * *

B. thunbergii 'Fireball'

* * * * *

B. thunbergii 'Orange Rocket'

* * * * *

B. thunbergii 'Sparkler'

* * * * *

Done in Washington, DC, this 6th day of June 2007.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E7–11275 Filed 6–11–07; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 30555; Amdt. No. 468]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. This regulatory action is needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

DATES: *Effective Date:* 0901 UTC, July 5, 2007.

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

SUPPLEMENTARY INFORMATION: This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95.

The Rule

The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances that create the need for this amendment involve matters of flight safety and operational efficiency in the National Airspace System, are related to published aeronautical charts that are essential to the user, and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are impracticable and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

Conclusion

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

List of Subjects in 14 CFR Part 95

Airspace, Navigation (air).

Issued in Washington, DC, on June 5, 2007.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator,

part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 UTC, July 5, 2007.

■ 1. The authority citation for part 95 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44719, 44721.

■ 2. Part 95 is amended to read as follows:

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINTS

[Amendment 468 effective date July 05, 2007]

From	To	MEA
§ 95.6001 VICTOR ROUTES—U.S.		
§ 95.6044 VOR Federal Airway V44 is Amended to Read in Part		
Baltimore, MD VORTAC *1700–MOCA.	Paleo, MD FIX	*2200
§ 95.6082 VOR Federal Airway V82 is Amended to Read in Part		
Gopher, MN VORTAC *2700–MOCA.	Farmington, MN VORTAC	*3500
§ 95.6093 VOR Federal Airway V93 is Amended to Read in Part		
Patuxent, MD VORTAC *10000–MRA. **1700–MOCA.	*Graco, MD FIX	**2500
*Graco, MD FIX *10000–MRA. **1600–MOCA.	Paleo, MD FIX	**10000
Paleo, MD FIX *1700–MOCA.	Baltimore, MD VORTAC	*2200
§ 95.6161 VOR Federal Airway V161 is Amended to Read in Part		
Farmington, MN VORTAC *2700–MOCA.	Gopher, MN VORTAC	*3500
§ 95.6369 VOR Federal Airway V369 is Amended to Read in Part		
Navasota, TX VORTAC *1800–MOCA Groesbeck, TX VOR/DME	Groesbeck, TX VOR/DME Maverick, TX VOR/DME	*2300 MAA–17500 3600 MAA–17500
§ 95.6379 VOR FEDERAL AIRWAY V379 is Amended to Read in Part		
Nottingham, MD VORTAC Jetta, MD FIX *10000–MRA **1600–MOCA Graco, MD FIX	Jetta, MD FIX *Graco, MD FIX Smyrna, DE VORTAC	1900 MAA–17500 **3000 MAA–17500 1800 MAA–17500
§ 95.6422 VOR FEDERAL AIRWAY V422 is Amended to Read in Part		
Wolf Lake, IN VOR	Twerp, OH FIX	2700

[FR Doc. E7–11143 Filed 6–11–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30553 Amdt. No. 3221]

Standard Instrument Approach Procedures, Weather Takeoff Minimums; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and/or Weather Takeoff Minimums for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic

requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective June 12, 2007. The compliance date for each SIAP and/or Weather Takeoff Minimums is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 12, 2007.

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

For Examination—

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

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

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

For Purchase—Individual SIAP and Weather Takeoff Minimums copies may be obtained from:

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

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

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

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

SUPPLEMENTARY INFORMATION: This amendment to Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), establishes, amends, suspends, or revokes SIAPs and/or Weather Takeoff Minimums. The complete regulatory description of each SIAP and/or Weather Takeoff Minimums is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms are identified as FAA Forms 8260–3, 8260–4, 8260–5 and 8260–15A. Materials incorporated by reference are available for examination or purchase as stated above.

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

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and/or Weather Takeoff Minimums as contained in the transmittal. Some SIAP and/or Weather Takeoff Minimums amendments may have been previously issued by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP, and/or Weather Takeoff Minimums amendments may require making them effective in less than 30 days. For the remaining SIAPs and/or Weather Takeoff Minimums, an effective date at least 30 days after publication is provided.

Further, the SIAPs and/or Weather Takeoff Minimums contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and/or Weather Takeoff Minimums, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and/or Weather Takeoff Minimums and safety in air commerce, I find that notice and public procedure before adopting these SIAPs and/or Weather Takeoff Minimums are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs and/or Weather Takeoff Minimums effective in less than 30 days.

Conclusion

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

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, and Navigation (air).

Issued in Washington, DC, on June 1, 2007.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, under Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and Weather Takeoff Minimums effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 05 July 2007

Adak Island, AK, Adak, Takeoff Minimums and Textual DP, Amdt 1
Los Angeles, CA, Los Angeles Intl, ILS OR LOC RWY 7L, Amdt 6A
Washington, DC, Washington Dulles Intl, CONVERGING ILS RWY 12, Amdt 5
Daytona Beach, FL, Daytona Beach Intl, ILS OR LOC RWY 7L, Amdt 30
Oxford, ME, Oxford County Regional, Takeoff Minimums and Obstacle DP, Amdt 1
Bemidji, MN, Bemidji Regional, LOC/DME RWY 25, Orig
Charleston, WV, Yeager, ILS OR LOC RWY 5, Amdt 5
Charleston, WV, Yeager, ILS OR LOC RWY 23, Amdt 29
Charleston, WV, Yeager, Takeoff Minimums and Textual DP, Amdt 6

Effective 02 Aug 2007

Guntersville, AL, Guntersville Muni—Joe Starnes Field, Takeoff Minimums and Obstacle DP, Amdt 1
Milton, FL, Peter Prince Fld, RNAV (GPS) RWY 36, Orig
Milton, FL, Peter Prince Fld, GPS RWY 36, Amdt 1, CANCELLED
Panama City, FL, Panama City—Bay Co Intl, Takeoff Minimums and Obstacle DP, Amdt 1
Bemidji, MN, Bemidji Regional, Takeoff Minimums and Textual DP, Amdt 3
Mocksville, NC, Twin Lakes, Takeoff Minimums and Obstacle DP, Orig
Williamston, NC, Martin County, Takeoff Minimums and Obstacle DP, Orig
Barnwell, SC, Barnwell Rgnl, Takeoff Minimums and Obstacle DP, Amdt 2
Darlington, SC, Darlington County Jetport, RNAV (GPS) RWY 5, Orig
Darlington, SC, Darlington County Jetport, GPS RWY 5, Orig, CANCELLED
Lancaster, SC, Lancaster County—Mc Whirter Field, VOR/DME–A, Orig
Portland, TN, Portland Muni, Takeoff Minimums and Textual DP, Orig

Effective 30 Aug 2007

Lake Providence, LA, Byerley, NDB RWY 17, Amdt 2, CANCELLED
Weatherford, OK, Thomas P. Stafford, NDB RWY 17, Amdt 3, CANCELLED
Middleton, WI, Middleton Muni—Mory Field, RNAV (GPS) RWY 28, Amdt 1
Sheboygan, WI, Sheboygan County Memorial, RNAV (GPS) RWY 3, Amdt 1
Sheboygan, WI, Sheboygan County Memorial, RNAV (GPS) RWY 21, Amdt 1

Note: The FAA published the following Amendment in Docket No. 30551 Amdt No. 3219 to Part 97 of the Federal Aviation Regulations (Vol. 72, FR No. 104, page 30256, dated, May 31, 2007) Under Section 97.15 effective July 5, 2007, which is hereby corrected to be effective for August 30, 2007.

Newport News, VA, Williamsburg Intl, Takeoff Minimums and Obstacle DP, Orig

[FR Doc. E7–11147 Filed 6–11–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 888

[Docket No. 2006N–0019]

Orthopedic Devices; Reclassification of the Intervertebral Body Fusion Device

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is reclassifying intervertebral body fusion devices that contain bone grafting material, from class III (premarket approval) into class II (special controls), and retain those that contain any therapeutic biologic (e.g., bone morphogenic protein) in class III. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a guidance document that will serve as the special control for this device. This reclassification is based upon on the recommendation of the Orthopaedic and Rehabilitation Devices Panel (the Panel).

EFFECTIVE DATE: July 12, 2007.

FOR FURTHER INFORMATION CONTACT: Jodi N. Anderson, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Boulevard, Rockville, MD 20850, 240–276–3680.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 301 *et seq.*), as amended by the Medical Device Amendments of 1976 (1976 amendments) (Public Law 94–295), the Safe Medical Devices Act of 1990 (Public Law 101–629), the Food and Drug Administration Modernization Act of 1997 (Public Law 105–115), and the Medical Device User Fee and Modernization Act of 2002 (Public Law 107–250), established a comprehensive system for the regulation of medical devices intended for human use. Section 513 of the act (21 U.S.C. 360c) established three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories of devices are class I (general controls), class II (special controls), and class III (premarket approval).

Under section 513 of the act, devices that were in commercial distribution before May 28, 1976 (the date of enactment of the 1976 amendments), generally referred to as preamendments devices, are classified after FDA has done the following: (1) Received a recommendation from a device classification panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. FDA has classified most preamendments devices under these procedures.

Devices that were not in commercial distribution before May 28, 1976, generally referred to as postamendments devices, are classified automatically by statute (section 513(f) of the act) into class III without any FDA rulemaking process. Those devices remain in class III and require premarket approval, unless and until the device is reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, under section 513(i) of the act, to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to previously offered devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807) of the regulations.

A preamendments device that has been classified into class III may be marketed, by means of notification procedures, without submission of a premarket approval application (PMA) until FDA issues a final regulation under section 515(b) of the act (21 U.S.C. 360e(b)) requiring premarket approval.

Section 513(e) of the act (21 U.S.C. 360c(e)) governs reclassification of classified preamendments devices. This section provides that FDA may, by rulemaking, reclassify a device (in a proceeding that parallels the initial classification proceeding) based upon ''new information.'' FDA can initiate a reclassification under section 513(e) of the act or an interested person may petition FDA to reclassify a preamendments device. The term ''new information,'' as used in section 513(e) of the act, includes information developed as a result of a reevaluation of the data before the agency when the device was originally classified, as well as information not presented, not available, or not developed at that time. (See, e.g., *Holland Rantos* v. *United States Department of Health, Education, and Welfare*, 587 F.2d 1173, 1174 n.1 (D.C. Cir. 1978); *Upjohn* v. *Finch*, 422 F.2d 944 (6th Cir. 1970); *Bell* v. *Goddard*, 366 F.2d 177 (7th Cir. 1966).)

Reevaluation of the data previously before the agency is an appropriate basis for subsequent regulatory action where the reevaluation is made in light of newly available regulatory authority (see *Bell* v. *Goddard*, supra, 366 F.2d at 181; *Ethicon, Inc.* v. *FDA*, 762 F.Supp. 382, 389–91 (D.D.C. 1991)), or in light of changes in ''medical science.'' (See *Upjohn* v. *Finch*, supra, 422 F.2d at 951.) Whether data before the agency are past or new data, the ''new information'' to support reclassification under section 513(e) must be ''valid scientific evidence,'' as defined in section 513(a)(3) of the act and 21 CFR 860.7(c)(2). (See, e.g., *General Medical Co.* v. *FDA*, 770 F.2d 214 (D.C. Cir. 1985); *Contact Lens Assoc.* v. *FDA*, 766 F.2d 592 (D.C. Cir.), cert. denied, 474 U.S. 1062 (1985)).

FDA relies upon ''valid scientific evidence'' in the classification process to determine the level of regulation for devices. To be considered in the reclassification process, the valid scientific evidence upon which the agency relies must be publicly available. Publicly available information excludes trade secret and/or confidential commercial information, e.g., the contents of a pending PMA. (See section 520(c) of the act (21 U.S.C. 360j(c).) Section 520(h)(4) of the act, added by FDAMA, provides that FDA may use, for reclassification of a device, certain information in a PMA 6 years after the application has been approved. This includes information from clinical and preclinical tests or studies that demonstrate the safety or effectiveness of the device but does not include descriptions of methods of manufacture or product composition and other trade secrets.

FDAMA added a new section 510(m) to the act. New section 510(m) of the act provides that a class II device may be exempted from the premarket notification requirements under section 510(k) of the act, if the agency determines that premarket notification is not necessary to assure the safety and effectiveness of the device. FDA believes that this device should not be exempt from premarket notification under section 510(m) of the act. FDA believes that it needs to review information in a premarket notification submission that addresses the risks identified in the guidance document in order to assure that a new device is at least as safe and effective as legally marketed devices of this type.

II. Regulatory History of the Device

In the **Federal Register** of February 9, 2006 (71 FR 6710), FDA published a proposed rule to reclassify the intervertebral body fusion devices that contain bone grafting material, from class III (premarket approval) into class II (special controls), and retain those that contain any therapeutic biologic (e.g., bone morphogenic protein) in class III. FDA received 12 comments on the proposed rule and draft guidance.

In the same issue of the **Federal Register** of February 9, 2006 (71 FR 6778), FDA announced the availability of the draft guidance document entitled ''Class II Special Controls Guidance Document: Class II Special Controls Guidance Document: Intervertebral Body Fusion Device'' that FDA intended to serve as the special control for this device type, if FDA reclassified this device type. Interested persons were invited to comment on the proposed rule and special controls draft guidance document by May 10, 2006.

III. Summary of Final Rule

Therefore, under sections 513 and 520(l) of the act, FDA is adopting the summary of reasons for the panel's recommendation, the summary of data upon which the panel's recommendations are based (Ref. 1), and the assessment of the risks to public health stated in the proposed rule published on February 9, 2006. Furthermore, FDA is issuing this final rule (21 CFR 888.3080), that reclassifies intervertebral body fusion devices that contain bone grafting material, from class III (premarket approval) into class II (special controls), and retain those that contain any therapeutic biologic (e.g., bone morphogenic protein) in class III.

IV. Analysis of Comments and FDA's Response

FDA received six comments stating the comment's full support for the reclassification as proposed and offering no additional input. Two comments suggested adding thoracic use to the classification identification. FDA disagrees with this comment because there are no legally marketed intervertebral body fusion devices indicated for thoracic use, and thus there is no experience with thoracic use of the intervertebral body fusion device. Two comments suggested that FDA classify all intervertebral body fusion devices into class II regardless of the grafting material the devices contain and regardless of whether grafting materials composed of therapeutic biologics remain class III. FDA disagrees with this comment. The intervertebral body fusion device and the grafting material it contains do not act independently in the body, thus the mitigation measures described in the special controls guidance are insufficient to provide reasonable assurance of safety and effectiveness for an intervertebral body fusion device when it contains a therapeutic biologic grafting material. The two remaining comments pertained to scientific recommendations in the draft guidance. FDA's consideration of these two comments is discussed in the notice of the availability of the guidance, published elsewhere in this issue of the **Federal Register**.

V. Environmental Impact

The agency has determined under 21 CFR 25.34(b) that this reclassification action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–602), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety and other advantages; distributive impacts and equity). The agency believes that this final rule is not a significant regulatory action under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Reclassification of this device from class III to class II will relieve all manufacturers of the device of the costs of complying with the premarket approval requirements in section 515 of the act. Because reclassification will reduce regulatory costs with respect to this device, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes an Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000

or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $122 million, using the most current (2005) Implicit Price deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

VII. Federalism

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

VIII. Paperwork Reduction Act of 1995

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) is not required. Elsewhere in this issue of the **Federal Register**, FDA is publishing a notice of availability of the guidance document entitled ''Class II Special Controls Guidance Document: Intervertebral Body Fusion Devices.'' The notice contains the PRA analysis for the guidance.

IX. References

The following reference has been placed on display in the division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Orthopedic and Rehabilitation Devices Panel Meeting Transcript, pp. 1–141, December 11, 2003.

List of Subjects in 21 CFR Part 888

Medical devices.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 888 is amended as follows:

PART 888—ORTHOPEDIC DEVICES

■ 1. The authority citation for 21 CFR part 888 continues to read asfollows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 371.

■ 2. Section 888.3080 is added to subpart D to read as follows:

§ 888.3080 Intervertebral body fusion device.

(a) *Identification.* An intervertebral body fusion device is an implanted single or multiple component spinal device made from a variety of materials, including titanium and polymers. The device is inserted into the intervertebral body space of the cervical or lumbosacral spine, and is intended for intervertebral body fusion.

(b) *Classification.* (1) Class II (special controls) for intervertebral body fusion devices that contain bone grafting material. The special control is the FDA guidance document entitled ''Class II Special Controls Guidance Document: Intervertebral Body Fusion Device.'' See § 888.1(e) for the availability of this guidance document.

(2) Class III (premarket approval) for intervertebral body fusion devices that include any therapeutic biologic (e.g., bone morphogenic protein). Intervertebral body fusion devices that contain any therapeutic biologic require premarket approval.

(c) *Date premarket approval application (PMA) or notice of product development protocol (PDP) is required.* Devices described in paragraph (b)(2) of this section shall have an approved PMA or a declared completed PDP in effect before being placed in commercial distribution.

Dated: May 31, 2007.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. E7–11240 Filed 6–11–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9328]

RIN 1545–BB90

Safe Harbor for Valuation Under Section 475.

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document sets forth an elective safe harbor that permits dealers in securities and dealers in commodities to elect to use the values of positions reported on certain financial statements as the fair market values of those positions for purposes of section 475 of the Internal Revenue Code (Code). This safe harbor is intended to reduce the compliance burden on taxpayers and to improve the administrability of the valuation requirement of section 475 for the IRS.

DATES: *Effective Date:* These regulations are effective on June 12, 2007.

Applicability Dates: Section 1.475(a)–4, concerning a safe harbor to use applicable financial statement values for purposes of section 475, applies to taxable years ending on or after June 12, 2007.

FOR FURTHER INFORMATION CONTACT: Marsha A. Sabin or John W. Rogers III (202) 622–3950 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–1945. Comments on the accuracy of the estimated burden and suggestions for reducing the burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224.

The collection of information in these regulations is in § 1.475(a)–4(f)(1) and § 1.475(a)–4(k). This information is required by the IRS to avoid any uncertainty about whether a taxpayer has made an election and to verify compliance with section 475 and the safe harbor method of accounting described in § 1.475(a)–4(d). This information will be used to facilitate examination of returns and to determine whether the amount of tax has been calculated correctly. The collection of the information is required to properly determine the amount of income or deduction to be taken into account. The taxpayers providing this information are sophisticated dealers in securities or commodities.

Estimated total annual recordkeeping burden: 49,232 hours.

Estimated average annual burden per recordkeeper: 4–6 hours.

Estimated number of recordkeepers: 12,308.

Estimated frequency of recordkeeping: Annually.

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 control number.

Books and records relating to the collection of information must be

retained as long as their contents might become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to 26 CFR Part 1 under section 475 of the Internal Revenue Code (Code). Section 475 was added to the Code by section 13223(a) of the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103–66, 107 Stat. 312). Section 475(a) generally provides that the securities held by dealers in securities must be valued as of the last business day of the year at fair market value. Section 475(e) allows dealers in commodities to elect similar treatment for their commodities. Under section 475(f), if a person is engaged in a trade or business as a trader in securities or a trader in commodities, the person may elect for the section 475 mark-to-market regime to apply to their trade or business.

Section 475(g) directs the Secretary to prescribe regulations that may be necessary or appropriate to carry out the purposes of section 475. The legislative history of section 475 indicates that, under this authority, the Secretary may issue regulations to permit the use of valuation methodologies that reduce the administrative burden of compliance on the taxpayer but clearly reflect income for Federal income tax purposes. On May 5, 2003, the Treasury Department and the IRS published in the **Federal Register** an advance notice of proposed rulemaking (Safe Harbor for Satisfying Certain Statutory Requirements for Valuation under Section 475 for Certain Securities and Commodities) (REG–100420–03) [68 FR 23632] (the ANPRM); Announcement 2003–35, 2003–1 CB 956 (see § 601.601(d)(2)). The ANPRM solicited comments on whether a safe harbor approach using values reported on an applicable financial statement for certain securities may be used for purposes of section 475. On May 24, 2005, the Treasury Department and the IRS published in the **Federal Register** a notice of proposed rulemaking (Safe Harbor for Valuation under Section 475) (REG–100420–03) [70 FR 29663] (the NPRM). The NPRM set forth a possible safe harbor for valuing these securities and asked for comments on various aspects of the safe harbor. A public hearing was held on September 15, 2005. The IRS received written and electronic comments responding to the NPRM. After consideration of all comments, the proposed regulations are adopted as amended by this Treasury decision. The amendments are discussed in this preamble.

Explanation of Provisions and Summary of Contents

Overview

Section 475(a) requires dealers in securities to mark their securities to market. Section 475(e) allows dealers in commodities to elect similar treatment for their commodities. If the security or commodity is inventory, it must be included in inventory at its fair market value. If it is not inventory and is held at the end of the taxable year, gain or loss is recognized as if the security or commodity had been sold for its fair market value on the last business day of the taxable year.

Although the term ''fair market value'' has a long-standing and well-established meaning within the tax law, it is sometimes difficult to determine the fair market value of certain securities and commodities. This has impeded the efficient administration of the mark-to-market system under section 475. Consequently, with a view to improving the administrability of the valuation requirements of section 475, the Treasury Department and the IRS issued the NPRM, which set forth a safe harbor for valuing securities and commodities under section 475.

These final regulations adopt the approach of the NPRM with the modifications discussed in this preamble.

Underlying Principles of the Safe Harbor

The safe harbor generally permits eligible taxpayers to elect to have the values that are reported for eligible positions on certain financial statements treated as the fair market values of those eligible positions for purposes of section 475, if certain conditions are met. The safe harbor is based upon the principle that if the mark-to-market method used for financial reporting is sufficiently consistent with the mark-to-market method required by section 475, then the values used for financial reporting should be acceptable values for purposes of section 475. To ensure minimal divergence from fair market value under tax principles, these regulations impose certain restrictions on the financial accounting methods and financial statements that are eligible for the safe harbor and also require certain adjustments to the values of the eligible positions on those financial statements that may be used under the safe harbor.

The safe harbor and its various requirements and limitations are based upon the business model for derivatives dealers that was described in comments received in response to the ANPRM and the NPRM. According to these comments, dealers seek to capture and profit from bid-ask spreads in the marketplace by entering into balanced portfolios for their derivatives, that is, positions that offset each other, either individually or in the aggregate. Although dealers may have some open positions, they seek to have balanced portfolios with a majority of positions offsetting each other. Those offsetting positions generally remain on dealers' books over the terms of the positions.

The spread between bid and ask values contains the dealer's profit, which compensates the dealer for all risks and expenses. The creation of a balanced portfolio may be seen as giving rise to a synthetic annuity, with a value that is largely immune from market-related changes in the values of the component positions. At the time the dealer has entered into the offsetting positions and created the synthetic annuity, all steps required to earn the income from the synthetic annuity have been completed. Recognizing the present value of the income attributable to the bid-ask spread is appropriate in the taxable year the synthetic annuity is created. For a matched book of eligible positions, such as a dealer's portfolio of interest rate swap contracts, use of bid or ask values approximates realization accounting and fails to recognize in income the present value of the synthetic annuity in the taxable year that the synthetic annuity is created. The final regulations are to be applied in a manner consistent with the premise that the present value of the synthetic annuity should be recognized in income not later than the taxable year in which the synthetic annuity is created.

Commentators described a different business model for securities that are not derivatives, commonly known as physicals. Under this model, dealers plan on rapid turnover of the physicals that are traded on qualified boards or exchanges or on liquid over-the-counter markets. Except for those acquired at the end of the taxable year, the acquisition and disposition of a physical occurs within a single taxable year, so that the effect of capturing a bid-ask spread also occurs entirely within that year. Consequently, for securities traded on a qualified board or exchange, as defined under section 1256(g)(7), there is little difference between the results of realization and mark-to-market accounting, and little opportunity for manipulation.

Eligible Taxpayers

The NPRM provided that traders could elect to use the safe harbor. In both the ANPRM and the NPRM, the Treasury Department and IRS asked for comments addressing whether traders in securities and commodities should be able to elect the safe harbor and whether the business model for traders differs from the business model for dealers. The commentators that recommended that the safe harbor apply to traders did so without providing information about the business model for traders and without suggesting how the limitations set forth in the NPRM would apply to traders. Without a full understanding of the business model for traders, the Treasury Department and the IRS have determined that it would be unwise to include traders in the safe harbor at this time. Accordingly, the final regulations provide that the safe harbor is available only to taxpayers who are dealers in securities under section 475(a) or who are dealers in commodities and are subject to the election described in section 475(e)(1).

Eligible Positions

Because financial markets and products evolve rapidly, listing the securities and commodities in the regulations would make the regulations less flexible and dynamic in the future. To ensure that the safe harbor will be adaptable and administrable in a changing environment, the Commissioner will issue concurrently with these final regulations a revenue procedure that will list the types of securities and commodities that are subject to the safe harbor. This revenue procedure may be updated as necessary.

It is important to note, however, that the valuation methodology under the safe harbor applies only for positions that, taking into account any elections and identifications that are in effect, are required to be marked to market under section 475. That is, the safe harbor only addresses valuation and does not expand or contract the scope or application of section 475. For example, if a security is not marked to market under section 475 because it has been properly identified as held for investment, then it may not be marked to market for Federal income tax purposes even though the safe harbor election is in effect and the security is properly marked to market on the financial statement in accordance with U.S. Generally Accepted Accounting Principles (U.S. GAAP). Similarly, if a security is not marked to market on the applicable financial statement because, for example, it is a hedge for financial statement purposes but section 475(a) applies because the security is not a hedging transaction for tax purposes, then the security must nevertheless be marked to market under section 475.

Eligible Method

The NPRM set forth four core requirements that a financial accounting method must satisfy in order to be eligible for the safe harbor. First, the method must mark eligible positions to market through valuations made as of the last business day of each taxable year. Second, it must recognize into income on the income statement any gain or loss from marking eligible positions to market. Third, it must recognize into income on the income statement any gain or loss on disposition of an eligible position as if a year-end mark occurred immediately before the disposition. Fourth, it must arrive at fair value in accordance with U.S. GAAP.

In addition to these core requirements, the NPRM imposed certain limitations to ensure minimal divergence from fair market value. Under the first limitation, the financial accounting method must not result in values at or near the bid or ask values, even if the use of bid or ask values is permissible under U.S. GAAP. This limitation applies to all eligible positions except those that are traded on a qualified board or exchange, as defined in section 1256(g)(7). This limitation ensures that a sufficient portion of the synthetic annuity captured by a dealer is reported in the correct accounting period of that dealer.

Under the second limitation in the NPRM, if a method of valuation is based on the present value of projected cash flows from an eligible position or positions, that method must not take into account any income or expense attributable to a period or time on or before the valuation date. This limitation ensures that items of income or expense will not be accounted for twice, first through current recognition and then again in the mark.

Under the third limitation in the NPRM, no cost or risk may be accounted for more than once, either directly or indirectly. For example, a financial accounting method may allow a special adjustment for credit risk. If, however, a method computes the present value of projected cash flows using a discount rate that takes credit risk into account and the method employs a special adjustment that takes some or all of the credit risk into account, then the method does not satisfy this limitation. This limitation ensures that items of income or expense will not be accounted for twice.

Most of the comments received on the NPRM focused on the core requirements and limitations for eligible methods. As explained in this preamble, the final regulations address those comments, rejecting some suggestions and modifying the regulations in response to others. The majority of the comments focused on (1) requiring changes in value to be reported on the income statement, (2) limiting the use of bid and ask values, and (3) excepting certain types of physical securities from the bid-ask limitation.

Income Statement Requirement—§ 1.475(a)–4(d)(2)(ii)

Some commentators suggested that eligible taxpayers be allowed to report changes in value on either the balance sheet or the income statement, because both are rigorously reviewed. They also expressed concern that, because certain items of other comprehensive income generally appear on the balance sheet and not on the income statement, the methodology used by many taxpayers for financial reporting would fail to be an eligible method and, therefore, would not satisfy the safe harbor.

When changes in value appear on the income statement, they also appear in retained earnings and in earnings-per-share. This creates a tension between the benefits of higher earnings for financial reporting and the benefit of lower income for tax reporting. This tension helps to ensure the reliability of values for tax purposes, a fundamental concept underlying the safe harbor. Balance sheet items, such as other comprehensive income, do not have the same tension. Therefore, the final regulations retain the income statement requirement of the NPRM.

Bid-Ask Limitation

Some commentators suggested that the bid-ask limitation be eliminated to make it easier for taxpayers to qualify for the safe harbor. These commentators indicated that dealers generally do not retain records of individual positions' bid-ask spreads for any meaningful period of time, and it would be burdensome to monitor the spreads of those positions for which records do exist.

The safe harbor set forth in the NPRM does not add to taxpayers' existing recordkeeping burden. Without the safe harbor, other sections of the Code would require taxpayers to keep records to prove the values of individual positions or to keep records of spreads if taxpayers account for their income and loss based on those spreads. The safe

harbor simply allows taxpayers to use those same records to prepare both the applicable financial statement and their tax return. Accordingly, the bid-ask limitation has been retained in the final regulations.

Additionally, according to some commentators, the requirement in the NPRM that values should be nearer to the mid-market value than to the bid or ask value could be interpreted in two ways. First, it could be a requirement that, if not met for a particular position, would disqualify an entire financial accounting method as an eligible method. Second, it could be a safe harbor that, if not met for a particular position, would not disqualify the method but would require the taxpayer to prove that the method consistently produces values nearer to mid-market than to bid or ask. The final regulations make it clear that this provision is a safe harbor and that a method that may occasionally produce a value that is not nearer to mid-market than to bid or ask will not preclude use of the safe harbor.

The Treasury Department and the IRS also received suggestions from commentators seeking expansion of the exceptions to the bid-ask limitations. Some commentators noted that the exception for exchange-traded positions in the NPRM was too narrow because it did not cover those equities and debt securities, such as Treasury obligations, that are traded in very liquid, over-the-counter markets and have easily determinable values. These commentators suggested that, rather than limit the exception to positions on qualified boards or exchanges as defined in section 1256(g)(7), the regulations should include within the exception all positions for which there is an established financial market within the meaning of § 1.1092(d)–1(b).

The exception for positions that are traded on a qualified board or exchange described in section 1256(g)(7) was included in the NPRM to except those positions with spreads so small that applying the bid-ask limitation would have little effect on the determination of fair market value. Because section 1092 is an anti-abuse provision that Congress intended to be broad in scope, the definition of established financial market in § 1.1092(d)–1(b) reflects a corresponding breadth. Thus, expansion of the exception for exchange-traded positions by reference to § 1.1092(d)–1(b) might inappropriately except too many positions from the general bid-ask limitation. For example, many derivative contracts for which dealers lock in spreads are positions for which there is an established financial market. See § 1.1092(d)–1(b), (c). Consequently, the reference to section 1256(g)(7) has been retained.

Some of the comments about the bid-ask exception were prompted by the view that debt instruments should be excepted from the bid-ask limitation for some of the same reasons as positions traded on a 1256(g)(7) board or exchange.

The Treasury Department and the IRS, however, decline at this time to adopt the suggestion that debt instruments be generally excepted from the bid-ask limitation. The Treasury Department and the IRS recognize that dealers' business model for debt instruments generally is to turn over debt securities very rapidly and that dealers have a strong economic incentive to do so because holding debt securities consumes balance sheet resources and poses risk management issues. Nevertheless, based on comments received, the Treasury Department and the IRS do not possess sufficient information to conclude that spreads in the over-the-counter debt markets are *de minimis*. Additionally, debt instruments may be used to lock in spreads with respect to open positions in other instruments, such as derivatives. Therefore, excepting over-the-counter debt instruments from the bid-ask limitation may be contrary to the tenets of the dealer business model for derivatives. Moreover, excepting debt instruments from the bid-ask limitation might introduce a tax-motivated distortion into the marketplace, as taxpayers may decide to lock in spreads with tax-advantaged instruments rather than with instruments that are selected on the basis of their non-tax economic attributes. The Commissioner may, however, designate additional positions as being exempt from the bid-ask limitation.

Understanding the need for a limitation on the use of bid and ask values, one commentator suggested an open position exception to the bid-ask limitation. Under this alternative, offsetting positions in the balanced portion of a portfolio would not be valued at or near the bid or ask values. Open positions, however, would not be subject to this limitation. Instead, they could be valued at any value between and including the bid and ask values. According to this commentator, the bid-ask limitation ensures that the present value of the income attributable to the bid-ask spread is recognized in the taxable year the synthetic annuity is created. Open positions, it was noted, do not create a synthetic annuity so the bid-ask limitation need not apply to them.

The Treasury Department and the IRS decline to adopt the rule suggested by this commentator. Under a mark-to-market system, when a dealer enters into an open position with a customer, that dealer has captured the spread inherent in that customer position, even if the customer position is not offset by another position. Although it can be argued that a dealer may be forced to pay a spread to obtain a position offsetting the open customer position, to assume a dealer would do so across the board would be to ascribe customer status (which is paying spreads) to the dealer, a result inconsistent with the dealer business model (which is charging spreads). Additionally, in the event a dealer actually pays a spread to offset the open customer position, the disadvantageous terms of the offsetting position will be reflected in the mark-to-market valuation of that position. Administrability is also a concern. Before accepting the suggestion that a dealer should recognize no mark-to-market income from any open position until the position is offset by one or more other positions, the Treasury Department and the IRS would need more information regarding the manner in which to verify the process for determining the proper amounts of adjustments taxpayers will use to achieve this result.

Eligible Methods, Eligible Positions and the Safe Harbor Election

The final regulations modify the NPRM by providing that the election to use the safe harbor is made by filing a statement with the taxpayer's return declaring that the taxpayer makes the safe harbor election for all eligible positions for which it has an eligible method. An example elaborating on this concept has been added to the final regulations.

Applicable Financial Statements

Not all financial statements qualify under the safe harbor. Consequently, these regulations set forth a system that enables a taxpayer to determine which one of its financial statements, if any, may be used when applying the safe harbor. The final regulations adopt the provisions of the NPRM on applicable financial statements.

Some commentators expressed concern that U.S. branches of foreign banks would not be eligible to use the safe harbor because they do not prepare financial statements in accordance with U.S. GAAP. The comments suggested that many of these branches prepare their financial statements in accordance with rules that are substantially similar to U.S. GAAP and, therefore, should be

permitted to use those non-U.S. GAAP financial statements for purposes of the safe harbor. The commentators also suggested that call reports submitted to U.S. bank regulators by foreign banks have sufficient indicia of reliability to merit use in the safe harbor, even though changes over time in the values in those reports may not be directly reflected in income statements prepared according to U.S. GAAP.

As noted in this preamble, the safe harbor is based on the concept that, with appropriate limitations, mark-to-market values used on certain financial statements can be sufficiently consistent with fair market values under section 475. The IRS and Treasury Department have concluded that the requirements and limitations of the safe harbor ensure sufficient consistency when applied to financial statements prepared according to U.S. GAAP. This conclusion is less clear when the requirements and limitations are applied to financial statements prepared under other accounting regimes. Consequently, the final regulations retain the requirement that applicable financial statements be prepared in accordance with U.S. GAAP. The final regulations retain the requirement in the NPRM that, to be an eligible method, a financial statement method of accounting must cause changes in value to be recognized into income on the income statement.

Nevertheless, making it practical for foreign banks to use the safe harbor for their U.S. branches could be valuable not only to the foreign banks but also to the IRS in its administration and application of section 475. Therefore, the IRS and Treasury Department are interested in expanding the scope of these regulations so that they may apply in the future to foreign banks. Answers to the following questions would facilitate efforts to achieve that expansion. First, should the safe harbor require that the values reported in the call report of the foreign bank be the same values that are reported in the income statement filed in the foreign bank's home country? If so, should the foreign bank, together with its certified independent registered public accountant, file with the U.S. tax return, subject to penalties of perjury, a statement to that effect?

Second, should the valuation standards used in the foreign bank's home country be identical to the valuation standards under U.S. GAAP, and if not identical, in what ways may they differ? If so, should the foreign bank, together with its certified independent registered public accountant, file a statement with the U.S. tax return, subject to penalties of perjury, describing the differences, if any, between the foreign country valuation standards and those under U.S. GAAP? Further, should the foreign valuation standards be fully consistent with, and should the foreign country have formally adopted, International Financial Reporting Standards as published by the International Accounting Standards Board?

Third, should the income statement filed by the foreign bank be filed with the foreign bank's home country bank regulator (as distinct from a market regulator like the SEC)?

Fourth, for purposes of these questions, should the term ''home country'' mean the country in which the foreign bank is chartered or incorporated?

Record Retention and Production

The safe harbor will be administrable only if the IRS can readily verify that the financial statements at issue are taxpayers' applicable financial statements, that the accounting methods used are eligible methods, and that the values used on the applicable financial statements are also used on the Federal income tax return. Consequently, recordkeeping and record production are critical to the effective administration of the safe harbor.

These final regulations retain the provisions of the NPRM regarding record retention and production. They provide specific requirements for the types of records that must be maintained and provided, to enable ready verification. In general, electing taxpayers must clearly show: (1) That the same value used for financial reporting was used on the Federal income tax return; (2) that no eligible position subject to section 475 is excluded from the application of the safe harbor; and (3) that only eligible positions subject to section 475 are carried over to the Federal income tax return under the safe harbor.

Commentators expressed concern that the language of the NPRM requiring all schedules, exhibits, computer programs, and other information used to produce values was too broad, making it difficult to know what materials must be retained and produced. They also expressed concern that a requirement to keep computer programs and information used in producing values not only would require taxpayers to keep information about models that are changed frequently but also would encourage IRS employees to examine valuation models not just for compliance with the definition of ''eligible method'' but also for examining the accuracy of the underlying valuations.

The final regulations retain the record retention and production requirements set forth in the NPRM. Other sections of the Code already require taxpayers to maintain records sufficient to support the accuracy of items reported on their Federal tax returns. Except for a possible increase in the retention period in some instances, therefore, the final regulations create no additional burden. To avoid confusion or undue burden, the final regulations permit a taxpayer to enter into an agreement with the IRS specifying which records must be maintained, how they must be maintained, and for how long they must be maintained. These agreements may include terms covering the maintenance of computer programs and information used in producing values.

The maintenance and production requirements of the regulations preclude undue delay in producing records. One commentator suggested that the 30-day deadline provided too little time to produce records. During the development of these regulations, the IRS conducted a test program to determine not only whether values could be traced from financial statements to the tax return but also how long it would take for taxpayers to produce the necessary records. This test program demonstrated that 30 days was generally a sufficient period of time. For specific cases, the Commissioner may excuse failures to provide records within 30 days if the taxpayer shows reasonable cause for the failure and has made a good faith effort to comply. As noted above, the taxpayer may also enter into an agreement with the Commissioner that sets forth a different time period. Accordingly, the final regulations retain the general 30-day requirement.

Special Analyses

It has been determined that this Treasury decision 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. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the expectation that the safe harbor will be used primarily by dealers in securities that are financial institutions with a sophisticated understanding of the capital markets. Because section 475 is

elective for dealers in commodities, some small businesses could qualify for the safe harbor if they make two voluntary elections: (1) An election to mark to market commodities under section 475 and (2) an election to apply the safe harbor. Because both elections are voluntary, it is unlikely any small business taxpayer who thinks the reporting and recordkeeping requirements are too burdensome will make these elections. Furthermore, the total average estimated burden per taxpayer is small, as reported earlier in the preamble. This is because most of the recordkeeping requirements do not require taxpayers to generate new records, but instead require records used for financial reporting purposes to be kept for tax reporting purposes. For all of these reasons, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these regulations are Marsha A. Sabin and John W. Rogers III, Office of the Associate Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

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

Section 1.475(a)–4 also issued under 26 U.S.C. 475(g). * * *

■ **Par. 2.** Section 1.475–0 is amended by:

■ 1. Revising the introductory text.

■ 2. Adding entries to the table for § 1.475(a)–4.

■ 3. Redesignating the entry for § 1.475(e)–1 as § 1.475(g)–1.

The revision and addition reads as follows:

§ 1.475–0 Table of contents.

This section lists the major captions in §§ 1.475(a)–3, 1.475(a)–4, 1.475(b)–1, 1.475(b)–2, 1.475(b)–4, 1.475(c)–1, 1.475(c)–2, 1.475(d)–1 and 1.475(g)–1.

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§ 1.475(a)–4 Safe Harbor for Valuation Under Section 475.

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(l) [Reserved.]
(m) Use of different values.

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§ 1.475(g)–1 Effective dates.

■ **Par. 3.** Section 1.475(a)–4 is added to read as follows:

§ 1.475(a)–4 Valuation safe harbor.

(a) *Overview*—(1) *Purpose.* This section sets forth a safe harbor that, under certain circumstances, permits taxpayers to elect to use the values of positions reported on certain financial statements as the fair market values of those positions for purposes of section 475. This safe harbor is based on the principle that, if a mark-to-market method used for financial reporting is sufficiently consistent with the requirements of section 475 and if the financial statement employing that method has certain indicia of reliability, then the values used on that financial statement may be used for purposes of section 475. If other provisions of the Internal Revenue Code or regulations require adjustments to fair market value, use of the safe harbor does not eliminate the need for those adjustments. See paragraph (e) of this section.

(2) *Dealer business model.* The safe harbor is based on the business model for a derivatives dealer. Under this model, the dealer seeks to capture and profit from bid-ask spreads in the marketplace by entering into substantially offsetting positions with customers that will remain on the derivatives dealer's books over their terms. Because the positions in the aggregate tend to offset each other, the dealer has achieved a predictable net cash flow (for example, a synthetic annuity) that reflects the captured bid-ask spread. This net cash flow is generally impervious to market fluctuations in the values on which the component derivatives are based. Section 475 requires current recognition of the present value of the net cash flow attributable to the capture of these spreads.

(3) *Summary of paragraphs.* Paragraph (b) of this section sets forth the safe harbor. To determine who may use the safe harbor, paragraph (c) of this section defines the term ''eligible taxpayer.'' Paragraph (d) of this section sets forth the basic requirements for determining whether the method used for financial reporting is sufficiently consistent with the requirements of

section 475. Paragraph (e) of this section describes adjustments to the financial statement values that may be required for purposes of applying this safe harbor. Paragraph (f) of this section describes the procedure for making the safe harbor election and the conditions under which the election may be revoked. Paragraph (g) of this section provides that the Commissioner will issue a revenue procedure that lists the types of securities and commodities that are eligible positions for purposes of the safe harbor. Using rules for determining priorities among financial statements, paragraph (h) of this section defines the term ''applicable financial statement'' and so describes the financial statement, if any, whose values may be used in the safe harbor. In some cases, as required by paragraph (j) of this section, the safe harbor is available only if the taxpayer's operations make significant business use of financial statement values. Paragraph (k) of this section sets forth requirements for record retention and record production. Paragraph (m) of this section provides that the Commissioner may use fair market values that clearly reflect income, but which differ from values used on the applicable financial statement, if an electing taxpayer fails to comply with the recordkeeping and record production requirements of paragraph (k) of this section.

(b) *Safe harbor*—(1) *General rule.* Subject to any adjustment required by paragraph (e) of this section, if an eligible taxpayer uses an eligible method for the valuation of an eligible position on its applicable financial statement and the eligible taxpayer is subject to the election described in paragraph (f) of this section, the value that the eligible taxpayer assigns to that eligible position on its applicable financial statement is the fair market value of the eligible position for purposes of section 475 and must be used for purposes of section 475, even if that value is not the fair market value of the position for any other purpose of the internal revenue laws. Notwithstanding the rule set forth in this paragraph, the Commissioner may, in certain circumstances, use fair market values that clearly reflect income but differ from the values used on the applicable financial statement. See paragraph (m) of this section.

(2) Example. Use of eligible and non-eligible methods. X uses eligible methods on its applicable financial statement for some, but not all, securities and commodities that are eligible positions. When X elects into the safe harbor, the election applies to all eligible positions for which X has an eligible method. Therefore, once the election is in effect, the financial statement values for eligible positions for which X has an eligible method are the fair market values of those eligible positions for purposes of section 475. Since X, however, does not have an eligible method for all eligible positions, those eligible positions for which X does not have an eligible method remain subject to the fair market value requirements of section 475 as set out in case law and otherwise.

(3) *Scope of the safe harbor.* The safe harbor may be used only to determine values for eligible positions that are properly marked to market under section 475. It does not determine whether any positions may or may not be subject to mark-to-market accounting under section 475.

(c) *Eligible taxpayer.* An eligible taxpayer is—

(1) A dealer in securities, as defined in section 475(c)(1); or

(2) A dealer in commodities, as defined in section 475(e), that is subject to an election under section 475(e).

(d) *Eligible method*—(1) *Sufficient consistency.* An eligible method is a mark-to-market method that is sufficiently consistent with the requirements of a mark-to-market method under section 475. To be sufficiently consistent with the requirements of a mark-to-market method under section 475, the eligible method must satisfy all of the requirements of paragraph (d)(2) and paragraph (d)(3) of this section.

(2) *General requirements.* The method—

(i) *Frequency.* Must require a valuation of the eligible position no less frequently than annually, including a valuation as of the last business day of the taxable year;

(ii) *Recognition at the mark.* Must recognize into income on the income statement for each taxable year mark-to-market gain or loss based upon the valuation or valuations described in paragraph (d)(2)(i) of this section;

(iii) *Recognition on disposition.* Must require, on disposition of the eligible position, recognition into income (on the income statement for the taxable year of disposition) as if a year-end mark occurred immediately before such disposition; and

(iv) *Fair value standard.* Must require use of a valuation standard that arrives at fair value in accordance with U.S. Generally Accepted Accounting Principles (U.S. GAAP).

(3) *Limitations*—(i) *Bid-ask method*—(A) *General rule.* Except for eligible positions that are traded on a qualified board or exchange, as defined in section 1256(g)(7), or eligible positions that the Commissioner designates in a revenue procedure or other published guidance, the valuation standard used must not, other than on a *de minimis* portion of a taxpayer's positions, permit values at or near the bid or ask value. Consequently, the valuation method described in § 1.471–4(a)(1) fails to satisfy this paragraph (d)(3)(i)(A).

(B) *Safe harbor.* The restriction in paragraph (d)(3)(i)(A) of this section is satisfied if the method consistently produces values that are closer to the mid-market values than they are to the bid or ask values.

(ii) *Valuations based on present values of projected cash flows.* If the method of valuation consists of projecting cash flows from an eligible position or positions and determining the present value of those cash flows, the method must not take into account any cash flows attributable to a period or time on or before the valuation date. In addition, adjustment of the gain or loss recognized on the mark may be required with respect to payments that will be made after the valuation date to the extent that portions of the payments have been recognized for tax purposes before the valuation and appropriate adjustment has not been made for purposes of determining financial statement value.

(iii) *Accounting for costs and risks.* Valuations may account for appropriate costs and risks, but no cost or risk may be accounted for more than once, either directly or indirectly. Further, no valuation adjustment for any cost or risk may be made for purposes of this safe harbor if that valuation adjustment is not also permitted by, and taken for, U.S. GAAP purposes on the taxpayer's applicable financial statement. If appropriate, the costs and risks that may be accounted for include, but are not limited to, credit risk (appropriately adjusted for any credit enhancement), future administrative costs, and model risk. An adjustment for credit risk is implicit in computing the present value of cash flows using a discount rate greater than a risk-free rate. Accordingly, a determination of whether any further downward adjustment to value for credit risk is warranted, or whether an upward adjustment is required, must take that implicit adjustment into consideration.

(4) *Examples.* The following examples illustrate this paragraph (d):

Example 1. (i) X, a calendar year taxpayer, is a dealer in securities within the meaning of section 475(c)(1). X generally maintains a balanced portfolio of interest rate swaps and other interest rate derivatives, capturing bid-ask spreads and keeping its market exposure within desired limits (using, if necessary, additional derivatives for this purpose). X uses a mark-to-market method on a statement that it is required to file with the United

States Securities and Exchange Commission (SEC) and that satisfies paragraph (d)(2) of this section with respect to both the contracts with customers and the additional derivatives. When determining the amount of any gain or loss realized on a sale, exchange, or termination of a position, X makes a proper adjustment for amounts taken into account respecting payments or receipts. All of X's counterparties on the derivatives have credit ratings of AA/aa, according to standard credit ratings obtained from private credit rating agencies.

(ii) Under X's valuation method, as of each valuation date, X determines a mid-market probability distribution of future cash flows under the derivatives and computes the present values of these cash flows. In computing these present values, X uses an industry standard yield curve that is appropriate for obligations by persons with credit ratings of AA/aa. In addition, based on information that includes its own knowledge about the counterparties, X adjusts some of these present values either upward or downward to reflect X's reasonable judgment about the extent to which the true credit status of each counterparty's obligation, taking credit enhancements into account, differs from AA/aa.

(iii) X's methodology does not violate the requirement in paragraph (d)(3)(iii) of this section that the same cost or risk not be taken into account, directly or indirectly, more than once.

Example 2. (i) The facts are the same as in *Example 1,* except that X uses a AAA/aaa rate to discount the payments to be received under the derivatives. Based on information that includes its own knowledge about the counterparties, X adjusts these present values to reflect X's reasonable judgment about the extent to which the true credit status of each counterparty's obligation, taking credit enhancements into account, differs from a AAA/aaa obligation.

(ii) X's methodology does not violate the requirement in paragraph (d)(3)(iii) of this section that the same cost or risk not be taken into account, directly or indirectly, more than once.

Example 3. (i) The facts are the same as in *Example 1,* except that, after computing present values using the discount rates that are appropriate for obligors with credit ratings of AA/aa, and based on information that includes X's own knowledge about the counterparties, X adjusts some of these present values either upward or downward to reflect X's reasonable judgment about the extent to which the true credit status of each counterparty's obligation, taking credit enhancements into account, differs from AAA/aaa.

(ii) X's methodology violates the requirement in paragraph (d)(3)(iii) of this section that the same cost or risk not be taken into account, directly or indirectly, more than once. By using a AA/aa discount rate, X's method takes into account the difference between risk-free obligations and AA/aa obligations. This difference includes the difference between a rating of AAA/aaa and one of AA/aa. By adjusting values for the difference between a rating of AAA/aaa and one of AA/aa, X takes into account risks that it had already accounted for through the discount rates that it used. The same result would occur if X judged some of its counterparties' obligations to be of AAA/aaa quality but X failed to adjust the values of those obligations to reflect the difference between a rating of AAA/aaa and one of AA/aa.

Example 4. (i) The facts are the same as in *Example 1,* except that X determines the mid-market value for each derivative and then subtracts the corresponding part of the bid-ask spread.

(ii) X's methodology violates the rule in paragraph (d)(3)(i) of this section that forbids valuing positions at or near the bid or ask value.

Example 5. (i) The facts are the same as in *Example 1,* and, in addition, X's adjustments for all risks and costs, including credit risk, future administrative costs and model risk, may occasionally cause the adjusted value of an eligible position to be at or near the bid value or ask value.

(ii) X's methodology does not violate the rule in paragraph (d)(3)(i)(A) of this section that forbids valuing eligible positions at or near the bid or ask value.

(e) *Compliance with other rules.* Notwithstanding any other provisions of this section, the fair market values for purposes of the safe harbor must be consistent with section 482, or rules that adopt section 482 principles, when applicable. For example, if a notional principal contract is subject to section 482 or section 482 principles, the values of future cash flows taken into account in determining the value of the contract for purposes of section 475 must be consistent with section 482.

(f) *Election*—(1) *Making the election.* Unless the Commissioner prescribes otherwise, an eligible taxpayer elects under this section by filing with the Commissioner a statement declaring that the taxpayer makes the safe harbor election in this section for all eligible positions for which it has an eligible method. In addition to any other information that the Commissioner may require, the statement must describe the taxpayer's applicable financial statement for the first taxable year for which the election is effective and must state that the taxpayer agrees to provide upon the request of the Commissioner all information, records, and schedules in the manner required by paragraph (k) of this section. The statement must be attached to a timely filed Federal income tax return (including extensions) for the taxable year for which the election is first effective.

(2) *Duration of the election.* Once made, the election continues in effect for all subsequent taxable years unless revoked.

(3) *Revocation*—(i) *By the taxpayer.* An eligible taxpayer that is subject to an election under this section may revoke the election only with the consent of the Commissioner.

(ii) *By the Commissioner.* The Commissioner, after consideration of the relevant facts and circumstances, may revoke an election under this section, effective beginning with the first open year for which the election is effective or with any subsequent year, if—

(A) The taxpayer fails to comply with paragraph (k) of this section (concerning record retention and production) and the taxpayer does not show reasonable cause for this failure;

(B) The taxpayer ceases to have an applicable financial statement or ceases to use an eligible method; or

(C) For any other reason, no more than a de minimis number of eligible positions, or no more than a de minimis fraction of the taxpayer's eligible positions, are covered by the safe harbor in paragraph (b) of this section.

(4) *Re-election.* If an election is revoked, either by the Commissioner or by the taxpayer, the taxpayer (or any successor in interest of the taxpayer) may not make the election without the consent of the Commissioner for any taxable year that begins before the date that is six years after the first day of the earliest taxable year affected by the revocation.

(g) *Eligible positions.* For any taxpayer, an eligible position is any security or commodity that the Commissioner in a revenue procedure or other published guidance designates as an eligible position with respect to that taxpayer for purposes of this safe harbor.

(h) *Applicable financial statement*—(1) *Definition.* An eligible taxpayer's applicable financial statement for a taxable year is the taxpayer's primary financial statement for that year if that primary financial statement is described in paragraph (h)(2)(i) of this section (concerning statements required to be filed with the SEC) or if that primary financial statement both meets the requirements of paragraph (j) of this section (concerning significant business use) and is described in either paragraph (h)(2)(ii) or (iii) of this section. Otherwise, or if the taxpayer does not have a primary financial statement for the taxable year, the taxpayer does not have an applicable financial statement for the taxable year.

(2) *Primary financial statement.* For any taxable year, an eligible taxpayer's primary financial statement is the financial statement, if any, described in one or more of paragraphs (h)(2)(i), (ii), and (iii) of this section. If more than one financial statement of the taxpayer for the year is so described, the primary financial statement is the one first

described in paragraphs (h)(2)(i), (ii), and (iii) of this section. A taxpayer has only one primary financial statement for any taxable year.

(i) *Statement required to be filed with the Securities and Exchange Commission (SEC).* A financial statement that is prepared in accordance with U.S. GAAP and that is required to be filed with the SEC, such as the 10–-K or the Annual Statement to Shareholders.

(ii) *Statement filed with a Federal agency other than the Internal Revenue Service.* A financial statement that is prepared in accordance with U.S. GAAP and that is required to be provided to the Federal government or any of its agencies other than the Internal Revenue Service (IRS).

(iii) Certified audited financial statement. A certified audited financial statement that is prepared in accordance with U.S. GAAP; that is given to creditors for purposes of making lending decisions, given to equity holders for purposes of evaluating their investment in the eligible taxpayer, or provided for other substantial non-tax purposes; and that the taxpayer reasonably anticipates will be directly relied on for the purposes for which it was given or provided.

(3) Example. Primary financial statement. X prepares financial statement FS1, which is required to be filed with a Federal government agency other than the SEC or the IRS. FS1 is thus described in paragraph (h)(2)(ii) of this section. X also prepares financial statement FS2, which is a certified audited financial statement that is given to creditors and that X reasonably anticipates will be relied on for purposes of making lending decisions. FS2 is thus described in paragraph (h)(2)(iii) of this section. Because FS1, which is described in paragraph (h)(2)(ii) of this section, is described before FS2, which is described in paragraph (h)(2)(iii) of this section, FS1 is X's primary financial statement.

(4) *Financial statements of equal priority.* If the rules of paragraph (h)(2) of this section cause two or more financial statements to be of equal priority, then the statement that results in the highest aggregate valuation of eligible positions being marked to market under section 475 is the primary financial statement.

(5) *Consolidated groups.* If the taxpayer is a member of an affiliated group that files a consolidated return, the primary financial statement of the taxpayer is the primary financial statement, if any, of the common parent (within the meaning of section 1504(a)(1)) of the consolidated group.

(6) *Supplement or amendment to a financial statement.* A financial statement includes any supplement or amendment to the financial statement.

(7) *Certified audited financial statement.* For purposes of this paragraph (h), a financial statement is a certified audited financial statement if it is certified by an independent certified public accountant from a Registered Public Accounting firm, as defined in section 2(a)(12) of the Sarbanes-Oxley Act of 2002, Public Law 107–204, 116 Stat. 746 (July 30, 2002), 15 U.S.C. § 7201(a)(12), and rules promulgated under that Act, and is—

(i) Certified to be fairly presented (a ''clean'' opinion);

(ii) Certified to be fairly presented subject to a concern about a contingency, other than a contingency relating to the value of eligible positions (a qualified ''subject to'' opinion); or

(iii) Certified to be fairly presented except for a method of accounting with which the Certified Public Accountant disagrees and which is not a method used to determine the value of an eligible position held by the eligible taxpayer (a qualified ''except for'' opinion).

(i) [Reserved].

(j) *Significant business use*—(1) *In general.* A financial statement is described in this paragraph (j) if—

(i) The financial statement contains values for eligible positions;

(ii) The eligible taxpayer makes significant use of financial statement values in most of the significant management functions of its business; and

(iii) That use is related to the management of all or substantially all of the eligible taxpayer's business.

(2) *Financial statement value.* For purposes of this paragraph (j), the term *financial statement value* means—

(i) A value that is taken from the financial statement; or

(ii) A value that is produced by a process that is in all respects identical to the process that produces the values that appear on the financial statement but that is not taken from the statement because either—

(A) The value was determined as of a date for which the financial statement does not value eligible positions; or

(B) The value is used in the management of the business before the financial statement has been prepared.

(3) *Management functions of a business.* For purposes of this paragraph (j), the term *management functions of a business* refers to the financial and commercial oversight of the business. Oversight includes, but is not limited to, senior management review of business-unit profitability, market risk measurement or management, credit risk measurement or management, internal allocation of capital, and compensation of personnel. Management functions of a business do not include either tax accounting or reporting the results of operations to persons other than directors or employees.

(4) *Significant use.* If an eligible taxpayer uses financial statement values for some significant management functions and uses values that are not financial statement values for other significant management functions, then the determination of whether the taxpayer has made significant use of the financial statement values is made on the basis of all the facts and circumstances. This determination must particularly take into account whether the taxpayer's reliance on the financial statement values exposes the taxpayer to material adverse economic consequences if the values are incorrect.

(k) *Retention and production of records*—(1) *In general.* In addition to all records that section 6001 otherwise requires to be retained, an eligible taxpayer subject to the election provided by this section must keep, and timely provide to the Commissioner upon request, records and books of account that are sufficient to establish that the financial statement to which the income tax return conforms is the taxpayer's applicable financial statement, that the method used on that statement is an eligible method, and that the values used for eligible positions for purposes of section 475 are the values used in the applicable financial statement. This obligation extends to all records and books that are required to be maintained for any period for financial or regulatory reporting purposes, even if these records or books may not otherwise be specifically covered by section 6001. All records and books described in this paragraph (k) must be maintained for the period described in paragraph (k)(4) of this section, even if a lesser period of retention applies for financial statement or regulatory purposes.

(2) *Specific requirements*—(i) *Verification and reconciliation.* Unless the Commissioner otherwise provides—

(A) *In general.* An eligible taxpayer must provide books and records to verify the appropriate use of the safe harbor and reconciliation schedules between the applicable financial statement for the taxable year and the Federal income tax return for that year. The required verification materials and reconciliation schedules include all supporting schedules, exhibits, computer programs, and any other information used in producing the

values and schedules, including the documentation of rules and procedures governing determination of the values. The required reconciliation schedules must also include a detailed explanation of any adjustments necessitated by the imperfect overlap between the eligible positions that the taxpayer marks to market under section 475 and the eligible positions for which the applicable financial statement uses an eligible method. In the time and manner provided by the Commissioner, a corporate taxpayer subject to this paragraph (k) must reconcile the net income amount reported on its applicable financial statement to the amount reported on the applicable forms and schedules on its Federal income tax return (such as the Schedule M–1, ''Net Income(Loss) Reconciliation for Corporations With Total Assets of $10 Million or More''; Schedule M–3, ''Net Income(Loss) Reconciliation for Corporations With Total Assets of $10 Million or More''; and Form 1120F, ''U.S. Income Tax Return of a Foreign Corporation''). Eligible taxpayers that are not otherwise required to file a Schedule M–1 or Schedule M–3 must reconcile net income using substitute schedules similar to Schedule M–1 and Schedule M–3, and these substitute schedules must be attached to the return.

(B) *Values on books and records with supporting schedules.* The books and records must state the value used for each eligible position separately from the value used for any other eligible position. However, an eligible taxpayer may make adjustments to values on a pooled basis, if the taxpayer demonstrates that it can compute gain or loss attributable to the sale or other disposition of an individual eligible position.

(C) *Consolidation schedules.* An eligible taxpayer must provide a schedule showing the consolidation and de-consolidation that is used in preparing the applicable financial statement, along with exhibits and subordinate schedules. This schedule must provide information that addresses the differences for consolidation and de-consolidation between the applicable financial statement and the Federal income tax return.

(ii) *Instructions provided by the Commissioner.* The Commissioner may provide an alternative time or manner in which an eligible taxpayer subject to this paragraph (k) must establish that the same values used for eligible positions on the applicable financial statement are also the values used for purposes of section 475 on the Federal income tax return.

(3) *Time for producing records.* All documents described in this paragraph (k) must be produced within 30 days of a request by the Commissioner, unless the Commissioner grants a written extension. Generally, the Commissioner will exercise his discretion to excuse a minor or inadvertent failure to provide requested documents if the taxpayer shows reasonable cause for the failure, has made a good faith effort to comply with the requirement to produce records, and promptly remedies the failure. For failures to maintain, or timely produce, records, see paragraph (f)(3)(ii) of this section (allowing the Commissioner to revoke the election), and see paragraph (m) of this section (allowing the Commissioner, but not the taxpayer, to use for eligible positions that otherwise might be subject to the safe harbor fair market values that clearly reflect income but that are different from the values used on the applicable financial statement).

(4) *Retention period for records.* All materials required by this paragraph (k) and section 6001 must be retained as long as their contents may become material in the administration of any internal revenue law.

(5) *Agreements with the Commissioner.* The Commissioner and an eligible taxpayer may enter into a written agreement that establishes, for purposes of this paragraph (k), which records must be maintained, how they must be maintained, and for how long they must be maintained.

(l) [Reserved].

(m) *Use of different values.* If, with respect to the records that relate to certain eligible positions for a taxable year, the taxpayer fails to satisfy paragraph (k) of this section (concerning record retention and record production), then, for those eligible positions for that year, the Commissioner may use values that the Commissioner determines to be fair market values that are appropriate to clearly reflect income, even if the values so determined are different from the values reported for those positions on the applicable financial statement. See also paragraph (f)(3)(ii) of this section (concerning revocation of the election by the Commissioner when a taxpayer does not produce required records and fails to demonstrate reasonable cause for the failure).

§ 1.475(e)–1 [Redesignated as § 1.475(g)–1]

■ **Par. 4.** Section 1.475(e)–1 is redesignated as § 1.475(g)–1.

■ **Par. 5.** Newly designated § 1.475(g)–1 is amended by redesignating paragraphs (d) through (j) as paragraphs (e) through (k), respectively, and adding a new paragraph (d) to read as follows:

§ 1.475(g)–1 Effective dates.

* * * * *

(d) Section 1.475(a)–4 (concerning a safe harbor to use applicable financial statement values for purposes of section 475) applies to taxable years ending on or after June 12, 2007.

* * * * *

PART 602—OMB CONTROL NUMBERS UNDER PAPERWORK REDUCTION ACT

■ **Par. 6.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 7.** In § 602.101, paragraph (b) is amended by adding the entry for 1.475(a)–4 to the table to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control no.
* * * *	*
1.475(a)–4	1545–1945
* * * *	*

Kevin M. Brown,

Deputy Commissioner for Services and Enforcement.

Approved: May 30, 2007.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E7–11146 Filed 6–11–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD09–07–005]

RIN 1625–AA00

Safety Zones; Annual Events Requiring Safety Zones in the Captain of the Port Lake Michigan Zone

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard has established permanent safety zones for

annual events in the Captain of the Port Lake Michigan zone. This rule will restrict vessels from portions of water and shore areas during events that pose a hazard to public safety. The safety zones established by this final rule are necessary to protect spectators, participants, and vessels from the hazards associated with fireworks displays, air shows, and other events.

DATES: This rule is effective June 27, 2007.

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 [CGD09–07–005] and are available for inspection or copying at Coast Guard Sector Lake Michigan (spw), 2420 South Lincoln Memorial Drive, Milwaukee, WI 53207 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: CWO Brad Hinken, Prevention Department, Coast Guard Sector Lake Michigan, Milwaukee, WI at (414) 747–7154.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On May 4, 2007, we published a notice of proposed rulemaking (NPRM) entitled ''Safety Zones; Annual events requiring safety zones in the Captain of the Port Lake Michigan zone'' in the **Federal Register** (72 FR 25219). 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**. Any delay encountered in the regulation's effective date would be contrary to the public interest since the safety zone is needed to protect the maritime public from any potential hazards associated with fireworks displays, air shows, or other events.

Background and Purpose

In 2005 the Coast Guard consolidated the Captain of the Port Milwaukee Zone and the Captain of the Port Chicago Zone and realigned the boundaries of the Captain of the Port Sault Ste. Marie Zone to create the Captain of the Port Lake Michigan Zone. This rule consolidates the regulations found in 33 CFR part 165.909, Safety Zones; Annual fireworks events in the Captain of the Port Milwaukee Zone and 33 CFR 165.918, Safety Zones; Annual fireworks events in the Captain of the Port Chicago Zone into one rule that includes all safety zones for annual events in the Captain of the Port Lake Michigan Zone. This rule also adds several annual events not previously listed in 33 CFR part 165 and removes several events that no longer occur annually or do not require a safety zone. These safety zones are necessary to protect vessels and people from the hazards associated with fireworks displays, air shows, or other events. Such hazards include obstructions to the waterway that may cause marine casualties and the explosive danger of fireworks and debris falling into the water that may cause death or serious bodily harm.

Discussion of Comments and Changes

No comments were received concerning this final rule. No changes have been 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.

We have determined the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. The Coast Guard's use of these safety zones will be periodic in nature, of short duration, and designed to minimize the impact on navigable waters. These safety zones will only be enforced immediately before and during the time the events are occurring. Furthermore, these safety zones have been designed to allow vessels to transit unrestricted to portions of the waterways not affected by the safety zones. The Coast Guard expects insignificant adverse impact to mariners from the activation of these safety zones.

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.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. 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). 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 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 affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This 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

The Coast Guard recognizes the treaty rights of Native American tribes. Moreover, the Coast Guard is committed to working with Tribal Governments to implement local policies and to mitigate tribal concerns. We have determined that this safety zone and fishing rights protection need not be incompatible. We have also determined that 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. Nevertheless, Indian Tribes that have questions concerning the provisions of this rule or options for compliance are encouraged to contact the point of contact listed under **FOR FURTHER INFORMATION CONTACT**.

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'' are 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, 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 § 165.929 to read as follows:

§ 165.929 Safety Zones; Annual events requiring safety zones in the Captain of the Port Lake Michigan zone.

(a) *Safety Zones.* The following areas are designated safety zones:

(1) *St. Patrick's Day Fireworks; Manitowoc, WI.* (i) *Location.* All waters of the Manitowoc River and Manitowoc Harbor, near the mouth of the Manitowoc River on the south shore, within the arc of a circle with a 100-foot radius from the fireworks launch site located in position 44°05′30″ N, 087°39′12″ W (NAD 83).

(ii) *Enforcement date and time.* The third Saturday of March; 5:30 p.m. to 7 p.m.

(2) *Michigan Aerospace Challenge Sport Rocket Launch; Muskegon, MI.* (i) *Location.* All waters of Muskegon Lake, near the West Michigan Dock and Market Corp facility, within the arc of a circle with a 1500-yard radius from the rocket launch site located in position 43°14′21″ N, 086°15′35″ W (NAD 83).

(ii) *Enforcement date and time.* The last Saturday of April; 8 a.m. to 4 p.m.

(3) *Tulip Time Festival Fireworks; Holland, MI.* (i) *Location.* All waters of Lake Macatawa, near Kollen Park, within the arc of a circle with a 1000-foot radius from the fireworks launch site in position 42°47′23″ N, 086°07′22″ W (NAD 83).

(ii) *Enforcement date and time.* The first Friday of May; 7 p.m. to 11 p.m. If the Friday fireworks are cancelled due to inclement weather, then this section will be enforced on the first Saturday of May; 7 p.m. to 11 p.m.

(4) *Rockets for Schools Rocket Launch; Sheboygan, WI.* (i) *Location.* All waters of Lake Michigan and Sheboygan Harbor, near the Sheboygan South Pier, within the arc of a circle with a 1500-yard radius from the rocket launch site located with its center in position 43°44′55″ N, 087°41′52″ W (NAD 83).

(ii) *Enforcement date and time.* The first Saturday of May; 8 a.m. to 5 p.m.

(5) *Celebrate De Pere; De Pere, WI.* (i) *Location.* All waters of the Fox River, near Voyageur Park, within the arc of a circle with a 500-foot radius from the fireworks launch site located in position 44°27′10″ N, 088°03′50″ W (NAD 83).

(ii) *Enforcement date and time.* The Sunday before Memorial Day; 8:30 p.m. to 10 p.m.

(6) [Reserved]

(7) *River Splash; Milwaukee, WI.* (i) *Location.* All waters of the Milwaukee River, near Pere Marquette Park, within the arc of a circle with a 300-foot radius from the fireworks launch site located on a barge in position 43°02′32″ N, 087°54′45″ W (NAD 83).

(ii) *Enforcement date and time.* The first Friday and Saturday of June; 9 p.m. to 11 p.m. each day.

(8) *International Bayfest; Green Bay, WI.* (i) *Location.* All waters of the Fox River, near the Western Lime Company 1.13 miles above the head of the Fox River, within the arc of a circle with a 1000-foot radius from the fireworks

launch site located in position 44°31′24″ N, 088°00′42″ W (NAD 83).

(ii) *Enforcement date and time.* The second Friday of June; 9 p.m. to 11 p.m.

(9) *Harborfest Music and Family Festival; Racine, WI.* (i) *Location.* All waters of Lake Michigan and Racine Harbor, near the Racine Launch Basin Entrance Light, within the arc of a circle with a 200-foot radius from the fireworks launch site located in position 42°43′43″ N, 087°46′40″ W (NAD 83).

(ii) *Enforcement date and time.* Friday and Saturday of the third complete weekend of June; 9 p.m. to 11 p.m. each day.

(10) *Jordan Valley Freedom Festival Fireworks; East Jordan, MI.* (i) *Location.* All waters of Lake Charlevoix, near the City of East Jordan, within the arc of a circle with a 1000-foot radius from the fireworks launch site in position 45°09′18″ N, 085°07′48″ W (NAD 83).

(ii) *Enforcement date and time.* Saturday of the third weekend of June; 9 p.m. to 11 p.m.

(11) *Spring Lake Heritage Festival Fireworks; Spring Lake, MI.* (i) *Location.* All waters of the Grand River, near buoy 14A, within the arc of a circle with a 500-foot radius from the fireworks launch site located on a barge in position 43°04′24″ N, 086°12′42″ W (NAD 83).

(ii) *Enforcement date and time.* The third Saturday of June; 9 p.m. to 11 p.m.

(12) *Elberta Solstice Festival Fireworks; Elberta, MI.* (i) *Location.* All waters of Betsie Bay, near Waterfront Park, within the arc of a circle with a 500-foot radius from the fireworks launch site located in position 44°37′43″ N, 086°14′27″ W (NAD 83).

(ii) *Enforcement date and time.* The last Saturday of June; 9 p.m. to 11 p.m.

(13) [Reserved]

(14) *Pentwater July Third Fireworks; Pentwater, MI.* (i) *Location.* All waters of Lake Michigan and the Pentwater Channel within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 43°46′57″ N, 086°26′38″ W (NAD 83).

(ii) *Enforcement date and time.* July 3; 9 p.m. to 11 p.m. If the July 3 fireworks are cancelled due to inclement weather, then this section will be enforced July 4; 9 p.m. to 11 p.m.

(15) *Taste of Chicago Fireworks; Chicago, IL.* (i) *Location.* All waters of Monroe Harbor and Lake Michigan within the arc of a circle with a 1000-foot radius from the fireworks launch site located on a barge in position 41°52′41″ N, 087°36′37″ W (NAD 83).

(ii) *Enforcement date and time.* July 3; 9 p.m. to 11 p.m. If the July 3 fireworks are cancelled due to inclement weather, then this section will be enforced July 4; 9 p.m. to 11 p.m.

(16) *U.S. Bank Fireworks; Milwaukee, WI.* (i) *Location.* All waters of Milwaukee Harbor, in the vicinity of Veterans Park, within the arc of a circle with a 1000-foot radius from the fireworks launch site located on a barge in position 43°02′27″ N, 087°53′45″ W (NAD 83).

(ii) *Enforcement date and time.* July 3; 9 p.m. to 11 p.m. If the July 3 fireworks are cancelled due to inclement weather, then this section will be enforced July 4; 9 p.m. to 11 p.m.

(17) *National Cherry Festival Fourth of July Celebration Fireworks; Traverse City, MI.* (i) *Location.* All waters of the West Arm of Grand Traverse Bay within the arc of a circle with a 1000-foot radius from the fireworks launch site located on a barge in position 44°46′12″ N, 085°37′06″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(18) *Harbor Springs Fourth of July Celebration Fireworks; Harbor Springs, MI.* (i) *Location.* All waters of Lake Michigan and Harbor Springs Harbor within the arc of a circle with a 1000-foot radius from the fireworks launch site located on a barge in position 45°25′30″ N, 084°59′06″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(19) *Bay Harbor Yacht Club Fourth of July Celebration Fireworks; Petoskey, MI.* (i) *Location.* All waters of Lake Michigan and Bay Harbor Lake within the arc of a circle with a 500-foot radius from the fireworks launch site located on a barge in position 45°21′50″ N, 085°01′37″ W (NAD 83).

(ii) *Enforcement date and time.* July 3; 9 p.m. to 11 p.m. If the July 3 fireworks are cancelled due to inclement weather, then this section will be enforced July 4; 9 p.m. to 11 p.m.

(20) *Petoskey Fourth of July Celebration Fireworks; Petoskey, MI.* (i) *Location.* All waters of Lake Michigan and Petoskey Harbor, in the vicinity of Bay Front Park, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 45°22′40″ N, 084°57′30″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(21) *Boyne City Fourth of July Celebration Fireworks; Boyne City, MI.* (i) *Location.* All waters of Lake Charlevoix, in the vicinity of Veterans Park, within the arc of a circle with a 1400-foot radius from the fireworks launch site located in position 45°13′30″ N, 085°01′40″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(22) *Independence Day Fireworks; Manistee, MI.* (i) *Location.* All waters of Lake Michigan, in the vicinity of the First Street Beach, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 44°14′51″ N, 086°20′46″ W (NAD 83)

(ii) *Enforcement date and time.* July 3; 9 p.m. to 11 p.m. If the July 3 fireworks are cancelled due to inclement weather, then this section will be enforced July 4; 9 p.m. to 11 p.m.

(23) *Frankfort Independence Day Fireworks; Frankfort, MI.* (i) *Location.* All waters of Lake Michigan and Frankfort Harbor, in the vicinity of the north breakwater, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 44°38′00″ N, 086°14′50″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(24) *Freedom Festival Fireworks; Ludington, MI.* (i) *Location.* All waters of Lake Michigan and Ludington Harbor, in the vicinity of the Loomis Street Boat Ramp, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 43°57′16″ N, 086°27′42″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(25) *White Lake Independence Day Fireworks; Montague, MI.* (i) *Location.* All waters of White Lake, in the vicinity of the Montague boat launch, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 43°24′33″ N, 086°21′28″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(26) *Muskegon Summer Celebration July Fourth Fireworks; Muskegon, MI.* (i) *Location.* All waters of Muskegon Lake, in the vicinity of Heritage Landing, within the arc of a circle with a 1000-foot radius from a fireworks launch site

located on a barge in position 43°14′00″ N, 086°15′50″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(iii) *Impact on Special Anchorage Area regulations:* Regulations for that portion of the Muskegon Lake East Special Anchorage Area, as described in 33 CFR 110.81(b), which are overlapped by this regulation, are suspended during this event. The remaining area of the Muskegon Lake East Special Anchorage Area not impacted by this regulation remains available for anchoring during this event.

(27) *Grand Haven Jaycees Annual Fourth of July Fireworks; Grand Haven, MI.* (i) *Location.* All waters of The Grand River between longitude 087°14′00″ W, near The Sag, then west to longitude 087°15′00″ W, near the west end of the south pier (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(28) *Celebration Freedom Fireworks; Holland, MI.* (i) *Location.* All waters of Lake Macatawa, in the vicinity of Kollen Park, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 42°47′23″ N, 086°07′22″ W (NAD 83).

(ii) *Enforcement date and time.* July 4, 2007; 9 p.m. to 11 p.m. Thereafter this section will be enforced the Saturday prior to July 4; 9 p.m. to 11 p.m. If the fireworks are cancelled due to inclement weather, then this section will be enforced the Sunday prior to July 4; 9 p.m. to 11 p.m.

(29) *Van Andel Fireworks Show, Holland, MI.* (i) *Location.* All waters of Lake Michigan and the Holland Channel within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 42°46′21″ N, 086°12′48″ W (NAD 83).

(ii) *Enforcement date and time.* July 3; 9 p.m. to 11 p.m. If the July 3 fireworks are cancelled due to inclement weather, then this section will be enforced July 4; 9 p.m. to 11 p.m.

(30) *Independence Day Fireworks; Saugatuck, MI.* (i) *Location.* All waters of Kalamazoo Lake within the arc of a circle with a 1000-foot radius from the fireworks launch site in position 42°38′52″ N, 086°12′18″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(31) *South Haven Fourth of July Fireworks; South Haven, MI.* (i) *Location.* All waters of Lake Michigan and the Black River within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 42°24′08″ N, 086°17′03″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(32) *St. Joseph Fourth of July Fireworks; St. Joseph, MI.* (i) *Location.* All waters of Lake Michigan and the St. Joseph River within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 42°06′48″ N, 086°29′5″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(33) *Town of Dune Acres Independence Day Fireworks; Dune Acres, IN.* (i) *Location.* All waters of Lake Michigan within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 41°39′23″ N, 087°04′59″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(34) *Gary Fourth of July Fireworks; Gary, IN.* (i) *Location.* All waters of Lake Michigan, approximately 2.5 miles east of Gary Harbor, within the arc of a circle with a 500-foot radius from the fireworks launch site located in position 41°37′19″ N, 087°14′31″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(35) *Joliet Independence Day Celebration Fireworks; Joliet, IL.* (i) *Location.* All waters of the Des Plains River, at mile 288, within the arc of a circle with a 500-foot radius from the fireworks launch site located in position 41°31′31″ N, 088°05′15″ W (NAD 83).

(ii) *Enforcement date and time.* July 3; 9 p.m. to 11 p.m. If the July 3 fireworks are cancelled due to inclement weather, then this section will be enforced July 4; 9 p.m. to 11 p.m.

(36) *Glencoe Fourth of July Celebration Fireworks; Glencoe, IL.* (i) *Location.* All waters of Lake Michigan, in the vicinity of Lake Front Park, within the arc of a circle with a 500-foot radius from the fireworks launch site located in position 42°08′17″ N, 087°44′55″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(37) *Lakeshore Country Club Independence Day Fireworks; Glencoe, IL.* (i) *Location.* All waters of Lake Michigan within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 42°08′27″ N, 087°44′57″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(38) *Shore Acres Country Club Independence Day Fireworks; Lake Bluff, IL.* (i) *Location.* All waters of Lake Michigan, approximately one mile north of Lake Bluff, IL, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 42°17′59″ N, 087°50′03″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(39) *Kenosha Independence Day Fireworks; Kenosha, WI.* (i) *Location.* All waters of Lake Michigan and Kenosha Harbor within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 42°35′17″ N, 087°48′27″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(40) *Fourthfest of Greater Racine Fireworks; Racine, WI.* (i) *Location.* All waters of Lake Michigan and Racine Harbor, in the vicinity of North Beach, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 42°44′17″ N, 087°46′42″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(41) *Sheboygan Fourth of July Celebration Fireworks; Sheboygan, WI.* (i) *Location.* All waters of Lake Michigan and Sheboygan Harbor, in the vicinity of the south pier, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 43°44′55″ N, 087°41′51″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(42) *Manitowoc Independence Day Fireworks; Manitowoc, WI.* (i) *Location.* All waters of Lake Michigan and Manitowoc Harbor, in the vicinity of south breakwater, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 44°05′24″ N, 087°38′45″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(43) *Sturgeon Bay Independence Day Fireworks; Sturgeon Bay, WI.* (i) *Location.* All waters of Sturgeon Bay, in the vicinity of Sunset Park, within the arc of a circle with a 1000-foot radius from the fireworks launch site located on a barge in position 44°50′37″ N, 087°23′18″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(44) *Fish Creek Independence Day Fireworks; Fish Creek, WI.* (i) *Location.* All waters of Green Bay, in the vicinity of Fish Creek Harbor, within the arc of a circle with a 1000-foot radius from the fireworks launch site located on a barge in position 45°07′52″ N, 087°14′37″ W (NAD 83).

(ii) *Enforcement date and time.* The first Saturday after July 4; 9 p.m. to 11 p.m.

(45) *Celebrate Americafest Fireworks; Green Bay, WI.* (i) *Location.* All waters of the Fox River between the railroad bridge located 1.03 miles above the mouth of the Fox River and the Main Street Bridge located 1.58 miles above the mouth of the Fox River, including all waters of the turning basin east to the mouth of the East River.

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(46) *Marinette Fourth of July Celebration Fireworks; Marinette, WI.* (i) *Location.* All waters of the Menominee River, in the vicinity of Stephenson Island, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 45°06′09″ N, 087°37′39″ W and all waters located between the Highway U.S. 41 bridge and the Hattie Street Dam (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(47) *Evanston Fourth of July Fireworks; Evanston, IL.* (i) *Location.* All waters of Lake Michigan, in the vicinity of Centennial Park Beach, within the arc of a circle with a 500-foot radius from the fireworks launch site located in position 42°02′56″ N, 087°40′21″ W (NAD 83).

(ii) *Enforcement date and time.* July 4; 9 p.m. to 11 p.m. If the July 4 fireworks are cancelled due to inclement weather, then this section will be enforced July 5; 9 p.m. to 11 p.m.

(48) [Reserved]

(49) *Muskegon Summer Celebration Fireworks; Muskegon, MI.* (i) *Location.* All waters of Muskegon Lake, in the vicinity of Heritage Landing, within the arc of a circle with a 1000-foot radius from a fireworks barge located in position 43°14′00″ N, 086°15′50″ W (NAD 83).

(ii) *Enforcement date and time.* The Sunday following July 4; 9 p.m. to 11 p.m.

(iii) *Impact on Special Anchorage Area regulations:* Regulations for that portion of the Muskegon Lake East Special Anchorage Area, as described in 33 CFR 110.81(b), which are overlapped by this regulation, are suspended during this event. The remaining area of the Muskegon Lake East Special Anchorage Area is not impacted by this regulation and remains available for anchoring during this event.

(50) *National Cherry Festival Air Show; Traverse City, MI.* (i) *Location.* All waters of the West Arm of Grand Traverse Bay bounded by a line drawn from 44°46′48″ N, 085°38′18″ W, then southeast to 44°46′30″ N, 085°35′30″ W, then southwest to 44°46′00″ N, 085°35′48″ W, then northwest to 44°46′30″ N, 085°38′30″ W, then back to the point of origin (NAD 83).

(ii) *Enforcement date and time.* Friday, Saturday, and Sunday of the first complete weekend of July; 12 noon to 4 p.m. each day.

(51) *National Cherry Festival Finale Fireworks; Traverse City, MI.* (i) *Location.* All waters and adjacent shoreline of the West Arm of Grand Traverse Bay within the arc of a circle with a 1000-foot radius from the fireworks launch site located on a barge in position 44°46′12″ N, 085°37′06″ W (NAD 83).

(ii) *Enforcement date and time.* The second Saturday of July; 9 p.m. to 11 p.m.

(52) *Gary Air and Water Show; Gary, IN.* (i) *Location.* All waters of Lake Michigan within the arc of a circle with a 5.75 statute mile radius with its center point in position 41°37′25″ N, 087°15′42″ W (NAD 83).

(ii) *Enforcement date and time.* Friday, Saturday, and Sunday of the second weekend of July; from 8 a.m. to 6 p.m. each day.

(53) *Milwaukee Air Expo, Milwaukee, WI.* (i) *Location.* All waters Lake Michigan and Milwaukee Harbor located within a 4000-yard by 1000-yard rectangle with its major axis bearing approximately 030°T located in the northern half of Milwaukee Harbor and along the north shore of Milwaukee bounded by the points beginning at 43°01′36″ N, 087°53′02″ W; then northeast to 43°03′20″ N, 087°51′40″ W; then northwest to 43°03′35″ N, 087°52′16″ W; then southwest to 43°01′51″ N, 087°53′38″ W; the back to the point of origin (NAD 83).

(ii) *Enforcement date and time.* Friday, Saturday, and Sunday of the second weekend of July; from 1 p.m. to 5 p.m. each day.

(54) *Annual Trout Festival Fireworks; Kewaunee, WI.* (i) *Location.* All waters of Kewaunee Harbor and Lake Michigan within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 44°27′29″ N, 087°29′45″ W (NAD 83).

(ii) *Enforcement date and time.* Friday of the second complete weekend of July; 9 p.m. to 11 p.m.

(55) *Michigan City Summerfest Fireworks; Michigan City, IN.* (i) *Location.* All waters of Michigan City Harbor and Lake Michigan within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 41°43′42″ N, 086°54′37″ W (NAD 83).

(ii) *Enforcement date and time.* July 15, 2007, and thereafter the Sunday of the first complete weekend of July; 9 p.m. to 11 p.m.

(56) *Port Washington Fish Day Fireworks; Port Washington, WI.* (i) *Location.* All waters of Port Washington Harbor and Lake Michigan, in the vicinity of the WE Energies coal dock, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 43°23′07″ N, 087°51′54″ W (NAD 83).

(ii) *Enforcement date and time.* The third Saturday of July; 9 p.m. to 11 p.m.

(57) *Bay View Lions Club South Shore Frolics Fireworks; Milwaukee, WI.* (i) *Location.* All waters of Milwaukee Harbor and Lake Michigan, in the vicinity of South Shore Park, within the arc of a circle with a 500-foot radius from the fireworks launch site in position 42°59′42″ N, 087°52′52″ W (NAD 83).

(ii) *Enforcement date and time.* Friday, Saturday, and Sunday of the second or third weekend of July; 9 p.m. to 11 p.m. each day.

(58) *Venetian Festival Fireworks; St. Joseph, MI.* (i) *Location.* All waters of Lake Michigan and the St. Joseph River, near the east end of the south pier,

within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 42°06′48″ N, 086°29′15″ W (NAD 83).

(ii) *Enforcement date and time.* Saturday of the third complete weekend of July; 9 p.m. to 11 p.m.

(59) *Joliet Waterway Daze Fireworks; Joliet, IL.* (i) *Location.* All waters of the Des Plaines River, at mile 287.5, within the arc of a circle with a 300-foot radius from the fireworks launch site located in position 41°31′15″ N, 088°05′17″ W (NAD 83).

(ii) *Enforcement date and time.* Friday and Saturday of the third complete weekend of July; 9 p.m. to 11 p.m. each day.

(60) *Charlevoix Venetian Festival Friday Night Fireworks; Charlevoix, MI.* (i) *Location.* All waters of Lake Charlevoix, in the vicinity of Depot Beach, within the arc of a circle with a 1000-foot radius from the fireworks launch site located on a barge in position 45°19′08″ N, 085°14′18″ W (NAD 83).

(ii) *Enforcement date and time.* Friday of the fourth weekend of July; 9 p.m. to 11 p.m.

(61) *EAA Airventure; Oshkosh, WI.* (i) *Location.* All waters of Lake Winnebago bounded by a line drawn from 43°57′30″ N, 088°30′00″ W; then south to 43°56′56″ N, 088°29′53″ W, then east to 43°56′40″ N, 088°28′40″ W; then north to 43°57′30″ N, 088°28′40″ W; then west returning to the point of origin (NAD 83).

(ii) *Enforcement date and time.* The last complete week of July, beginning Monday and ending Sunday; from 8 a.m. to 8 p.m. each day.

(62) *Charlevoix Venetian Festival Saturday Night Fireworks; Charlevoix, MI.* (i) *Location.* All waters of Round Lake within the arc of a circle with a 300-foot radius from the fireworks launch site located on a barge in position 45°19′03″ N, 085°15′18″ W (NAD 83).

(ii) *Enforcement date and time.* Saturday of the fourth weekend of July; 9 p.m. to 11 p.m.

(63) *Venetian Night Fireworks; Saugatuck, MI.* (i) *Location.* All waters of Kalamazoo Lake within the arc of a circle with a 500-foot radius from the fireworks launch site located on a barge in position 42°38′52″ N, 086°12′18″ W (NAD 83)

(ii) *Enforcement date and time.* The last Saturday of July; 9 p.m. to 11 p.m.

(64) *Roma Lodge Italian Festival Fireworks; Racine, WI.* (i) *Location.* All waters of Lake Michigan and Racine Harbor within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 42°44′04″ N, 087°46′20″ W (NAD 83).

(ii) *Enforcement date and time.* Friday and Saturday of the last complete weekend of July; 9 p.m. to 11 p.m.

(65) *Venetian Night Fireworks; Chicago, IL.* (i) *Location.* All waters of Monroe Harbor and Lake Michigan within the arc of a circle with a 1000-foot radius from the fireworks launch site located on a barge in position 41°52′41″ N, 087°36′37″ W (NAD 83).

(ii) *Enforcement date and time.* Saturday of the last weekend of July; 9 p.m. to 11 p.m.

(66) *Port Washington Maritime Heritage Festival Fireworks; Port Washington, WI.* (i) *Location.* All waters of Port Washington Harbor and Lake Michigan, in the vicinity of the WE Energies coal dock, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 43°23′07″ N, 087°51′54″ W (NAD 83).

(ii) *Enforcement date and time.* Saturday of the last complete weekend of July or the second weekend of August; 9 p.m. to 11 p.m.

(67) [Reserved]

(68) *Grand Haven Coast Guard Festival Fireworks; Grand Haven, MI.* (i) *Location.* All waters of the Grand River between longitude 087°14′00″ W, near The Sag, then west to longitude 087°15′00″ W, near the west end of the south pier (NAD 83).

(ii) *Enforcement date and time.* First weekend of August; 9 p.m. to 11 p.m.

(69) *Sturgeon Bay Yacht Club Evening on the Bay Fireworks; Sturgeon Bay, WI.* (i) *Location.* All waters of Sturgeon Bay, in the vicinity of the Sturgeon Bay Yacht Club, within the arc of a circle with a 500-foot radius from the fireworks launch site located on a barge in position 44°49′33″ N, 087°22′26″ W (NAD 83).

(ii) *Enforcement date and time.* The first Saturday of August; 9 p.m. to 11 p.m.

(70) *Elk Rapids Harbor Days Fireworks; Elk Rapids, MI.* (i) *Location.* All waters of Grand Traverse Bay, in the vicinity of Edward G. Grace Memorial Park, within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 44°53′58″ N, 085°25′04″ W (NAD 83).

(ii) *Enforcement date and time.* The first Saturday of August; 9 p.m. to 11 p.m.

(71) *Hammond Marina Venetian Night Fireworks; Hammond, IN.* (i) *Location.* All waters of Hammond Marina and Lake Michigan within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 41°41′53″ N, 087°30′43″ W (NAD 83).

(ii) *Enforcement date and time.* The first Saturday of August; 9 p.m. to 11 p.m.

(72) *North Point Marina Venetian Festival Fireworks; Winthrop Harbor, IL.* (i) *Location.* All waters of Lake Michigan within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 42°28′55″ N, 087°47′56″ W (NAD 83).

(ii) *Enforcement date and time.* The second Saturday of August; 9 p.m. to 11 p.m.

(73) *Waterfront Festival Fireworks; Menominee MI.* (i) *Location.* All waters of Green Bay, in the vicinity of Menominee Marina, within the arc of a circle with a 1000-foot radius from a fireworks barge in position 45°06′17″ N, 087°35′48″ W (NAD 83).

(ii) *Enforcement date and time.* Saturday following first Thursday in August; 9 p.m. to 11 p.m.

(74) *Ottawa Riverfest Fireworks; Ottawa, IL.* (i) *Location.* All waters of the Illinois River, at mile 239.7, within the arc of a circle with a 300-foot radius from the fireworks launch site located in position 41°20′29″ N, 088°51′20″ W (NAD 83).

(ii) *Enforcement date and time.* The first Sunday of August; 9 p.m. to 11 p.m.

(75) *Algoma Shanty Days Fireworks; Algoma WI.* (i) *Location.* All waters of Lake Michigan and Algoma Harbor within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 44°36′24″ N, 087°25′54″ W (NAD 83).

(ii) *Enforcement date and time.* Sunday of the second complete weekend of August; 9 p.m. to 11 p.m.

(76) *New Buffalo Ship and Shore Festival Fireworks; New Buffalo, MI.* (i) *Location.* All waters of Lake Michigan and New Buffalo Harbor within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 41°48′09″ N, 086°44′49″ W (NAD 83).

(ii) *Enforcement date and time.* The second Sunday of August; 9 p.m. to 11 p.m.

(77) *Pentwater Homecoming Fireworks; Pentwater, MI.* (i) *Location.* All waters of Lake Michigan and the Pentwater Channel within the arc of a circle with a 1000-foot radius from the fireworks launch site located in position 43°46′56.5″ N, 086°26′38″ W (NAD 83).

(ii) *Enforcement date and time.* Saturday following the second Thursday of August; 9 p.m. to 11 p.m.

(78) *Chicago Air and Water Show; Chicago, IL.* (i) *Location.* All waters and adjacent shoreline of Lake Michigan and Chicago Harbor bounded by a line drawn from 41°55′54″ N at the shoreline, then east to 41°55′54″ N,

087°37′12″ W, then southeast to 41°54′00″ N, 087°36′00″ W (NAD 83), then southwestward to the northeast corner of the Jardine Water Filtration Plant, then due west to the shore.

(ii) *Enforcement date and time.* The third Thursday, Friday, Saturday, and Sunday of August; from 9 a.m. to 6 p.m. each day.

(79) [Reserved]

(80) *Downtown Milwaukee BID 21 Fireworks; Milwaukee, WI.* (i) *Location.* All waters of the Milwaukee River between the Kilbourn Avenue Bridge at 1.7 miles above the Milwaukee Pierhead Light to the State Street Bridge at 1.79 miles above the Milwaukee Pierhead Light.

(ii) *Enforcement date and time.* The third Thursday of November; 6 p.m. to 8 p.m.

(81) *New Years Eve Fireworks; Chicago, IL.* (i) *Location.* All waters of Monroe Harbor and Lake Michigan within the arc of a circle with a 1000-foot radius from the fireworks launch site located on a barge in position 41°52′41″ N, 087°36′37″ W (NAD 83).

(ii) *Enforcement date and time.* December 31; 11 p.m. to January 1; 1 a.m.

(b) *Definitions.* The following definitions apply to this section:

(1) Designated representative means any Coast Guard commissioned, warrant, or petty officer designated by the Captain of the Port Lake Michigan to monitor this safety zone, permit entry into this zone, give legally enforceable orders to persons or vessels within this zones and take other actions authorized by the Captain of the Port.

(2) Public vessel means vessels owned, chartered, or operated by the United States, or by a State or political subdivision thereof.

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

(2) All persons and vessels must comply with the instructions of the Coast Guard Captain of the Port or a designated representative. Upon being hailed by the U.S. Coast Guard by siren, radio, flashing light or other means, the operator of a vessel shall proceed as directed.

(3) All vessels must obtain permission from the Captain of the Port or a designated representative to enter, move within or exit the safety zone established in this section when this safety zone is enforced. Vessels and persons granted permission to enter the safety zone shall obey all lawful orders or directions of the Captain of the Port or a designated representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

(d) *Suspension of Enforcement.* If the event concludes earlier than scheduled, the Captain of the Port or a designated representative will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone established by this section is suspended.

(e) *Exemption.* Public vessels as defined in paragraph (b) of this section are exempt from the requirements in this section.

(f) *Wavier.* For any vessel, the Captain of the Port Lake Michigan or a designated representative may waive any of the requirements of this section, upon finding that operational conditions or other circumstances are such that application of this section is unnecessary or impractical for the purposes of safety or environmental safety.

§ 165.909 [Removed]

■ 3. Remove and reserve § 165.909.

§ 165.918 [Removed]

■ 4. Remove and reserve § 165.918.

Dated: June 5, 2007.

Bruce C. Jones,

Captain, U.S. Coast Guard, Captain of the Port Lake Michigan.

[FR Doc. E7–11262 Filed 6–11–07; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 51

RIN 1024–AD20

Authentic Native Handicrafts

AGENCY: National Park Service, Interior.

ACTION: Final rule.

SUMMARY: The National Parks Omnibus Management Act of 1998 encourages the sale of authentic United States Indian, Alaska Native, Native Samoan and Native Hawaiian handicrafts relating to the cultural, historical, and geographic characteristics of units of the national park system. This final rule implements the requirements of the act.

DATES: *Effective Date:* This rule is effective on July 12, 2007.

FOR FURTHER INFORMATION CONTACT: Jo Pendry, Concessions Program Manager, National Park Service, 1201 I Street NW., Washington, DC 20005. (202–513–7156).

SUPPLEMENTARY INFORMATION:

Background

For many years it has been the policy of the National Park Service (NPS) to encourage its concessioners to sell native handicrafts to park area visitors. The Congress, through Section 416 of the National Parks Omnibus Management Act of 1998 (1998 Act), embodied this policy into law, stating that:

> Promoting the sale of authentic United States Indian, Alaska Native, Native Samoan, and Native Hawaiian handicrafts relating to the cultural, historical, and geographic characteristics of units of the National Park System is encouraged, and the Secretary shall ensure that there is a continuing effort to enhance the handicraft trade where it exists and establish the trade in appropriate areas where the trade currently does not exist.

In furtherance of this objective, Section 416(b) of the 1998 Act exempts the revenue derived by NPS concessioners from the sale of United States Indian, Alaska Native, Native Samoan and Native Hawaiian handicrafts from concession contract franchise fees. This final regulation collectively refers to these handicrafts as ''authentic native handicrafts.''

Also, Section 417 of the 1998 Act requires the Secretary of the Interior (Secretary) to promulgate a regulation that further defines United States Indian, Alaska Native and Native Hawaiian handicrafts. Section 409 of the 1998 Act (16 U.S.C. 5958) requires the National Park Service Concessions Management Advisory Board (Advisory Board) to make recommendations to the Secretary regarding the nature and scope of products that qualify as authentic native handicrafts within the meaning of the 1998 Act. This regulation has been developed in consideration of the recommendations of the Advisory Board.

This regulation will give guidance to the NPS and NPS concessioners to determine what products meet the definition of authentic native handicrafts for purposes of franchise fee exemptions and other elements of the NPS concessions management program.

In developing the regulation, NPS, upon the recommendation of the Advisory Board, incorporated to the extent appropriate the relevant definitions established by the Indian Arts and Crafts Board of the Department of the Interior (IACB) in 25 CFR part 309 in recognition of the native handicraft expertise of the IACB.

Please note that Section 417 of the 1998 Act requires the Secretary to further define ''United States Indian, Alaska Native, and Native Hawaiian handicraft.'' However, section 416 of the 1998 Act additionally refers to Native Samoan handicraft. Accordingly, although the term ''Native Samoan handicraft'' is not defined in the

regulation, the regulation specifies that the sale of Native Samoan handicrafts is encouraged and exempt from NPS concession contract franchise fees. An administrative definition of ''Native Samoan handicraft'' will be developed by NPS in consultation with appropriate Samoans and Samoan organizations.

The source for the definition of ''Alaska Native'' found in this regulation is from the Alaska Native Claims Settlement Act (43 U.S.C. 1602 (b)). The source of the term ''arts and crafts objects'' is 25 CFR part 309 (the regulations of the IACB) as adapted for purposes of this regulation.

The source of the definition of ''authentic native handicrafts'' contained in the regulation is 25 CFR part 309 as adapted for the purposes of this regulation.

The source of the term ''Native Hawaiian'' is Section 3001(10) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001(10)) and Section 16(11) of the National Museum of the American Indian Act (20 U.S.C. 80q–14(11)).

The source of the term ''United States Indian'' is the applicable portion of the term ''Indian'' as defined in 25 CFR part 309. The term ''label'' means a separate tag, paper, sign, sticker, or signed document attesting to the authenticity of the item as ''authentic native handicraft.''

Notice of Proposed Rulemaking

On March 25, 2004, the National Park Service published a Notice of Proposed Rulemaking (NPRM) for Authentic Native Handicrafts (69 FR 15286). The comment period was open for 60 days. No public comments were received.

During the review process two comments were received from within the Department. One comment from the Office of the Assistant Secretary for Policy, Management, and Budget requested that we consider requiring concessioners to mark sales items that are authentic native handicrafts marked with a label to attest to the item's authenticity, in order to be eligible for franchise fee exemption. This requirement is in addition to the standard concession contract requirement that concessioners provide receipts from the sale of handicrafts that have been approved for sales by the Director as constituting authentic American Indian, Alaska Native, Native Samoan, or Native Hawaiian handicrafts. The regulation was changed to incorporate these recommendations.

The second comment, from the Department's Office of the Solicitor, Division of Indian Affairs, asked that we use the term Alaska Native instead of Alaskan Native or Native Alaskan. It was felt that Native Alaskan was a broader term that included more than those intended to benefit by this rule. The term Native Alaskan would include all people born in Alaska.

Compliance With Other Laws

Regulatory Planning and Review (Executive Order 12866)

In accordance with the criteria in Executive Order 12866, the Office of Management and Budget makes the final determination as to the significance of this regulatory action and it has determined that this document is not a significant rule and is not subject to review as:

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

(4) This rule does not raise novel legal or policy issues.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will 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.*). If there is an effect it will be a positive effect by exempting revenue derived by the sales of Native American Handicraft from concession contract franchise fees.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule does not have an annual effect on the economy of $100 million or more; will not cause a major increase in costs or prices for consumers, individual entities, Federal, State, or local government agencies, or geographic regions; and does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The effect of the rule is to establish definitions for the sale of native handicrafts in areas of the national park system.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector.

Takings (Executive Order 12630)

In accordance with Executive Order 12360, this rule does not have significant takings implications. A takings assessment is not required.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment. The rule imposes no requirements on any governmental entity other than NPS.

Civil Justice Reform (Executive Order 12998)

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

Paperwork Reduction Act

This rule does not require an information collection from 10 or more parties. Accordingly, a submission under the Paperwork Reduction Act is not required. An OMB form 83–I is not required.

National Environmental Policy Act

This rule does not constitute a major Federal action affecting the quality of the human environment. A detailed statement under the National Environment Policy Act is not required. The rule will not increase public use of park areas, introduce non-compatible uses into park areas, conflict with adjacent land ownerships or land uses, or cause a nuisance to property owners or occupants adjacent to park areas. Accordingly, this rule is categorically excluded from procedural requirements of the National Environmental Policy Act by 516 DM 12.5(A)(10). 7.4A(10).

Government-to-Government Relationship With Tribes

In accordance with Executive Order 13175 ''Consultation and Coordination With Indian Tribal Governments'' (65 FR 67249), the President's memorandum of April 29, 1994, ''Government-to-Government Relations With Native American Tribal Governments'' (59 FR 22951) and 512 DM 2, we have evaluated potential

effects on federally recognized Indian tribes and have determined that there are no potential effects on the tribes.

Clarity of Rule

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your 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 read if it were divided into more (but shorter) sections? (A ''section'' appears in bold type and is preceded by the symbol ''§ '' and a numbered heading; for example § 7.XX .....) (5) Is the description of the rule in the ''Supplementary Information'' section of the preamble helpful in understanding the proposed rule? 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.*

Drafting Information: The principal contributors to this final rule were: Jo Pendry, Chief Concession Program, WASO; Judy Bassett, Concession Policy Analyst, WASO; Meridith Stanton, Director, and Jill Moran, Program Specialist, IACB, and Jerry Case, Regulations Program Manager, WASO.

List of Subjects in 36 CFR Part 51

Concessions, Government contracts, National parks, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, the National Park Service amends 36 CFR Part 51 as follows:

PART 51—CONCESSION CONTRACTS

■ 1. The authority for part 51 continues to read as follows:

Authority: The Act of August 25, 1916, as amended and supplemented, 16 U.S.C. 1 *et seq.*, particularly, 16 U.S.C. 3 and Title IV of the National Parks Omnibus Management Act of 1998 (Pub. L. 105–391).

■ 2. Section 51.83 is added to read as follows:

§ 51.83 Sale of Native Handicrafts.

(a) Where authorized by an applicable concession contract, concessioners are encouraged to sell authentic native handicrafts appropriately labeled or denoted as authentic that reflect the cultural, historical, and geographic characteristics of the related park area. To further this objective, concession contracts will contain a provision that exempts the revenue of a concessioner derived from the sale of appropriately labeled or denoted authentic native handicrafts from the concession contract's franchise fee.

(b) The sale of products as authentic native handicrafts is further regulated under the Indian Arts and Crafts Act, Public Law 101–644, as amended.

(c) *Definitions.* (1) *Alaska Native* means any citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metalakatla Indian Community), Eskimo, or Aleut blood, or combination thereof. The term includes any person so defined either or both of whose adoptive parents are not Alaska Natives. It also includes, in the absence of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Alaska native village or native groups of which he or she claims to be a member and whose father or mother is (or, if deceased, was) regarded as an Alaska Native by any village or group.

(2) *Arts and crafts objects* means art works and crafts that are in a traditional or non-traditional style or medium.

(3) *Authentic native handicrafts* means arts and crafts objects created by a United States Indian, Alaska Native, Native Samoan or Native Hawaiian that are made with the help of only such devices as allow the manual skill of the maker to condition the shape and design of each individual object.

(4) *Native Hawaiian* means any individual who is a descendant of the aboriginal people that, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(5) *United States Indian* means any individual that is a member of an Indian tribe as defined in 18 U.S.C. 1159(c)(3).

Dated: May 22, 2007.

David M. Verhey,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E7–11274 Filed 6–11–07; 8:45 am]

BILLING CODE 4312–53–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2006–1022; FRL–8324–9]

Determination of Attainment, Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Ohio; Redesignation of Youngstown, OH to Attainment of the 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On February 15, 2007, the Ohio Environmental Protection Agency (Ohio EPA), submitted a request to redesignate its portion of the Youngstown area (Mahoning, Trumbull and Columbiana Counties) to attainment of the 8-hour ozone National Ambient Air Quality Standard (NAAQS), and a request for EPA approval of an ozone maintenance plan. EPA is making a determination that the Youngstown, Ohio ozone nonattainment area has attained the 8-hour ozone NAAQS. This determination is based on three years of complete, quality assured ambient air quality monitoring data for the 2004–2006 ozone seasons that demonstrate that the 8-hour ozone NAAQS has been attained in the area. EPA is approving, as a State Implementation Plan (SIP) revision, the State's maintenance plan for the Ohio portion of the area. As a result, Ohio has satisfied the criteria for redesignation of Mahoning, Trumbull and Columbiana Counties to attainment and EPA is approving the requested redesignation. Further, EPA is approving, for purposes of transportation conformity, the motor vehicle emission budgets (MVEBs) for the years 2009 and 2018 that are contained in the 8-hour ozone maintenance plan for the area.

DATES: This final rule is effective on June 12, 2007.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2006–1022. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., 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 *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Patricia Morris, Environmental Scientist, at (312) 353–8656 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Patricia Morris, Environmental Scientist, Criteria Pollutant Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8656, *morris.patricia@epa.gov*.

SUPPLEMENTARY INFORMATION: In the following, whenever ''we,'' ''us,'' or ''our'' are used, we mean the United States Environmental Protection Agency.

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I. What Is the Background for This Rule?
II. What Comments Did We Receive on the Proposed Action?
III. What Are Our Final Actions?
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I. What Is the Background for This Rule?

The Clean Air Act (CAA) requires EPA to designate as nonattainment any area that is violating the 8-hour ozone NAAQS based on three consecutive years of air quality monitoring data. EPA designated Youngstown, Ohio as a nonattainment area in a **Federal Register** notice published on April 30, 2004, (69 FR 23857). At the same time EPA classified the area as a subpart 1 8-hour ozone nonattainment area, based on air quality monitoring data from 2001–2003.

On February 15, 2007, the Ohio EPA submitted a request to redesignate its portion of the Youngstown area to attainment for the 8-hour ozone standard. The redesignation request included three years of complete, quality-assured data for the period of 2004 through 2006, indicating the 8-hour NAAQS for ozone had been achieved. The data satisfy the CAA requirements for attainment when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentration is less than or equal to 0.08 ppm. Under the CAA, nonattainment areas may be redesignated to attainment if sufficient complete, quality-assured data are available for the Administrator to determine that the areas have attained the standard and the areas meet the other CAA redesignation requirements in section 107(d)(3)(E). The April 18, 2007, proposed rule (72 FR 19435) provides a discussion of how the State of Ohio met these requirements for the Youngstown, Ohio area.

II. What Comments Did We Receive on the Proposed Action?

EPA provided a 30-day review and comment period on the April 18, 2007, proposed rule. EPA received no comments.

The United States Court of Appeals for the District of Columbia Circuit recently vacated EPA's April 30, 2004 ''Final Rule to Implement the 8-Hour Ozone National Ambient Standard'' (the Phase 1 implementation rule). *South Coast Air Quality Management District* v. *EPA*, No. 04–1200., 472 F.3d 882 (D.C. Cir. 2007). This court decision and EPA's interpretation of the decision was discussed in the proposed rule. No comments were received.

III. What Are Our Final Actions?

EPA is taking several related actions. EPA is making a determination that the Youngstown, Ohio nonattainment area has attained the 8-hour ozone standard. EPA is approving Ohio's maintenance plan SIP revision for Mahoning, Trumbull and Columbiana counties (such approval being one of the CAA criteria for redesignation to attainment status). The Ohio maintenance plan, in conjunction with the Pennsylvania SIP, is designed to keep the area in attainment for ozone through 2018. Because Ohio has met these and other prerequisites for redesignation, EPA is approving the State's request to change the legal designation of the counties from nonattainment to attainment for the 8-hour ozone NAAQS. In addition, and supported by and consistent with the ozone maintenance plan, EPA is approving the 2009 and 2018 volatile organic compounds (VOC) and oxides of nitrogen (NO_X) MVEBs for the Ohio counties for transportation conformity purposes. The 2009 motor vehicle emission budgets are 19.58 tons per day for VOCs and 33.71 tons per day for NO_X. For 2018 the budgets are 10.36 tons per day for VOC and 13.29 tons per day for NO_X.

EPA finds that there is good cause for these actions to become effective immediately upon publication because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which relieves the area from certain CAA requirements that would otherwise apply to it. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule ''grants or recognizes an exemption or relieves a restriction'' and section 553(d)(3) which allows an effective date less than 30 days after publication ''as otherwise provided by the agency for good cause found and published with the rule.'' The purpose of the 30-day waiting period prescribed in 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today's rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today's rule relieves the State of planning requirements for these 8-hour ozone nonattainment areas. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for these actions to become effective on the date of publication of these actions.

IV. Statutory and Executive Order Review

Executive Order 12866: Regulatory Planning and Review

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.

Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Because it is not a ''significant regulatory action'' under Executive Order 12866 or a ''significant energy action,'' 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).

Regulatory Flexibility Act

This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Redesignation of an area to attainment under section 107(d)(3)(E) of the Clean Air Act does not impose any new requirements on small entities. Redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on sources. 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.*).

Unfunded Mandates Reform Act

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).

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

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).

Executive Order 13132: Federalism

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). Redesignation is an action that merely affects the status of a geographical area, and does not impose any new requirements on sources, or allows a state to avoid adopting or implementing additional requirements, and does not alter the relationship or distribution of power and responsibilities established in the Clean Air Act.

Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

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 approves a state rule implementing a Federal Standard.

National Technology Transfer Advancement Act

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. Redesignation is an action that affects the status of a geographical area but does not impose any new requirements on sources. 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.

Paperwork Reduction Act

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.*).

Congressional Review Act

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 August 13, 2007. 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 force its requirements. (See Section 307(b)(2).)

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Volatile organic compounds.

40 CFR Part 81

Air pollution control, Environmental protection, National parks, Wilderness areas.

Dated: June 1, 2007.

Walter Kovalick, Jr.,

Acting Regional Administrator, Region 5.

■ Parts 52 and 81, chapter I, title 40 of the Code of Federal Regulations are amended as follows:

PART 52—[AMENDED]

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

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

Subpart KK—Ohio

■ 2. Section 52.1885 is amended by adding paragraph (ff)(5) to read as follows:

§ 52.1885 Control strategy: Ozone.

* * * * *

(ff) * * *

(5) Mahoning, Trumbull and Columbiana Counties, as submitted on February 15, 2007. The maintenance plan establishes 2009 and 2018 motor vehicle emission budgets for Mahoning, Trumbull and Columbiana Counties. The 2009 motor vehicle emission budgets are 19.58 tons per day for volatile organic compounds (VOC) and 33.71 tons per day for oxides of nitrogen (NO_X). For 2018 the budgets are 10.36 tons per day for VOC and 13.29 tons per day for NO_X.

PART 81—[AMENDED]

■ 1. The authority citation for part 81 continues to read as follows:

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

■ 2. Section 81.336 is amended by revising the entries for Youngstown-Warren-Sharon, PA-OH: Columbiana, Mahoning, and Trumbull Counties in the table entitled ''Ohio-Ozone (8-Hour Standard)'' to read as follows:

§ 81.336 Ohio.

* * * * *

OHIO—OZONE
[8-Hour Standard]

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [1]	Type
* *	*	* *	*	*
Youngstown-Warren-Sharon, PA-OH:	June 12, 2007.			
Columbiana County		Attainment		
Mahoning County		Attainment		
Trumbull County		Attainment		
* *	*	* *	*	*

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is June 15, 2004, unless otherwise noted.

[FR Doc. E7–11229 Filed 6–11–07; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 53 and 58

[EPA–HQ–OAR–2004–0018; FRL–8308–7]

RIN 2060–AO06

Ambient Air Monitoring Regulations: Correcting and Other Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is taking direct final action on ''Ambient Air Monitoring Regulations: Correcting and Other Amendments'' to correct and clarify parts of a recent final rule published on October 17, 2006, that amended the ambient air monitoring requirements for criteria pollutants. These errors included several instances where the wording in the preamble and regulatory text were not completely consistent, several regulatory text passages that contained some imprecise language, two instances of regulatory text omission, an outdated address reference, and numerous publication errors in tables and equations. EPA is also amending the monitoring rule to allow EPA Regional Administrators to approve departures from the minimum number of PM_{10} monitors otherwise specified in the rule.

The October 17, 2006, final rule revised requirements for reference and equivalent method determinations, modified requirements for general monitoring network design, and modified other requirements pertaining to quality assurance, annual network plans and assessments, data reporting, monitoring methodology, and probe and monitor siting criteria. All other preamble and regulatory text printed in the October 17, 2006, final rule is correct.

DATES: This rule is effective on September 10, 2007, without further notice, unless EPA receives adverse comment by July 12, 2007. If we receive adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that some or all of the amendments in this rule will not take effect.

ADDRESSES: Submit your comments, identified under Docket ID No. EPA–HQ–OAR–2004–0018 by one of the following methods:

- *www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov*.
- *Fax:* (202) 566–1741.
- *Mail:* Ambient Air Monitoring Regulations: Correcting and Other Amendments, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Please include a total of 2 copies.
- *Hand Delivery:* EPA Docket Center, 1301 Constitution Avenue, NW., Room 3334, Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2004–0018. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at: *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 *www.regulations.gov* or e-mail. The *www.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 *www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public 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 *www.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 in *www.regulations.gov* or in hard copy at the Revisions to the Ambient Air Monitoring Regulations Docket, EPA/DC, EPA West, Room 3334, Constitution Ave., NW., Washington, DC. The 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 Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Lewis Weinstock, Air Quality Assessment Division (C304–06), Office

of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–3661; fax number: (919) 541–1903; e-mail address: *weinstock.lewis@epa.gov*.

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I. Why Is EPA Using a Direct Final Rule?

The EPA is publishing this rule without a prior proposed rule because we view this as a non-controversial action and anticipate no adverse comment. None of the proposed changes creates additional regulatory requirements on affected entities compared to those that were promulgated in the final rule that was published in the **Federal Register** on October 17, 2006. However, in the ''Proposed Rules'' section of this **Federal Register**, we are publishing a separate document that will serve as the proposed rule to make corrections to the Ambient Air Monitoring Regulations if relevant adverse comments are received on one or more of the amendments in this direct final rule as described in sections VI.A. through VI.I of this preamble. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document. If EPA receives relevant adverse comment on one or more of the amendments included in this rulemaking, we will publish a timely withdrawal in the **Federal Register** indicating which amendment or amendments we are withdrawing. The provisions that are not withdrawn will become effective on the date set out above, notwithstanding any relevant adverse comment on any other provision.

II. Does This Action Apply to Me?

Categories and entities potentially regulated by this action include:

Category	NAICS code [1]	Examples of regulated entities
Industry	334513 541380	Manufacturer, supplier, distributor, or vendor of ambient air monitoring instruments; analytical laboratories or other monitoring organizations that elect to submit an application for a reference or equivalent method determination under 40 CFR part 53.
Federal Government	924110	Federal agencies (that conduct ambient air monitoring similar to that conducted by States under 40 CFR part 58 and that wish EPA to use their monitoring data in the same manner as State data) or that elect to submit an application for a reference or equivalent method determination under 40 CFR part 53.
State/territorial/local/tribal government.	924110	State, territorial, and local air quality management programs that are responsible for ambient air monitoring under 40 CFR part 58 or that elect to submit an application for a reference or equivalent method determination under 40 CFR part 53 or for an approved regional method approved under 40 CFR part 58 appendix C. The proposal also may affect Tribes that conduct ambient air monitoring similar to that conducted by States and that wish EPA to use their monitoring data in the same manner as State monitoring data.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility or Federal, State, local, tribal, or territorial agency is regulated by this action, you should carefully examine the requirements for reference or equivalent method determinations in 40 CFR part 53, subpart A (General Provisions) and the applicability criteria in 40 CFR 51.1 of EPA's requirements for State Implementation Plans (SIPs). If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

III. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of the direct final rule amendments is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia by August 13, 2007. Under section 307(d)(7)(B) of the CAA, only an objection to the direct final rule amendments that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by the direct final rule amendments may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

IV. Authority

The EPA rules for ambient air monitoring are authorized under sections 110, 301(a), and 319 of the CAA. Section 110(a)(2)(B) of the CAA requires that each SIP provide for the establishment and operation of devices,

methods, systems, and procedures needed to monitor, compile, and analyze data on ambient air quality and for the reporting of air quality data to EPA. Section 103 authorizes, among others, research and investigations relating to the causes, effects, extent, prevention and control of air pollution. Section 301(a) of the CAA authorizes EPA to develop regulations needed to carry out EPA's mission and establishes rulemaking requirements. Uniform criteria to be followed when measuring air quality and provisions for daily air pollution index reporting are required by CAA section 319.

V. Overview of the October 17, 2006 Rule Changes

On October 17, 2006 (71 FR 61236), EPA amended the rules for ambient air monitoring of criteria pollutants. The rule amendments established limited ambient air monitoring requirements for particles between 2.5 and 10 micrometers (μm) in diameter ($PM_{10–2.5}$) to support continued research into these particles' distribution, sources, and health effects. The rule amendments required each State to operate one to three ''NCore'' monitoring stations that will take an integrated, multipollutant approach to ambient air monitoring. In addition, the rule amendments modified the general monitoring network design requirements for minimum numbers of ambient air monitors to focus on populated areas with air quality problems and to reduce significantly the requirements for criteria pollutant monitors that have measured ambient air concentrations well below the applicable National Ambient Air Quality Standards. The rule amendments also revised certain provisions regarding monitoring network descriptions and periodic assessments, quality assurance, and data certifications. A number of the amendments related specifically to monitoring of fine particles (referring to particles less than or equal to 2.5 μm in diameter, $PM_{2.5}$), revising the requirements for reference and equivalent method determinations (including specifications and test procedures) for fine particle monitors.

VI. This Action

EPA is taking the following actions:

- Correcting a statement in the regulatory text pertaining to the potential comparability of data collected from Special Purpose Monitors (SPM) with approved alternative quality assurance plans to the National Ambient Air Quality Standards (NAAQS).
- Correcting a statement in the preamble with regard to the requirement for collocating required continuous $PM_{2.5}$ monitors and clarifying associated regulatory text.
- Clarifying several ambiguous regulatory text passages pertaining to operating schedules for manual $PM_{2.5}$ samplers.
- Correcting a reference regarding standard versus daylight savings time.
- Restoring two instances of regulatory text that were inadvertently omitted from the network design for monitoring particles less than or equal to 10 μm in diameter (PM_{10}).
- Adding authority for the Regional Administrator, consistent with the authority that already exists for $PM_{2.5}$ and ozone, to allow monitoring agencies to deviate from PM_{10} monitoring requirements.
- Updating an organizational address reference within regulatory text pertaining to quality assurance requirements.
- Clarifying the conditions when the EPA Regional Administrator is not required to offer a public comment opportunity prior to approving a State's annual monitoring network plan.
- Correcting numerous typographical errors in tables and equations.

A. Correction to Special Purpose Monitors

The intent of 40 CFR 58.20(c) (published at 71 FR 61302) was to describe the conditions when data from an SPM using a Federal reference method (FRM), Federal equivalent method (FEM), or Approved Regional Method (ARM) which has operated for more than 24 months is eligible for comparison to the relevant NAAQS. The rule text states that all data from an SPM is eligible for comparison to the relevant NAAQS unless the data from the particular monitor came from a period when the requirements of appendix A to part 58 (Quality Assurance Requirements for SLAMS, SPMs, and PSD Air Monitoring) or an approved alternative, appendix C to part 58 (Ambient Air Quality Monitoring Methodology), or appendix E to part 58 (Probe and Monitoring Path Siting Criteria for Ambient Air Monitoring) were not met in practice. This text does not reflect EPA's actual intention. Instead, as discussed in the preamble (71 FR 61253), the intention of the October 17, 2006, final rule was that if the Regional Administrator approved an alternative quality assurance plan in place of the requirements of appendix A to part 58, the data from the affected SPM would not be eligible for comparison to the relevant NAAQS. The unintentional inclusion in the rule text of the phrase ''or an approved alternative'' implied that data from SPMs operating during a period when approved alternative quality assurance requirements were in effect, rather than appendix A requirements, would still be eligible for comparison to the relevant NAAQS.

The EPA provided the Regional Administrator with the authority to approve an alternative to the requirements of appendix A to part 58 with respect to SPM sites when meeting those requirements would be physically and/or financially impractical due to physical conditions at the monitoring site and the requirements were not essential to achieving the intended data objectives of the SPM site.

Therefore, EPA is clarifying the regulatory text by deleting the aforementioned words referencing alternative quality assurance plans. The corrected rule text 40 CFR 58.20(c) reads: ''All data from an SPM using an FRM, FEM, or ARM which has operated for more than 24 months is eligible for comparison to the relevant NAAQS, subject to the conditions of § 58.30, unless the air monitoring agency demonstrates that the data came from a particular period during which the requirements of appendix A, appendix C, or appendix E to this part were not met in practice.''

B. Clarification to Requirement for Collocating Required Continuous Fine Particle ($PM_{2.5}$) Monitors

The regulatory text in 40 CFR part 58, appendix D (Network Design Criteria for Ambient Air Quality Monitoring), section 4.7.2 (71 FR 61322) describes the minimum requirements for operating continuous $PM_{2.5}$ analyzers.[1] The text requires States to operate a minimum number of continuous $PM_{2.5}$ analyzers equal to at least one-half (round up) the minimum required FRM/FEM/ARM $PM_{2.5}$ sites listed in Table D–5 of appendix D to part 58. At least one required FRM/FEM/ARM $PM_{2.5}$ monitor in each MSA must be collocated with a continuous analyzer. For example, if a MSA had three required FRM/FEM/ARM $PM_{2.5}$ monitors, then two continuous monitors are required, and at least one of those continuous monitors must be collocated (placed at the same site) with one of the FRM/FEM/ARM $PM_{2.5}$ monitors. The second

[1] In 40 CFR part 58 and in this preamble, the terms monitor, analyzer, and sampler are sometimes used interchangeably. Monitor is the more general term. Most often, analyzer means a self-contained monitor which can produce concentration data on-site. Sampler means a device that collects a sample (e.g., a filter) which must be further processed at an outside laboratory to obtain the concentration value.

required continuous monitor could be collocated with one of the remaining two required FRM/FEM/ARM $PM_{2.5}$ monitors at another site, or be located at a separate site based on monitoring objectives. The EPA did not intend that the continuous analyzers required under section 4.7.2 be required to be collocated with each other.

The October 17, 2006, rule text matches our intended meaning. However, when referencing this rule requirement in the preamble (71 FR 61263), EPA incorrectly stated that the collocation requirement was adopted to address concerns about whether required continuous monitors needed to be collocated with a matching second continuous monitor, and that the final rule only required one of all the required $PM_{2.5}$ continuous monitors in each MSA to have ''such a collocated match.'' This unintentional statement could be construed as a requirement for collocating two continuous monitors with each other, in addition to the requirement for collocation with at least one required FRM/FEM/ARM monitor, leading to the conclusion that EPA was requiring three $PM_{2.5}$ monitors (two continuous, one filter-based) at the first required site, subject to the requirements of section 4.7.2. Moreover, it was not our intention to require a second continuous monitor be sited with an FEM or ARM that itself provides continuous data.

Therefore, EPA is clarifying the regulatory text to make clear the intentions described above. The EPA is also clarifying that an associated reference to quality assurance/quality control procedures refers to the continuous monitoring requirement by adding the words ''for these required continuous analyzers.'' The corrected provision of 40 CFR part 58, appendix D, section 4.7.2 now reads: ''Requirement for Continuous $PM_{2.5}$ Monitoring. The State, or where appropriate, local agencies must operate continuous $PM_{2.5}$ analyzers equal to at least one-half (round up) the minimum required sites listed in Table D–5 of this appendix. At least one required continuous analyzer in each MSA must be collocated with one of the required FRM/FEM/ARM monitors, unless at least one of the required FRM/FEM/ARM monitors is itself a continuous FEM or ARM monitor, in which case no collocation requirement applies. State and local air monitoring agencies must use methodologies and quality assurance/quality control (QA/QC) procedures approved by the EPA Regional Administrator for these required continuous analyzers.''

C. Clarification to Operating Schedule Requirements for Filter-Based Manual $PM_{2.5}$ Samplers

The regulatory text in 40 CFR 58.12(d) (71 FR 61299) describes the required sampling frequency for manual filter-based $PM_{2.5}$ samplers. Manual $PM_{2.5}$ samplers at SLAMS stations must operate on at least a 1-in-3 day schedule at sites which do not also have a collocated continuously operating $PM_{2.5}$ monitor. For SLAMS $PM_{2.5}$ sites with both manual and continuous $PM_{2.5}$ monitors operating, other than NCore stations, monitoring agencies may request approval from the EPA Regional Administrator for a reduction to 1-in-6 day $PM_{2.5}$ sampling or for seasonal sampling. The EPA Regional Administrator may grant sampling frequency reductions after consideration of factors including, but not limited to, the historical $PM_{2.5}$ data quality assessments, the location of current $PM_{2.5}$ design value sites, and the regulatory data needs of States and EPA. The regulatory text provides specific criteria under which a manual $PM_{2.5}$ sampler at a SLAMS station cannot be exempted by the Regional Administrator from at least 1-in-3 day sampling, and also includes a separate provision describing when a daily sampling schedule is required. The textual length of 40 CFR 58.12(d)(1) as well as the specific wording of certain statements could create difficulty in understanding the intended operating schedule requirements for manual $PM_{2.5}$ samplers. Therefore, EPA is clarifying 40 CFR 58.12(d)(1) as described below.

The first sentence of 40 CFR 58.12(d)(1) stated that: ''Manual $PM_{2.5}$ samplers at SLAMS stations other than NCore stations must operate on at least a 1-in-3 day schedule at sites without a collocated continuously operating $PM_{2.5}$ monitor.'' This statement could be construed as meaning that manual $PM_{2.5}$ samplers at NCore stations were not required to maintain at least a 1-in-3 day schedule. The rule in fact does require manual $PM_{2.5}$ samplers at NCore stations to maintain at least a 1-in-3 day sampling schedule, as later noted in 40 CFR 58.12(d)(2), and these samplers are not eligible for sampling frequency relief. Therefore, EPA is clarifying the rule text by deleting the phrase ''other than NCore stations'' from first sentence of 40 CFR 58.12(d)(1).

Another potential ambiguity regarding the 1-in-3 day sampling frequency provision of 40 CFR 58.12(d)(1) is its geographic applicability. Since the regulatory language did not specify that the 1-in-3 day sampling frequency requirement be applied only in areas in which $PM_{2.5}$ monitoring is required, this requirement could be interpreted as applying to any manual $PM_{2.5}$ sampler within a State that recorded the highest design value ''in an area'' whether or not any $PM_{2.5}$ monitors were even required in that area according to 40 CFR part 58, appendix D. The EPA is concerned that such an interpretation would create a disincentive to monitoring by potentially requiring States that operated discretionary SLAMS monitors to sample on a 1-in-3 day frequency even though the monitor was in excess of minimum monitoring requirements. Therefore, the first sentence of 40 CFR 58.12(d)(1)(i) is amended to read: ''Manual $PM_{2.5}$ samplers at required SLAMS stations without a collocated continuously operating $PM_{2.5}$ monitor must operate on at least a 1-in-3 day schedule.'' In this rule text, ''required SLAMS stations'' refers to minimum monitoring requirements as specified in 40 CFR part 58, appendix D, section 4.7. It does not include SPMs; therefore SPMs are not required to sample on a 1-in-3 day schedule.

After stating the 1-in-3 day sampling requirement, the rule text at 40 CFR 58.12(d)(1)(ii) goes on to allow the Regional Administrator to grant a reduction of this schedule to 1-in-6 day for SLAMS $PM_{2.5}$ sites with both manual and continuous $PM_{2.5}$ monitors operating. In this context, the rule text contains a duplicated reference to SLAMS $PM_{2.5}$ sites; the second reference, ''at SLAMS stations,'' is removed in the corrected rule language since the opening part of the sentence already states the applicability of the provision to SLAMS $PM_{2.5}$ sites. The text goes on to describe two situations in which a manual $PM_{2.5}$ sampler at a required SLAMS station could not be granted sampling frequency relief by the Regional Administrator from the minimum 1-in-3 day sampling schedule. In the first situation, the phrase: ''Sites that have design values that are within plus or minus 10 percent of the NAAQS'' could be construed as applying to all sites within a particular area that have design values that are within plus or minus 10 percent of the NAAQS, when the intention was to apply the provision only to the site with the highest value in a particular area calculated in accordance with 40 CFR part 50, appendix N (Interpretation of the National Ambient Air Quality Standards for $PM_{2.5}$).[2] In the second

[2] EPA notes that the term ''design value'' as defined in the final rule (40 CFR part 58.1, 71 FR 61296) is the calculated concentration of a pollutant according to the applicable appendix of part 50 for

situation, the phrase: ''and sites where the 24-hour values exceed the NAAQS for a period of 3 years are required to maintain at least a 1-in-3 day sampling frequency'' created ambiguity about whether the provision was applicable in situations where a single 24-hour value exceeded the NAAQS at a particular site during only 1 or 2 years of a 3-year period. The EPA's intention was that at least one 24-hour value had to exceed the NAAQS in each of the years comprising the 3-year period situation for the provision to apply.

Also, the regulatory text could be construed as requiring 1-in-3 day manual $PM_{2.5}$ sampling at all sites within a particular area that have design values within the plus or minus 10 percent criteria, regardless of whether the site is required and regardless of the potential availability of continuous $PM_{2.5}$ FEM or ARM monitors which inherently would provide every-day data eligible for comparison to the NAAQS. The EPA anticipates the increasing availability of approved FEM and ARM methods over the next few years, and expects that many such approved continuous monitors will be deployed at sites formerly dedicated to manual filter-based FRM or FEM $PM_{2.5}$ samplers, including design value sites subject to the plus or minus 10 percent criteria when compared with the 24-hour $PM_{2.5}$ NAAQS. The EPA supports the deployment of approved FEM or ARM continuous $PM_{2.5}$ methods to meet appropriate monitoring objectives as such monitors become available, and thus we did not intend to require 1-in-3 day sampling utilizing manual $PM_{2.5}$ methods at design value sites, or any other sites, where monitoring agencies have deployed an approved continuous FEM or ARM.

The clarified language of the restriction related to being within plus or minus 10 percent of the NAAQS now reads: ''Required SLAMS stations whose measurements determine the design value for their area and that are within plus or minus 10 percent of the NAAQS, and all required sites where one or more 24-hour values have exceeded the NAAQS each year for a consecutive period of at least 3 years, are required to maintain at least a 1-in-3 day sampling frequency. A continuously operating FEM or ARM $PM_{2.5}$ monitor satisfies this requirement.''

At the end of 40 CFR 58.12(d)(1), EPA specified that manual $PM_{2.5}$ samplers at sites that have a design value within plus or minus 5 percent of the daily $PM_{2.5}$ NAAQS must have an FRM or FEM operate on a daily schedule. As with the previously discussed phrasing in the context of the 1-in-3 day sampling requirement, this text could be construed as applying to all sites within a particular area that have design values that are within plus or minus 5 percent of the NAAQS, when the intention was to apply the provision only to the required SLAMS site with the highest value in a particular area. Also, the above described concern regarding the acceptability of continuous $PM_{2.5}$ analyzers applies in the case of this plus or minus 5 percent criterion, and a similar clarification to the rule text is appropriate.

Therefore, EPA is clarifying 40 CFR 58.12(d)(1) and for purposes of clarity is adding subparagraph (iii). It will read: ''Required SLAMS sites whose measurements determine the design value for their area and that are within plus or minus 5 percent of the daily $PM_{2.5}$ NAAQS must have an FRM or FEM operate on a daily schedule. A continuously operating FEM or ARM $PM_{2.5}$ monitor satisfies this requirement.''

The EPA notes that only population-oriented monitors are subject to the previously described percent-dependent sampling frequency requirements. In 40 CFR 58.30 (Special Considerations for Data Comparisons to the NAAQS), sites must be population-oriented to be comparable to either the annual or daily $PM_{2.5}$ NAAQS. By implication, design value sites must be NAAQS comparable, therefore non-population oriented sites would not be affected by the plus or minus 10 percent or plus or minus 5 percent provisions.

As previously mentioned, EPA is aware that the length of 40 CFR 58.12(d)(1) creates the potential for ambiguity in the applicability of individual provisions related to sampling frequency requirements. To clarify the applicability of such provisions, EPA has restructured 40 CFR 58.12(d)(1) to create distinct paragraphs encompassing the previously described amended language applicable to SLAMS sites without continuously operating $PM_{2.5}$ monitors (now numbered 40 CFR 58.12(d)(1)(i)), SLAMS sites with both manual and continuous $PM_{2.5}$ monitors (now numbered 40 CFR 58.12(d)(1)(ii)), and design value sites within plus or minus 5 percent of the daily $PM_{2.5}$ NAAQS (now numbered 40 CFR 58.12(d)(1)(iii)).

In 40 CFR 58.12(d)(3), manual $PM_{2.5}$ speciation samplers at required Speciation Trends Network (STN) stations are required to operate on a 1-in-3 day sampling frequency. The EPA intended the 1-in-3 day sampling frequency to be a minimum sampling frequency and not to imply a prohibition against a more frequent sampling frequency, such as a daily sampling frequency, if such a frequency is appropriate for specific monitoring objectives. Consistent with the phraseology of sampling frequency requirements elsewhere in the regulatory text, EPA is correcting the aforementioned phrase to read: ''Manual $PM_{2.5}$ speciation samplers at STN stations must operate on at least a 1-in-3 day sampling frequency.''

D. Standard versus Daylight Savings Time Reference

40 CFR 58.12(e) requires that the operating schedule for PM_{10} samplers must be a 24-hour sampling period taken from midnight to midnight (local time) to ensure national consistency. In a 1999 EPA memorandum,[3] the use of standard time versus daylight savings time is discussed in the context of sample collection for particulate matter monitors, concluding with the recommendation that monitoring agencies operate their particulate matter sampler clocks on standard time to avoid the semi-annual time-shift issues associated with conversion between standard time and daylight savings time. Monitoring agencies have generally adopted the practice of keeping their particulate matter sampler clocks on standard time since the issuance of the 1999 memorandum. It was EPA's intention to codify the practice of keeping particulate matter clocks on standard time in the October 17, 2006, Revisions to the Ambient Monitoring Regulations; however, the codifying rule text was inadvertently omitted for PM_{10}.[4] If the aforementioned 40 CFR 58.12(e) reference to PM_{10} operating schedule is left uncorrected, this could create inconsistent interpretation of the standard versus daylight savings time issue among monitoring agencies causing unnecessary confusion in the interpretation of the air quality data.

Therefore, EPA is correcting the reference to PM_{10} operating schedules in

the highest monitoring site in an attainment or nonattainment area, and that EPA's usage of ''design value'' in the rule text was consistent with this definition.

[3] ''Use of PM Reference Methods and Daylight Savings Time,'' J. David Mobley; Office of Air Quality Planning and Standards, June 11, 1999. *http://www.epa.gov/ttn/amtic/files/ambient/pm25/stdtime.pdf*.

[4] The intention to base sampling on local standard time was correctly reflected in rule text applicable to $PM_{2.5}$. 40 CFR part 50, appendix N (Interpretation of the National Ambient Air Quality Standards for $PM_{2.5}$) reads: ''Daily values for $PM_{2.5}$ refers to the 24-hour average concentrations of $PM_{2.5}$ calculated (averaged from hourly measurements) or measured from midnight to midnight (local standard time) that are used in NAAQS computations.''

40 CFR 58.12(e) to read as follows: ''For PM_{10} samplers, a 24-hour sample must be taken from midnight to midnight (local standard time) to ensure national consistency.''

E. Corrections to Regulatory Text on Particulate Matter (PM_{10}) Network Design Criteria

In the preamble to the final monitoring rule (71 FR 61240), EPA stated an intention to retain the pre-existing minimum monitoring network design requirements for PM_{10}, which are based on the population of an MSA and its historical PM_{10} air quality. The EPA's intention in finalizing the regulatory text in section 4.6, Particulate Matter (PM_{10}) Design Criteria, of 40 CFR part 58, appendix D (Network Design Criteria for Ambient Air Quality Monitoring) (71 FR 61320) was to retain all PM_{10}-relevant portions of the pre-existing regulatory text beginning with section 3.7, Particulate Matter Design Criteria for NAMS (see 62 FR 38820, July 18, 1997), with only minor changes necessary to maintain consistency of monitor type terminology (e.g., to eliminate obsolete references to National Air Monitoring Stations (NAMS)). The EPA inadvertently omitted several passages from the pre-existing regulatory text in section 3.7 referencing PM_{10} network design criteria. If left uncorrected, these omissions could lead to misinterpretation of PM_{10} monitoring network design requirements. Three specific textual corrections are detailed below.

First, in Table D–4, PM_{10} Minimum Monitoring Requirements (Number of Stations per MSA), the word ''Approximate'' which had appeared in the title of the pre-existing Table 4 was omitted. Therefore, in order to retain the earlier language EPA is revising the title of Table D–4 to read: ''PM_{10} Minimum Monitoring Requirements (Approximate Number of Stations Per MSA).''

Second, the first footnote contains some words (''within the ranges shown in this table'') that were not part of the corresponding footnote to the pre-existing Table 4. Therefore, the first footnote is revised to read: ''Selection of urban areas and actual numbers of stations per area will be jointly determined by EPA and the State Agency.''

Third, in paragraph (a) of section 4.6, the regulatory text notes that State, and where applicable local, agencies must operate the minimum number of required PM_{10} SLAMS sites listed in Table D–4 of appendix D. In the October 17, 2006, rulemaking, EPA intended to retain all of the pre-existing regulatory text in the pre-existing paragraph 3.7.1 (as last promulgated on July 18, 1997, at 62 FR 38850) in new paragraph (a) of new section 4.6, to explain in words the flexibility in minimum PM_{10} monitoring requirements as provided in the pre-existing Table 4 which had listed ranges of required numbers (rather than a single number) of monitors for each of the categories of MSA population and historical PM_{10} range. This regulatory text was inadvertently omitted. Therefore, EPA is restoring the omitted text and correcting paragraph (a) of section 4.6 to read: ''Table D–4 indicates the approximate number of permanent stations required in MSAs to characterize national and regional PM_{10} air quality trends and geographical patterns. The number of PM_{10} stations in areas where MSA populations exceed 1,000,000 must be in the range from 2 to 10 stations, while in low population urban areas, no more than 2 stations are required. A range of monitoring stations is specified in Table D–4 because sources of pollutants and local control efforts can vary from one part of the country to another and, therefore, some flexibility is allowed in selecting the actual number of stations in any one locale.''

F. Additional Regional Administrator Flexibility in Applying PM_{10} Minimum Monitoring Requirements

We are amending the monitoring rule to allow EPA Regional Administrators to approve departures from the minimum number of PM_{10} monitors otherwise specified in the rule.

In the January 17, 2006, proposed monitoring rule (71 FR 2802), EPA proposed minimum network design monitoring requirements for $PM_{10-2.5}$. In paragraph (b) of section 4.8.1 of 40 CFR part 58, appendix D, (Network Design Criteria for Ambient Air Quality Monitoring), EPA proposed that modifications from the $PM_{10-2.5}$ monitoring requirements must be approved by the Regional Administrator. The proposed regulatory language providing the Regional Administrator flexibility to modify the $PM_{10-2.5}$ monitoring requirements was consistent with similar language proposed for $PM_{2.5}$ that read: ''Deviations from these $PM_{2.5}$ monitoring requirements must be approved by the EPA Regional Administrator'' (71 FR 2801, paragraph (b) of section 4.7.1). Similar regulatory language was proposed for ozone monitoring requirements (71 FR 2798, paragraph (b) of section 4.1): ''Deviations from the above O_3 requirements are allowed if approved by the EPA Regional Administrator.'' The EPA finalized the Regional Administrator authority to modify the $PM_{2.5}$ and ozone monitoring requirements in the October 17, 2006, rule following a public comment period in which no adverse comments were received about the specific provisions concerning Regional Administrator flexibility in applying these regulations.

The EPA did not adopt the proposed $PM_{10-2.5}$ minimum monitoring network design including the Regional Administrator flexibility language. The EPA notes, however, that no adverse comments were received specifically addressing the proposed Regional Administrator authority to modify $PM_{10-2.5}$ monitoring network requirements although voluminous comment was received on other proposed provisions of the $PM_{10-2.5}$ monitoring network design and accompanying suitability test.

The EPA also proposed and adopted requirements for ''NCore'' multipollutant monitoring sites, including a provision allowing the Administrator to approve modifications from these requirements. Again, no adverse comment was received on this modification provision. Finally, specific requirements in the rule for photochemical assessment monitoring stations (PAMS) have always been modifiable by the Administrator.

Thus, EPA notes that under the current 40 CFR part 58, appendix D network design requirements, PM_{10} is the only pollutant with minimum monitoring requirements not subject to modification based on either Administrator or Regional Administrator evaluation and approval. Such flexibility, already finalized for ozone and $PM_{2.5}$, can prove useful in particular cases where a State demonstrates that meeting the minimum monitoring requirements, for an individual MSA for example, may be impractical or contrary to the optimum use of monitoring resources.

The EPA believes it is appropriate to allow the Regional Administrator to modify PM_{10} monitoring requirements, for the same reasons such authority was finalized for $PM_{2.5}$ and ozone monitoring requirements. Such authority allows for specific local factors and information can be considered in order to make the PM_{10} monitoring network more economical while still meeting program data needs. In light of the absence of any comments of concern regarding very similar Administrator or Regional Administrator authority for other pollutants, we do not expect any adverse comment on this action. Therefore, EPA is amending paragraph

(a) of section 4.6 quoted in the section above and adding the following sentence so it now reads: ''Modifications from these PM_{10} monitoring requirements must be approved by the Regional Administrator.'' See also section VI.E of this preamble for a clarifying amendment which also affects section 4.6 of appendix D to part 58 by restoring inadvertently omitted text.

G. Correction to Division Name and Address Reference

The October 17, 2006, final rule provided an address reference in paragraph 2.4 of 40 CFR part 58 appendix A, to assist with communications regarding the National Performance Evaluation Programs. Monitoring agencies were advised to contact either the appropriate EPA Regional Quality Assurance (QA) Coordinator at the appropriate EPA Regional Office location, or the NPAP Coordinator, Emissions Monitoring and Analysis Division (D205–02), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711. Due to a reorganization within the Office of Air Quality Planning and Standards and subsequent physical relocation within the North Carolina facility, the provided address mail code (D205–02) is no longer correct for quality assurance related communications. Additionally, the Emissions Monitoring and Analysis Division has been renamed to the Air Quality Assessment Division, as part of the same reorganization. Due to the possibility of future address changes, EPA believes a more general reference to quality assurance contact information is appropriate for inclusion in regulatory language. Updated contact information for all air monitoring program leads is maintained on the Ambient Monitoring Technology Information Center (AMTIC) Web site *http://www.epa.gov/ttn/amtic/contacts.html*. This website is well publicized and frequently accessed by all monitoring agencies; therefore, specific address entries in the rule are unnecessary and potentially misleading. Accordingly, EPA is amending the regulatory text in paragraph 2.4 to read: ''For clarification and to participate, monitoring organizations should contact either the appropriate EPA Regional Quality Assurance (QA) Coordinator at the appropriate EPA Regional Office location, or the NPAP Coordinator at the Air Quality Assessment Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency in Research Triangle Park, North Carolina.''

H. Clarification to Conditions for Waiving Regional Administrator Comment Period on Submitted Annual Monitoring Network Plans

The regulatory text in 40 CFR 58.10(a)(2) (71 FR 61298) describes the approval process for State-submitted annual monitoring network plans that propose SLAMS network modifications. Such plans are subject to the approval of the Regional Administrator, including a new requirement for the Regional Administrator to provide opportunity for public comment during the 120-day period allowed for approval or disapproval. The rule permits the Regional Administrator to waive the separate public comment opportunity if the State or local agency has already provided a public comment opportunity on its plan and has made no changes to the plan subsequent to that comment opportunity.

Implied but not explicitly stated in the regulatory language is that the Regional Administrator may forgo public comment only if the State or local agency submitted the full text of public comments received on its annual monitoring network plan to the Regional Administrator, because only the availability of such detailed comments would make a separate comment period by the Regional Administrator redundant.

The EPA believes that the aforementioned regulatory language should be clarified to avoid ambiguity about what situations would require the Regional Administrator to provide a public comment opportunity on submitted annual monitoring network plans that contain SLAMS network modifications. The EPA notes that the clarification does not modify the minimum requirements for State and local agencies to make their plans available for public inspection for at least 30 days prior to submission to EPA.

Accordingly, the clarified regulatory text in the second sentence of 40 CFR 58.10(a)(2) reads: ''If the State or local agency has already provided a public comment opportunity on its plan and has made no changes subsequent to that comment opportunity, and has submitted the received comments together with the plan, the Regional Administrator is not required to provide a separate opportunity for comment.''

Such comments could be transmitted to the Regional Administrator in hard-copy or electronic format, and at a minimum, would include all relevant information supplied to the State or local agency by the commenters. Monitoring agencies would not be expected to provide comment summaries or comment responses, although those submissions could optionally be provided to the Regional Administrator in addition to the actual text of the received comments.

I. Typographical Corrections

The **Federal Register** printing of the October 17, 2006, final rule contained typographical errors in equations, tables, and figures. These errors, as explained below and listed by **Federal Register** page reference and CFR section number, are corrected in this rulemaking.

- 71 FR 61284. Subpart C of Part 53—§ 53.35(d)(4), Calculation of mean concentrations. Equation 12: The ''n'' over the summation symbol is replaced with ''m.''
- 71 FR 61284. Subpart C of Part 53—§ 53.35(e) and § 53.35(f), Tests for reference method and candidate method precision. Equations 13 and 15: 100% is moved to be outside the square root symbol.
- 71 FR 61284. Subpart C of Part 53—§ 53.35(g), Test for additive and multiplicative bias (comparative slope and intercept). Equation 17: Left part of equation is changed to be $\bar{R}$ not $\bar{R}_j$.
- 71 FR 61284. Subpart C of Part 53—§ 53.35(h), Tests for comparison correlation. Equation 21: Radical sign in the denominator is extended to cover both summation signs.
- 71 FR 61285. Table C–1 to Subpart C of Part 53, Test Concentration Ranges, Number of Measurements Required, and Maximum Discrepancy Specification. The four occurrences of ''Total'' in the first column are moved to the second column.
- 71 FR 61285. Table C–1 to Subpart C of Part 53, Test Concentration Ranges, Number of Measurements Required, and Maximum Discrepancy Specification. Two entries of ''18'' are moved 3 columns left to appear in the ''Second Set'' column rather than as shown in the right-most column.
- 71 FR 61285. Table C–4 to Subpart C of Part 53—Test Specifications for PM_{10}, $PM_{2.5}$ and $PM_{10-2.5}$ Candidate Equivalent Methods. An erroneous ''R'' character in the table title is removed so that the title reads—Test Specifications for PM_{10}, $PM_{2.5}$ and $PM_{10-2.5}$ Candidate Equivalent Methods.
- 71 FR 61286. Table C–4 to Subpart C of Part 53—Test Specifications for PM_{10}, $PM_{2.5}$ and $PM_{10-2.5}$ Candidate Equivalent Methods. In the column header for the last 2 columns, the ''$PM_{10-2.5}$'' is corrected to be ''$PM_{10-2.5}$''.
- 71 FR 61286. Table C–4 to Subpart C of Part 53—Test Specifications for PM_{10}, $PM_{2.5}$ and $PM_{10-2.5}$ Candidate

Equivalent Methods. The horizontal line under ''R_j > 60 μg/m3'' in the table is removed.

• 71 FR 61286. Table C–4 to Subpart C of Part 53—Test Specifications for PM_{10}, $PM_{2.5}$ and $PM_{10-2.5}$ Candidate Equivalent Methods. In the first column, in the ''Precision of replicate reference method measurements * * *'' entry, the ''prime'' symbols are removed from ''RP_{Rj}'' and ''$PM_{10-2.5}$''.

• 71 FR 61286. Table C–4 to Subpart C of Part 53—Test Specifications for PM_{10}, $PM_{2.5}$ and $PM_{10-2.5}$ Candidate Equivalent Methods. An unintended period is removed at the end of the entry in the last column, Intercept row, and at the end of the second footnote.

• 71 FR 61286. Table C–4 to Subpart C of Part 53—Test Specifications for PM_{10}, $PM_{2.5}$ and $PM_{10-2.5}$ Candidate Equivalent Methods. Values for correlation of reference method and candidate method measurements for $PM_{2.5}$ Class II and III, and $PM_{10-2.5}$ Class II and III are added to all four columns:

• ≥0.93 for CCV≤0.4;
• ≥0.85 + 0.2×CCV for 0.4≤CCV≤0.5;
• ≥0.95 for CCV≥0.5.

• 71 FR 61287. Figure C–1 to Subpart C of Part 53—Suggested Format for Reporting Test Results for Methods for SO_2, CO, O_3, NO_2. Title and the first lines of content are repositioned from being section text to being proper parts of Figure C–1.

• 71 FR 61287. Figures C–2 and C–3 to Subpart C of Part 53—Illustration of the Slope and Intercept Limits for Class II and Class III $PM_{2.5}$ Candidate Equivalent Methods and Illustration of the Slope and Intercept Limits for Class II and Class III $PM_{10-2.5}$ Candidate Equivalent Methods. ''$PM_{2.5}$'' is changed to ''$PM_{2.5}$,'' ''$PM_{10-2.5}$'' is changed to ''$PM_{10-2.5}$,'' ''μg/m3'' is changed to ''μg/m^3.'' Also, the ''Class II'' and ''Class III'' labels are related by arrows to the outline of the hexagons rather than the area inside, to be consistent with the title, which indicates ''Acceptance Limits.''

• 71 FR 61289. Figure C–4 to Subpart C of Part 53—Illustration of the Minimum Limits for Correlation Coefficient for $PM_{2.5}$ and $PM_{10-2.5}$ Class II and III methods. In the axes labels, the commas are deleted and the ''r'' and the ''CCV'' are placed within parentheses.

• 71 FR 61293. Subpart E of Part 53—§ 53.58(g), Operational field precision and blank test. Equation 26: the symbol ''$C_{1,j}$'' is corrected to ''$C_{i,j}$.''

• 71 FR 61294. Table E–1 to Subpart E of Part 53—Summary of Test Requirements for Reference and Class I Equivalent Methods for $PM_{2.5}$ and $PM_{10-2.5}$. In the 3rd column, row identified as ''§ 53.56* * *,'' a comma is added after ''16.67 ± 5%'' and before ''L/min.''

• 71 FR 61294. Table E–1 to Subpart E of Part 53—Summary of Test Requirements for Reference and Class I Equivalent Methods for $PM_{2.5}$ and $PM_{10-2.5}$. In the 3rd column, row identified as ''§ 53.57* * *,'' one of the two periods at the end of item 3 is removed.

• 71 FR 61294. Table E–1 to Subpart E of Part 53—Summary of Test Requirements for Reference and Class I Equivalent Methods for $PM_{2.5}$ and $PM_{10-2.5}$. In the fourth column, row identified as ''§ 53.57* * *,'' item (c) is changed to read ''Solar flux of 1000 ± 50 W/m^2'' not ''Solar flux of 1000 ? 50 W/m^2.''

• 71 FR 61294. Table E–1 to Subpart E of Part 53—Summary of Test Requirements for Reference and Class I Equivalent Methods for $PM_{2.5}$ and $PM_{10-2.5}$. Spurious ''?'' characters throughout the table are removed.

• 71 FR 61294. Table E–1 to Subpart E of Part 53—Summary of Test Requirements for Reference and Class I Equivalent Methods for $PM_{2.5}$ and $PM_{10-2.5}$. § 53.56 cell reference, Barometric pressure effect test, Sample flow rate performance specification, value is changed to be 16.67 (versus 16.6).

• 71 FR 61296. Table F–1 to Subpart F of Part 53—Performance Specifications for $PM_{2.5}$ Class II Equivalent Samplers. In the last column, row identified as ''§ 53.64,'' ''Dp_{50} = 2.5 μm ? 0.2 μm'' is changed to be ''Dp_{50} = 2.5 μm ± 0.2 μm.''

• 71 FR 61296. Table F–1 to Subpart F of Part 53—Performance Specifications for $PM_{2.5}$ Class II Equivalent Samplers. In the last column, last row, a comma is added after ''0.15mg'' and before ''r ≥0.97.''

• 71 FR 61296. Table F–1 to Subpart F of Part 53—Performance Specifications for $PM_{2.5}$ Class II Equivalent Samplers. Spurious ''?'' characters throughout the table are removed.

• 71 FR 61300. Figure 1 to Subpart B of Part 58—Ratio to Standard for PM_{10} Operating Schedule. A missing value (1.4) is added on the X axis.

• 71 FR 61309. Appendix A of Part 58—Quality Assurance Requirements for SLAMS, SPMs, and PSD Air Monitoring. Equation 7: A missing ''•'' character is added so that the equation reads: Lower Probability Limit = m–1.96 • S.

• 71 FR 61309. Appendix A of Part 58—Quality Assurance Requirements for SLAMS, SPMs, and PSD Air Monitoring. A missing minus sign is added in caption below Equation 11 so that it reads: a chi-squared distribution with n–1 degrees of freedom.

• 71 FR 61310. Appendix A of Part 58—Quality Assurance Requirements for SLAMS, SPMs, and PSD Air Monitoring. Equation 12: missing ellipsis is added in caption so that it reads: where, n_j is the number of pairs and d_1, d_2, * * * dn_j are the biases for each of the pairs to be averaged.

• ''PM_{10C}'', where it appears in Part 53 without a subscripted ''C'', is replaced with ''PM_{10c}.''

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it may raise novel legal policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection, as it only corrects printing errors, provides clarifications, and provides new flexibility for PM_{10} monitoring on a case-by-case basis. However, the OMB has previously approved the information collection requirements contained in the existing regulations for 40 CFR part 53 and 40 CFR part 58 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060–0084, EPA ICR number 0940.20. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division, U.S. Environmental Protection Agency (2822T), 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672. This action does not impose any new information collection burden beyond the already-approved ICR.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying

information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

This final rule will not impose any requirements on small entities. None of the corrections and clarifications creates additional regulatory requirements on affected entities compared to those that were promulgated in the final rule that was published in the **Federal Register** on October 17, 2006. The rule changes being made only correct printing errors, provide clarifications, and provides new flexibility for PM_{10} monitoring on a case-by-case basis.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that this final rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year, because the changes being made are merely clarifications and corrections. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

The EPA has determined that this final rule contains no regulatory requirements that might significantly or uniquely affect small governments. None of the changes creates additional regulatory requirements on affected entities compared to those that were promulgated in the final rule that was published in the **Federal Register** on October 17, 2006. The rule changes being made only correct printing errors, provide clarifications, and provide some new flexibility for PM_{10} monitoring on a case-by-case basis. Therefore, this final rule is not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications because it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This is because the changes being made only correct printing errors, provide clarifications, and provides some new flexibility for PM_{10} monitoring on a case-by-case basis. Thus, Executive Order 13132 does not apply to this final rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. The EPA consulted with tribal officials early in the process of developing the October 17, 2006, rule to permit them to have meaningful and timely input into its development. Although tribal governments may elect to conduct ambient air monitoring, none of the changes in today's rule apply directly to tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885,

April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under EO 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets EO 13045 as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This final rule is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The rule merely amends the October 17, 2006, final monitoring rule (71 FR 61236) by correcting printing errors, providing clarifications, and providing some new flexibility for PM_{10} monitoring on a case-by-case basis.

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. No significant change in the use of energy is expected because the total number of monitors for ambient air quality measurements will not increase above present levels. Further, we have concluded that this rule is not likely to have any adverse energy effects.

J. National Technology Transfer Advancement Act

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

This action does not involve technical standards, other than to make corrections and clarifications. Therefore, EPA did not consider the use of any voluntary consensus standards.

K. Congressional Review Act

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 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 ''major rule'' as defined by 5 U.S.C. 804(2). This final rule will not have an annual effect on the economy of $100 million or more, will not result in a major increase in costs or prices for State or local agencies, and will not affect competition with foreign-based enterprises in domestic and export markets. The final amendments will be effective on September 10, 2007.

List of Subjects in 40 CFR Parts 53 and 58

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

Dated: April 30, 2007.

Stephen L. Johnson,

Administrator.

■ For the reasons stated in the preamble, title 40, chapter I, parts 53 and 58 of the Code of Federal Regulations are amended as follows:

PART 53—[AMENDED]

■ 1. The authority citation for part 53 continues to read as follows:

Authority: Section 301(a) of the Clean Air Act (42 U.S.C. sec. 1857g(a)), as amended by sec. 15(c)(2) of Pub. L. 91–604, 84 Stat. 1713, unless otherwise noted.

Subpart C—[Amended]

■ 2. Section 53.35 is amended by:

■ a. Revising Equation 12 of paragraph (d)(4),

■ b. Revising Equation 13 of paragraph (e)(1),

■ c. Revising Equation 15 of paragraph (f)(1),

■ d. Revising Equation 17 of paragraph (g)(1), and

■ e. Revising Equation 21 of paragraph (h)(1) to read as follows:

§ 53.35 Test procedure for Class II and Class III methods for $PM_{2.5}$ and $PM_{10-2.5}$.

* * * * *

(d) * * *

(4) * * *

Equation 12

$$\overline{C}_j = \frac{1}{m}\sum_{i=1}^{m} C_{i,j}$$

Where:

C_j = The mean concentration measured by the candidate method for the measurement set;

$C_{i,j}$ = The measurement of the candidate method sampler or analyzer i on test day j; and

m = The number of valid candidate method measurements in the measurement set (normally 3).

(e) * * *

(1) * * *

Equation 13

$$RP_j = \frac{1}{\overline{R}_j}\sqrt{\frac{\sum_{i=1}^{n} R_{i,j}^2 - \frac{1}{n}\left(\sum_{i=1}^{n} R_{i,j}\right)^2}{n-1}} \times 100\%$$

* * * * *

(f) * * *

(1) * * *

Equation 15

$$CP_j = \frac{1}{\overline{C}_j}\sqrt{\frac{\sum_{i=1}^{m} C_{i,j}^2 - \frac{1}{m}\left(\sum_{i=1}^{m} C_{i,j}\right)^2}{m-1}} \times 100\%$$

* * * * *

(g) * * *

(1) * * *

Equation 17

$$\overline{R} = \frac{1}{J}\sum_{j=1}^{J} \overline{R}_j$$

* * * * *

(h) * * *

(1) * * *

Equation 21

$$r = \frac{\sum_{j=1}^{J}\left(\overline{R}_j - \overline{R}\right)\left(\overline{C}_j - \overline{C}\right)}{\sqrt{\sum_{j=1}^{J}\left(\overline{R}_j - \overline{R}\right)^2 \sum_{j=1}^{J}\left(\overline{C}_j - \overline{C}\right)^2}}$$

* * * * *

■ 3. Table C–1 to subpart C is revised to read as follows:

TABLE C–1 TO SUBPART C OF PART 53—TEST CONCENTRATION RANGES, NUMBER OF MEASUREMENTS REQUIRED, AND MAXIMUM DISCREPANCY SPECIFICATION

Pollutant	Concentration range, parts per million	Simultaneous measurements required				Maximum discrepancy specification, parts per million
		1-hr		24-hr		
		First set	Second set	First set	Second set	
Ozone	Low 0.06 to 0.10	5	6	.....	.....	0.02
	Med 0.15 to 0.25	5	6	.....	.....	.03
	High 0.35 to 0.45	4	6	.....	.....	.04
	Total	14	18	.....	.....	.....
Carbon monoxide	Low 7 to 11	5	6	.....	.....	1.5
	Med 20 to 30	5	6	.....	.....	2.0
	High 35 to 45	4	6	.....	.....	3.0
	Total	14	18	.....	.....	.....
Sulfur dioxide	Low 0.02 to 0.05	.....	.....	3	3	0.02
	Med 0.10 to 0.15	.....	.....	2	3	.03
	High 0.30 to 0.50	7	8	2	2	.04
	Total	7	8	7	8	.....
Nitrogen dioxide	Low 0.02 to 0.08	.....	.....	3	3	0.02
	Med 0.10 to 0.20	.....	.....	2	3	.03
	High 0.25 to 0.35	.....	.....	2	2	.03
	Total	.....	.....	7	8	.....

■ 4. Table C–4 to subpart C is revised to read as follows:

TABLE C–4 TO SUBPART C OF PART 53.—TEST SPECIFICATIONS FOR PM_{10}, $PM_{2.5}$ AND $PM_{10-2.5}$ CANDIDATE EQUIVALENT METHODS

Specification	PM_{10}	$PM_{2.5}$			$PM_{10-2.5}$	
		Class I	Class II	Class III	Class II	Class III
Acceptable concentration range (R_j), $\mu g/m^3$.	15–300	3–200	3–200	3–200	3–200	3–200
Minimum number of test sites	2	1	2	4	2	4

TABLE C–4 TO SUBPART C OF PART 53.—TEST SPECIFICATIONS FOR PM_{10}, $PM_{2.5}$ AND $PM_{10-2.5}$ CANDIDATE EQUIVALENT METHODS—Continued

Specification	PM_{10}	$PM_{2.5}$			$PM_{10-2.5}$	
		Class I	Class II	Class III	Class II	Class III
Minimum number of candidate method samplers or analyzers per site.	3	3	3[1]	3[1]	3[1]	3[1]
Number of reference method samplers per site.	3	3	3[1]	3[1]	3[1]	3[1]
Minimum number of acceptable sample sets per site for PM_{10} methods:						
$R_j < 60$ μg/m³	3					
$R_j > 60$ μg/m³	3					
Total	10					
Minimum number of acceptable sample sets per site for $PM_{2.5}$ and $PM_{10-2.5}$ candidate equivalent methods:						
$R_j < 30$ μg/m³ for 24-hr or $R_j < 20$ μg/m³ for 48-hr samples.		3				
$R_j > 30$ μg/m³ for 24-hr or $R_j > 20$ μg/m³ for 48-hr samples.		3				
Each season		10	23	23	23	23
Total, each site		10	23	23 (46 for two-season sites)	23	23 (46 for two-season sites)
Precision of replicate reference method measurements, P_{Rj} or RP_{Rj}, respectively; RP for Class II or III $PM_{2.5}$ or $PM_{10-2.5}$, maximum.	5 μg/m³ or 7%	2 μg/m³ or 5%	10%[2]	10%[2]	10%[2]	10%[2]
Precision of $PM_{2.5}$ or $PM_{10-2.5}$ candidate method, CP, each site.			10%[2]	15%[2]	15%[2]	15%[2]
Slope of regression relationship.	1 ± 0.10	1 ± 0.05	1 ± 0.10	1 ± 0.10	1 ± 0.10	1 ± 0.12
Intercept of regression relationship, μg/m³.	0 ± 5	0 ± 1	Between: 13.55 − (15.05 × slope), but not less than −1.5; and 16.56 − (15.05 × slope), but not more than +1.5	Between: 15.05 − (17.32 × slope), but not less than −2.0; and 15.05 − (13.20 × slope), but not more than +2.0	Between: 62.05 − (70.5 × slope), but not less than −3.5; and 78.95 − (70.5 × slope), but not more than +3.5	Between: 70.50 − (82.93 × slope), but not less than −7.0; and 70.50 − (61.16 × slope), but not more than +7.0
Correlation of reference method and candidate method measurements.	≥ 0.97	≥ 0.97	≥ 0.93—for CCV ≤ 0.4; ≥ 0.85 + 0.2 × CCV—for 0.4 ≤ CCV ≤ 0.5; ≥ 0.95—for CCV ≥ 0.5			

[1] Some missing daily measurement values may be permitted; see test procedure.
[2] Calculated as the root mean square over all measurement sets.

■ 5. Figures C–1 through C–4 to subpart C are revised to read as follows:

Figure C–1 to Subpart C of Part 53—Suggested Format for Reporting Test Results for Methods for SO_2, CO, O_3, NO_2

Candidate Method _____
Reference Method _____
Applicant _____

☐ First Set ☐ Second Set ☐ Type ☐ 1 Hour ☐ 24 Hour

Concentration range		Date	Time	Concentration, ppm		Difference	Table C–1 spec.	Pass or fail
				Candidate	Reference			
Low	1							
_____ ppm	2							
to _____ ppm	3							
	4							
	5							
	6							
Medium	1							
_____ ppm	2							
to _____ ppm	3							
	4							
	5							
	6							
High	1							
_____ ppm	2							
to _____ ppm	3							
	4							
	5							
	6							
	7							
	8							
							Total Failures:	

FIGURE C-2 TO SUBPART C OF PART 53–ILLUSTRATION OF THE SLOPE AND INTERCEPT LIMITS FOR CLASS II AND CLASS III $PM_{2.5}$ CANDIDATE EQUIVALENT METHODS.

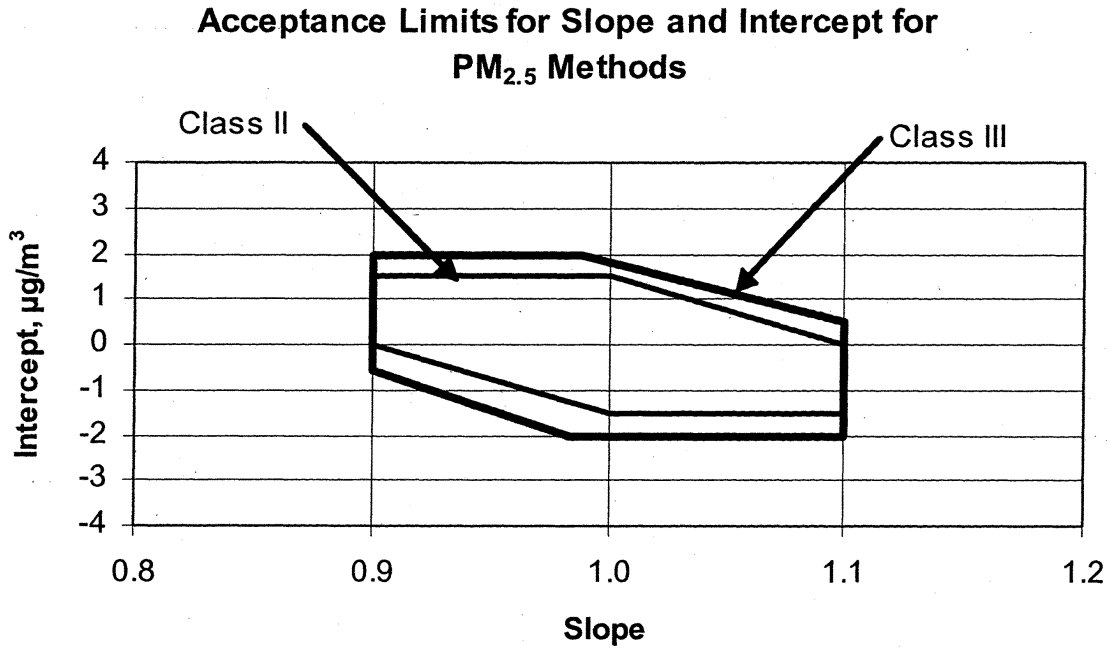


FIGURE C-3 TO SUBPART C OF PART 53–ILLUSTRATION OF THE SLOPE AND INTERCEPT LIMITS FOR CLASS II AND CLASS III $PM_{10-2.5}$ CANDIDATE EQUIVALENT METHODS.

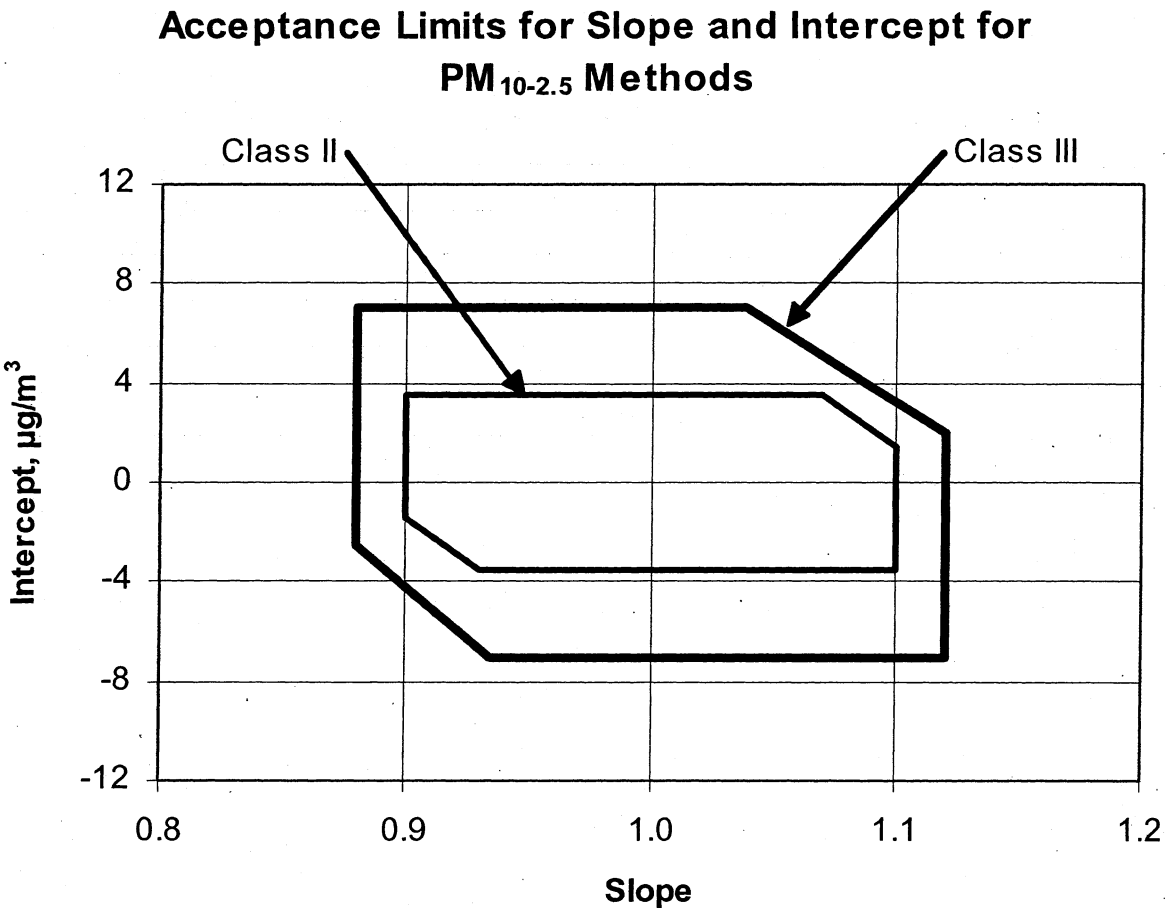
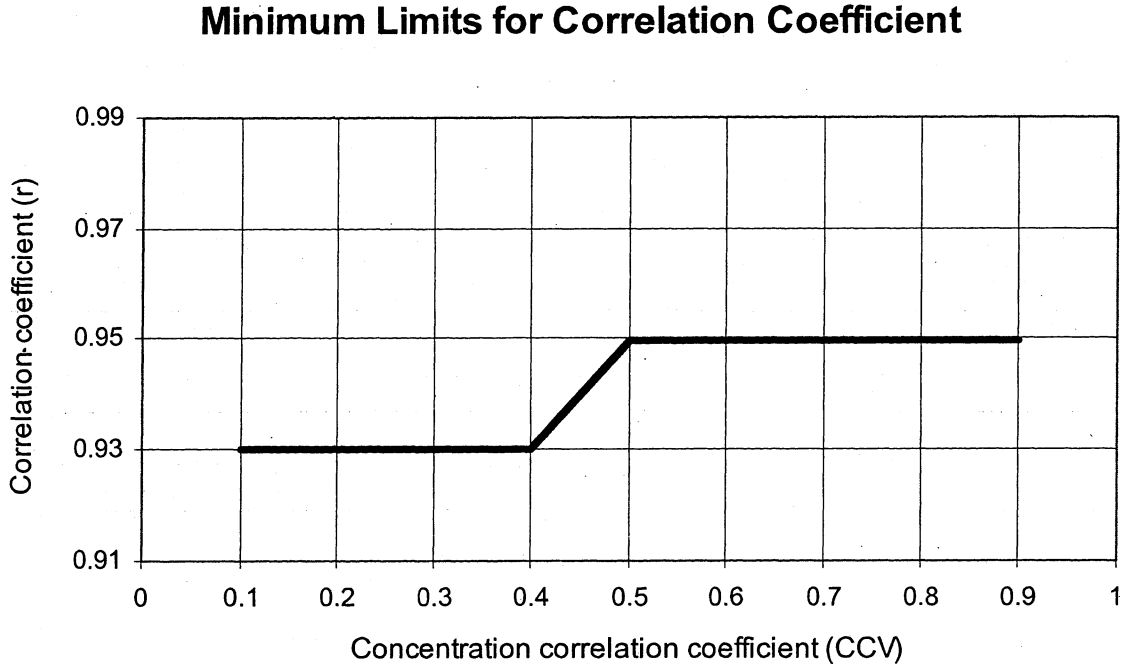


FIGURE C-4 TO SUBPART C OF PART 53–ILLUSTRATION OF THE MINIMUM LIMITS FOR CORRELATION COEFFICIENT FOR $PM_{2.5}$ AND $PM_{10-2.5}$ CLASS II AND III METHODS.



Subpart E—[Amended]

■ 6. Section 53.58 is amended by revising Equation 26 of paragraph (g)(2)(i) to read as follows:

§ 53.58 Operational field precision and blank test.

* * * * *

(g) * * *

(2)(i) * * *

Equation 26

$$C_{ave,j} = \frac{1}{3} \times \sum_{i=1}^{3} C_{i,j}$$

* * * * *

■ 7. Table E–1 to subpart E is revised to read as follows:

TABLE E–1 TO SUBPART E OF PART 53.—SUMMARY OF TEST REQUIREMENTS FOR REFERENCE AND CLASS I EQUIVALENT METHODS FOR $PM_{2.5}$ AND $PM_{10-2.5}$

Subpart E procedure	Performance test	Performance specification	Test conditions	Part 50, appendix L reference
§ 53.52 Sample leak check test.	Sampler leak check facility	External leakage: 80 mL/min, max. Internal leakage: 80 mL/min, max.	Controlled leak flow rate of 80 mL/min.	Sec. 7.4.6.
§ 53.53 Base flow rate test	Sample flow rate ..... 1. Mean ..... 2. Regulation ..... 3. Meas accuracy ..... 4. CV accuracy ..... 5. Cut-off	1. 16.67 ± 5%, L/min ..... 2. 2%, max ..... 3. 2%, max ..... 4. 0.3% max ..... 5. Flow rate cut-off if flow rate deviates more than 10% from design flow rate for >60 ± 30 seconds.	(a) 6-hour normal operational test plus flow rate cut-off test. (b) Normal conditions ..... (c) Additional 55 mm Hg pressure drop to simulate loaded filter. (d) Variable flow restriction used for cut-off test.	Sec. 7.4.1. Sec. 7.4.2. Sec. 7.4.3. Sec. 7.4.4. Sec. 7.4.5.

TABLE E–1 TO SUBPART E OF PART 53.—SUMMARY OF TEST REQUIREMENTS FOR REFERENCE AND CLASS I EQUIVALENT METHODS FOR $PM_{2.5}$ AND $PM_{10-2.5}$—Continued

Subpart E procedure	Performance test	Performance specification	Test conditions	Part 50, appendix L reference
§ 53.54 Power interruption test.	Sample flow rate 1. Mean 2. Regulation 3. Meas. accuracy 4. CV accuracy 5. Occurrence time of power interruptions. 6. Elapsed sample time 7. Sample volume	1. 16.67 ± 5%, L/min 2. 2%, max 3. 2%, max 4. 0.3% max 5. ± 2 min if >60 seconds. 6. ± 20 seconds 7. ± 2%, max	(a) 6-hour normal operational test. (b) Nominal conditions (c) Additional 55 mm Hg pressure drop to simulate loaded filter. (d) 6 power interruptions of various durations.	Sec. 7.4.1. Sec. 7.4.2. Sec. 7.4.3. Sec. 7.4.5. Sec. 7.4.12. Sec. 7.4.13. Sec. 7.4.15.4. Sec. 7.4.15.5.
§ 53.55 Temperature and line voltage test.	Sample flow rate 1. Mean 2. Regulation 3. Meas. accuracy 4. CV accuracy 5. Temperature meas. accuracy. 6. Proper operation.	1. 16.67 ± 5%, L/min 2. 2%, max 3. 2%, max 4. 0.3% max 5. 2 °C	(a) 6-hour normal operational test. (b) Normal conditions (c) Additional 55 mm Hg pressure drop to simulate loaded filter. (d) Ambient temperature at −20 and +40 °C. (e) Line voltage: 105 Vac to 125 Vac.	Sec. 7.4.1. Sec. 7.4.2. Sec. 7.4.3. Sec. 7.4.5. Sec. 7.4.8. Sec. 7.4.15.1.
§ 53.56 Barometric pressure effect test.	Sample flow rate 1. Mean 2. Regulation 3. Meas. accuracy 4. CV accuracy 5. Pressure meas. accuracy. 6. Proper operation.	1. 16.67 ± 5%, L/min 2. 2%, max 3. 2%, max 4. 0.3% max 5. 10 mm Hg	(a) 6-hour normal operational test. (b) Normal conditions (c) Additional 55 mm Hg pressure drop to simulate loaded filter. (d) Barometric pressure at 600 and 800 mm Hg.	Sec. 7.4.1. Sec. 7.4.2. Sec. 7.4.3. Sec. 7.4.5. Sec. 7.4.9.
§ 53.57 Filter temperature control test.	1. Filter temp. meas. accuracy. 2. Ambient temp. meas. accuracy. 3. Filter temp. control accuracy, sampling and non-sampling.	1. 2 °C 2. 2 °C 3. Not more than 5 °C above ambient temp. for more than 30 min.	(a) 4-hour simulated solar radiation, sampling. (b) 4-hour simulated solar radiation, non-sampling. (c) Solar flux of 1000 ± 50 W/m^2.	Sec. 7.4.8. Sec. 7.4.10. Sec. 7.4.11.
§ 53.58 Field precision test	1. Measurement precision 2. Storage deposition test for sequential samplers.	1. P_j < 2 μg/m^3 or RP_j < 5%. 2. 50 μg max. average weight gain/blank filter.	(a) 3 collocated samplers at 1 site for at least 10 days. (b) $PM_{2.5}$ conc. > 3 μg/m^3 (c) 24- or 48-hour samples (d) 5- or 10-day storage period for inactive stored filters.	Sec. 5.1. Sec. 7.3.5. Sec. 8. Sec. 9. Sec. 10.
The Following Requirement Is Applicable to Class I Candidate Equivalent Methods Only				
§ 53.59 Aerosol transport test.	Aerosol transport	97%, min. for all channels.	Determine aerosol transport through any new or modified components with respect to the reference method sampler before the filter for each channel.	

Subpart F—[Amended]

■ 8. Table F–1 to subpart F is revised to read as follows:

TABLE F–1 TO SUBPART F OF PART 53.—PERFORMANCE SPECIFICATIONS FOR $PM_{2.5}$ CLASS II EQUIVALENT SAMPLERS

Performance test	Specifications	Acceptance criteria
§ 53.62 Full Wind Tunnel Evaluation	Solid VOAG produced aerosol at 2 km/hr and 24 km/hr.	Dp_{50} = 2.5 μm ± 0.2 μm Numerical Analysis Results: 95% ≤ R_c ≤ 105%.
§ 53.63 Wind Tunnel Inlet Aspiration Test	Liquid VOAG produced aerosol at 2 km/hr and 24 km/hr.	Relative Aspiration: 95% ≤ A ≤ 105%.
§ 53.64 Static Fractionator Test	Evaluation of the fractionator under static conditions.	Dp_{50} = 2.5 μm ± 0.2 μm Numerical Analysis Results: 95% ≤ R_c ≤ 105%.
§ 53.65 Loading Test	Loading of the clean candidate under laboratory conditions.	Acceptance criteria as specified in the post-loading evaluation test (§ 53.62, § 53.63, or § 53.64).
§ 53.66 Volatility Test	Polydisperse liquid aerosol produced by air nebulization of A.C.S. reagent grade glycerol, 99.5% minimum purity.	Regression Parameters Slope = 1 ± 0.1, Intercept = 0 ± 0.15 mg, r ≥ 0.97.

PART 58—[AMENDED]

■ 9. The authority citation for part 58 continues to read as follows:

Authority: 42 U.S.C. 7403, 7410, 7601(a), 7611, and 7619.

Subpart B—[Amended]

■ 10. Section 58.10 is amended by revising the second sentence in paragraph (a)(2) to read as follow:

§ 58.10 Annual monitoring network plan and periodic network assessment.

(a)(1) * * *

(2) * * * If the State or local agency has already provided a public comment opportunity on its plan and has made no changes subsequent to that comment opportunity, and has submitted the received comments together with the plan, the Regional Administrator is not required to provide a separate opportunity for comment.

* * * * *

■ 11. Section 58.12 is amended by revising paragraph (d)(1), paragraph (d)(3), and the first sentence of paragraph (e) to read as follows:

§ 58.12 Operating schedules.

* * * * *

(d) * * *

(1)(i) Manual $PM_{2.5}$ samplers at required SLAMS stations without a collocated continuously operating $PM_{2.5}$ monitor must operate on at least a 1-in-3 day schedule.

(ii) For SLAMS $PM_{2.5}$ sites with both manual and continuous $PM_{2.5}$ monitors operating, the monitoring agency may request approval for a reduction to 1-in-6 day $PM_{2.5}$ sampling or for seasonal sampling from the EPA Regional Administrator. The EPA Regional Administrator may grant sampling frequency reductions after consideration of factors, including but not limited to the historical $PM_{2.5}$ data quality assessments, the location of current $PM_{2.5}$ design value sites, and their regulatory data needs. Required SLAMS stations whose measurements determine the design value for their area and that are within plus or minus 10 percent of the NAAQS; and all required sites where one or more 24-hour values have exceeded the NAAQS each year for a consecutive period of at least 3 years are required to maintain at least a 1-in-3 day sampling frequency. A continuously operating FEM or ARM $PM_{2.5}$ monitor satisfies this requirement.

(iii) Required SLAMS stations whose measurements determine the design value for their area and that are within plus or minus 5 percent of the daily $PM_{2.5}$ NAAQS must have an FRM or FEM operate on a daily schedule. A continuously operating FEM or ARM $PM_{2.5}$ monitor satisfies this requirement.

* * * * *

(3) Manual $PM_{2.5}$ speciation samplers at STN stations must operate on at least a 1-in-3 day sampling frequency.

(e) For PM_{10} samplers, a 24-hour sample must be taken from midnight to midnight (local standard time) to ensure national consistency. * * *

§ 58.12 [Amended]

■ 12. Figure 1 of paragraph (e) of § 58.12 is revised to read as follows:

Subpart C—[Amended]

■ 13. Section 58.20(c) is revised to read as follows:

§ 58.20 Special purpose monitors (SPM).

* * * * *

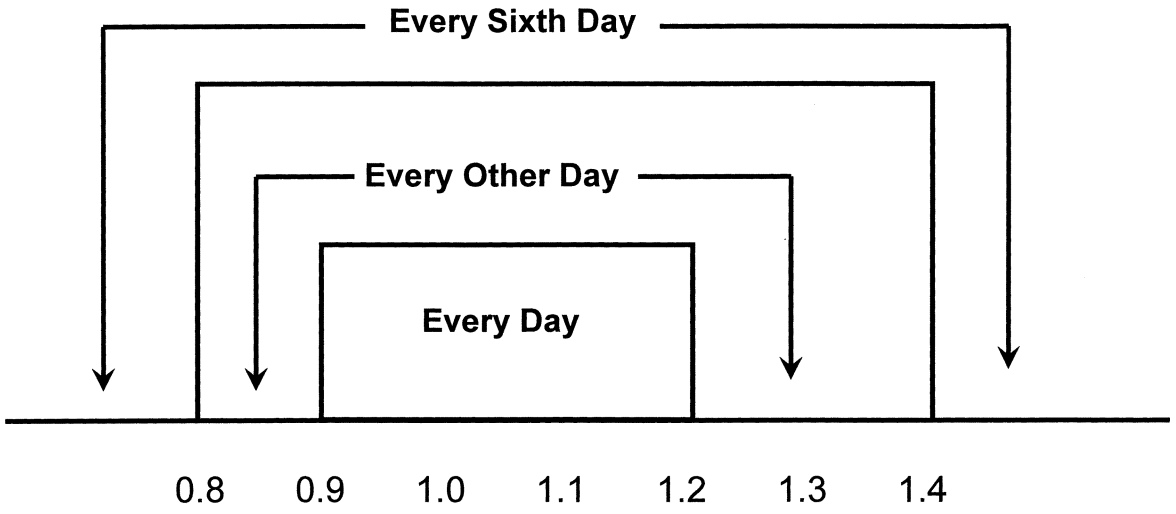


Figure 1 – Ratio to Standard

(c) All data from an SPM using an FRM, FEM, or ARM which has operated for more than 24 months is eligible for comparison to the relevant NAAQS, subject to the conditions of § 58.30, unless the air monitoring agency demonstrates that the data came from a particular period during which the requirements of appendix A, appendix C, or appendix E to this part were not met in practice.

* * * * *

Appendix A to Part 58—[Amended]

■ 14. Appendix A is amended by:
■ a. Revising the third (last) sentence of section 2.4;
■ b. Revising Equation 7 of section 4.1.4;
■ c. Revising the definition of the symbol ''*n*'' for Equation 11 of section 4.2.1,
■ d. Revising the last sentence in section 4.2.2.2, and
■ e. Revising the definition of the symbol ''n_j'' for Equation 12 of section 4.3.2.1 to read as follows:

2. General Monitoring Requirements

* * * * *

2.4 * * * For clarification and to participate, monitoring organizations should contact either the appropriate EPA Regional Quality Assurance (QA) Coordinator at the appropriate EPA Regional Office location, or the NPAP Coordinator at the Air Quality Assessment Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency in Research Triangle Park, North Carolina.

* * * * *

4. Calculations for Data Quality Assessments

* * * * *

4.1.4 * * *

Equation 7

$$\text{Lower Probability Limit} = m - 1.96 \cdot S$$

* * * * *

4.2.1 * * *

Equation 11

where, *n* is the number of valid data pairs being aggregated, and $X^2_{0.1, n-1}$ is the 10th percentile of a chi-squared distribution with n–1 degrees of freedom. The factor of 2 in the denominator adjusts for the fact that each d_i is calculated from two values with error.

4.2.2 * * * The absolute volume bias upper bound is then calculated using equation 3 of this appendix, where *n* is the number of flow rate audits being aggregated; $t_{0.95, n-1}$ is the 95th quantile of a t-distribution with n–1 degrees of freedom, the quantity *AB* is the mean of the absolute values of the d_i's and is calculated using equation 4 of this appendix, and the quantity *AS* in equation 3 of this appendix is the standard deviation of the absolute values of the d_i's and is calculated using equation 5 of this appendix.

4.3.2.1 * * *

Equation 12

where, n_j is the number of pairs and d_1, d_2, * * *, d_{nj} are the biases for each of the pairs to be averaged.

* * * * *

Appendix D to Part 58—[Amended]

■ 15. Appendix D is amended by:
■ a. Revising section 4.6(a);
■ b. Revising the title of Table D–4 and Footnote 1 to Table D–4; and
■ c. Revising section 4.7.2 to read as follows:

4. Pollutant-Specific Design Criteria for SLAMS Sites

* * * * *

4.6 Particulate Matter (PM_{10}) Design Criteria.

(a) Table D–4 indicates the approximate number of permanent stations required in MSAs to characterize national and regional PM_{10} air quality trends and geographical patterns. The number of PM_{10} stations in areas where MSA populations exceed 1,000,000 must be in the range from 2 to 10 stations, while in low population urban areas, no more than two stations are required. A range of monitoring stations is specified in Table D–4 because sources of pollutants and local control efforts can vary from one part of the country to another and therefore, some flexibility is allowed in selecting the actual number of stations in any one locale. Modifications from these PM_{10} monitoring requirements must be approved by the Regional Administrator.

Table D–4 of Appendix D to Part 58. PM_{10} Minimum Monitoring Requirements (Approximate Number of Stations Per MSA) [1]

* * * * *

4.7.2 Requirement for Continuous $PM_{2.5}$ Monitoring. The State, or where appropriate, local agencies must operate continuous $PM_{2.5}$ analyzers equal to at least one-half (round up) the minimum required sites listed in Table D–5 of this appendix. At least one required continuous analyzer in each MSA must be collocated with one of the required FRM/FEM/ARM monitors, unless at least one of the required FRM/FEM/ARM monitors is itself a continuous FEM or ARM monitor in

[1] Selection of urban areas and actual numbers of stations per area will be jointly determined by EPA and the State agency.

which case no collocation requirement applies. State and local air monitoring agencies must use methodologies and quality assurance/quality control (QA/QC) procedures approved by the EPA Regional Administrator for these required continuous analyzers.

* * * * *

[FR Doc. 07–2201 Filed 6–11–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[EPA–HQ–OAR–2006–0159; FRL–8325–5]

RIN 2060–AN81

Protection of Stratospheric Ozone: Allocation of Essential Use Allowances for Calendar Year 2007

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: With this action, EPA is allocating essential use allowances for import and production of Class I stratospheric ozone-depleting substances (ODSs) for calendar year 2007. Essential use allowances enable a person to obtain controlled Class I ODSs as part of an exemption to the regulatory ban on the production and import of these chemicals, which became effective as of January 1, 1996. EPA allocates essential use allowances for exempted production or import of a specific quantity of Class I ODSs solely for the designated essential purpose. The allocations in this action total 167.0 metric tons (MT) of chlorofluorocarbons (CFCs) for use in metered dose inhalers (MDIs) for 2007.

DATES: Effective Date: This final rule is effective June 12, 2007.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2006–0159. All documents in the docket are listed on the *www.regulations.gov* Web site. 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, 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 *www.regulations.gov* or in hard copy at the Air Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The 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 Air Docket is (202) 566–1742.

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I. Basis for Allocating Essential Use Allowances

A. What are essential use allowances?

Essential use allowances are allowances to produce or import certain ODSs in the U.S. for purposes that have been deemed ''essential'' by the U.S. Government and by the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).

The Montreal Protocol is an international agreement aimed at reducing and eliminating the production and consumption[1] of ODSs. The elimination of production and consumption of Class I ODSs is accomplished through adherence to phase-out schedules for specific Class I ODSs,[2] which include CFCs, halons, carbon tetrachloride, and methyl chloroform. As of January 1, 1996, production and import of most Class I ODSs were phased out in developed countries, including the United States.

However, the Montreal Protocol and the Clean Air Act (the Act) provide exemptions that allow for the continued import and/or production of Class I ODSs for specific uses. Under the Montreal Protocol, exemptions may be granted for uses that are determined by the Parties to be ''essential.'' Decision IV/25, taken by the Parties to the Protocol in 1992, established criteria for determining whether a specific use should be approved as essential, and set forth the international process for making determinations of essentiality. The criteria for an essential use, as set forth in paragraph 1 of Decision IV/25, are the following:

''(a) That a use of a controlled substance should qualify as 'essential' only if:

(i) It is necessary for the health, safety or is critical for the functioning of society (encompassing cultural and intellectual aspects); and

(ii) There are no available technically and economically feasible alternatives or substitutes that are acceptable from the standpoint of environment and health;

(b) That production and consumption, if any, of a controlled substance for essential uses should be permitted only if:

(i) All economically feasible steps have been taken to minimize the essential use and any associated emission of the controlled substance; and

(ii) The controlled substance is not available in sufficient quantity and quality from existing stocks of banked or recycled controlled substances, also bearing in mind the developing countries' need for controlled substances.''

[1] ''Consumption'' is defined as the amount of a substance produced in the United States, plus the amount imported into the United States, minus the amount exported to Parties to the Montreal Protocol (see Section 601(6) of the Clean Air Act).

[2] Class I ozone depleting substances are listed at 40 CFR Part 82 subpart A, appendix A.

B. Under what authority does EPA allocate essential use allowances?

Title VI of the Act implements the Montreal Protocol for the United States. Section 604(d) of the Act authorizes EPA to allow the production of limited quantities of Class I ODSs after the phaseout date for the following essential uses:

(1) Methyl chloroform, ''solely for use in essential applications (such as nondestructive testing for metal fatigue and corrosion of existing airplane engines and airplane parts susceptible to metal fatigue) for which no safe and effective substitute is available.'' Under the Act, this exemption was available only until January 1, 2005. Prior to that date, EPA issued methyl chloroform allowances to the U.S. Space Shuttle and Titan Rocket programs.

(2) Medical devices (as defined in section 601(8) of the Act), ''if such authorization is determined by the Commissioner [of the Food and Drug Administration], in consultation with the Administrator [of EPA] to be necessary for use in medical devices.'' EPA issues allowances to manufacturers of MDIs, which use CFCs as propellant for the treatment of asthma and chronic obstructive pulmonary disease.

(3) Aviation safety, for which limited quantities of halon-1211, halon-1301, and halon-2402 may be produced ''if the Administrator of the Federal Aviation Administration, in consultation with the Administrator [of EPA] determines that no safe and effective substitute has been developed and that such authorization is necessary for aviation safety purposes.'' Neither EPA nor the Parties have ever granted a request for essential use allowances for halon, because in most cases alternatives are available and because existing quantities of this substance are large enough to provide for any needs for which alternatives have not yet been developed.

The Parties to the Montreal Protocol, under Decision XV/8, have additionally allowed a general exemption for laboratory and analytical uses through December 31, 2007. This exemption is reflected in EPA's regulations at 40 CFR part 82, subpart A. While the Act does not specifically provide for this exemption, EPA has determined that an allowance for essential laboratory and analytical uses is allowable under the Act as a *de minimis* exemption. The *de minimis* exemption is addressed in EPA's final rule of March 13, 2001 (66 FR 14760–14770). The Parties to the Protocol subsequently agreed (Decision XI/15) that the general exemption does not apply to the following laboratory and analytical uses: Testing of oil and grease, and total petroleum hydrocarbons in water; testing of tar in road-paving materials; and forensic finger-printing. EPA incorporated this exclusion at Appendix G to subpart A of 40 CFR part 82 on February 11, 2002 (67 FR 6352).

C. What is the process for allocating essential use allowances?

Before EPA allocates essential use allowances, the Parties to the Montreal Protocol must first authorize the United States' request to produce or import essential Class I ODSs. The procedure set out by Decision IV/25 calls for individual Parties to nominate essential uses and the total amount of ODSs needed for those essential uses on an annual basis. The Montreal Protocol's Technology and Economic Assessment Panel (TEAP) evaluates the nominated essential uses and makes recommendations to the Parties. The Parties make the final decisions on whether to authorize a Party's essential use nomination at their annual meeting. This nomination cycle occurs approximately two years before the year in which the allowances would be in effect. The allowances allocated through today's action were first nominated by the United States in January 2005.

Once the Parties authorize the U.S. nomination, EPA allocates essential use exemptions to specific entities through notice-and-comment rulemaking in a manner consistent with the Act. For MDIs, EPA requests information from manufacturers about the number and type of MDIs they plan to produce, as well as the amount of CFCs necessary for production. EPA then forwards the information to the Food and Drug Administration (FDA), which determines the amount of CFCs necessary for MDIs in the coming calendar year. Based on FDA's determination, EPA proposes allocations for each eligible entity. Under the Act and the Montreal Protocol, EPA may allocate essential use allowances in quantities that together are below or equal to the total amount authorized by the Parties. EPA will not allocate essential use allowances in amounts higher than the total authorized by the Parties. For 2007, the Parties authorized the United States to allocate up to 1,000 MT of CFCs for essential uses. In a notice of proposed rulemaking published in the **Federal Register** on November 3, 2006 (71 FR 64668), EPA proposed to allocate 125.3 MT.

D. What quantity of essential use allowances is EPA allocating?

EPA proposed to allocate 125.3 MT of essential use allowances for 2007 in its November 2006 proposed rule. With today's final action, EPA is allocating 167.0 MT of essential use allowances for 2007 for the production and import of CFCs for the manufacture of essential use MDIs. EPA is allocating this amount based on a revised determination letter by FDA dated May 4, 2007. EPA has placed this revised determination letter in the docket for review. This quantity of 167.0 MT includes two increases from the amounts proposed in November 2006. First, EPA is allocating 22.4 MT to Armstrong Pharmaceuticals, Inc. (an increase from a proposed allocation of 0.0 MT) for the manufacture of epinephrine; second, EPA is allocating an additional 19.3 MT to 3M Pharmaceuticals (65.0 MT total for 2007) for the manufacture of essential use MDI products (Aerobid, Aerobid M, and Maxair Autohaler). The total allocation for 2007 of 167.0 MT is far below the 1,000 MT that the Parties to the Montreal Protocol authorized for the United States for 2007. It is also a significant reduction from the 1,002.4 MT allocated for 2006. These reductions demonstrate the U.S. commitment to decreasing the amount of CFCs allocated for essential uses. Furthermore, the 167.0 MT does not include an allocation for the manufacture of CFC-albuterol MDIs, indicating that the transition to non-CFC alternatives for this application is well underway.

In its revised determination letter FDA informed EPA that Armstrong needed 22.4 MT of CFCs to manufacture generic epinephrine in 2007. EPA and FDA are allocating this amount to Armstrong to acquire CFC–114 for the manufacture of epinephrine, not CFCs to manufacture CFC-albuterol. In the revised determination letter, FDA articulated that Armstrong's allocation is specific to CFC–114 for the production of epinephrine MDIs. FDA stated, ''In recent years, we aggregated the amounts for CFC–11, –12, –114 and provided recommendations on the total amounts of CFC necessary to protect the public health. This year, we provide recommendations for aggregated amount of CFCs, with one exception. We recommend that Armstrong Pharmaceuticals receive an allocation of 22.4 tonnes of CFC–114 for the manufacture of epinephrine CFC MDIs. We believe that this specific allocation is necessary to protect the public health, given the current essentiality determination as contained in 21 CFR 2.125(e).'' Consistent with FDA's

determination letter, EPA is allocating 22.4 MT of CFC–114 to Armstrong for the production of epinephrine MDIs for 2007.

FDA also informed EPA in its revised determination letter that it determined that 3M needed an additional 19.3 MT of essential use allowances to manufacture essential use MDI products. These products include Aerobid, Aerobid M, and Maxair Autohaler.

FDA noted to EPA that in making its revised determination, FDA reviewed supplementary information from MDI manufacturers, including more recent data on the quantities and types of CFCs held as well as more specific information on manufacturers' production plans for 2007. Based on this information, FDA recalculated the quantities and types of CFCs that would be medically necessary and recommended small increases in the allocations for two MDI manufacturers for calendar year 2007. In addition, FDA informed EPA that it applied the terms of Decision XVII/5, including the provision that each manufacturer maintain no more than a one-year operational supply of CFCs for essential uses.

II. Response to Comments

EPA received comments from twelve entities on the proposed rule, as discussed below.

A. Proposed Level of Allocations

One commenter opposed as too low EPA's proposed allocation of 125.3 MT of CFCs for MDIs, given that the Parties to the Montreal Protocol authorized 1,000 MT. The commenter stated that 125.3 MT would not suffice to ensure the continuous availability of CFCs necessary to meet expected demand. The commenter noted that the facility being used to produce CFC–11 and CFC–12 is the only facility doing so and it is sized for far larger volumes of production. According to the commenter, continuing to decrease the size of production runs makes manufacturing more inefficient, complex, and costly. The commenter urged EPA to set policies that enable the manufacture of CFCs and allow producers and users the ability to shift unused allocations from one year to the next so that supply can be more easily assured. In addition, the commenter urged EPA to re-allocate essential use allowances in 2007 for essential use CFCs that were not produced and subsequently conferred in 2006. The commenter also noted that production of CFC–114 during 2006 was not adequate to meet MDI producer demand for which 2006 essential use allowances existed.

A second commenter provided similar comments and noted concern that qualified CFC producers may not be able or willing to produce a reliable supply in future years, citing the CFC–114 production shortfalls experienced by Honeywell as an example. The commenter expressed support for efforts by the U.S. Government to work with other Parties to the Montreal Protocol to establish a process for assessing the need for and feasibility of a final production campaign; the commenter stated that such efforts would support the ultimate phaseout of CFC production for MDIs while protecting public health by ensuring a smooth transition for MDIs.

A third commenter also opposed as too low the quantity of essential use allowances proposed for allocation. The commenter submitted two sets of comments, one of which was supplementary and received after the end of the comment period, but which EPA considered. Both sets of comments were submitted as confidential business information (CBI); EPA has placed redacted versions of them in the docket. The commenter indicated that it received a proposed allocation of zero metric tons and urged EPA to allocate additional allowances so that it could meet anticipated market demand for CFC-albuterol and CFC epinephrine in 2007 and 2008. The commenter noted that with the withdrawal of Schering-Plough from the CFC market, Armstrong would be only manufacturer of CFC-albuterol. In addition, the commenter asserted, the elimination of Schering-Plough's Warrick branded CFC-albuterol product will create a dramatic shortfall in the supply of CFC inhalers and is likely to lead to serious market disruption unless Armstrong increases production to meet demand. The commenter urged EPA to provide for its propellant needs for both 2007 and 2008 in the 2007 rule. To support its argument, the commenter provided data from IMS, a pharmaceutical market research firm, indicating market trends of CFC-albuterol that suggest in 2006, CFC-albuterol comprised a significant amount of the total albuterol market.

A fourth commenter that submitted CBI comments requested additional CFCs to manufacture its essential use MDIs. A redacted version of these comments has been placed in the docket. The commenter requested an additional 19.3 MT of CFCs to manufacture Aerobid, Aerobid M, and Maxair Autohaler. The commenter stated that without the additional allowances it would likely be unable to manufacture all of the MDIs forecasted by two of its customers.

Another commenter noted that it understood the zero allocation proposed for its company for 2007 and stated that it has been working to acquire existing CFCs to satisfy essential needs.

EPA also received comments that either supported the proposed allocations—in whole or in part—or believed they should be lower. One commenter stated that there should be no exemptions for any ODS. The commenter stated that allowing exemptions discourages the development of alternatives.

Seven commenters supported some or all of the proposed allocations for 2007. Four expressed approval of EPA's allocation of zero essential use allowances for manufacture of albuterol MDIs, as determined by FDA. One commenter additionally stated that by allocating only what was necessary and not the entire amount allowed by the Parties, FDA and EPA are supporting the over-arching goals of the Montreal Protocol. The commenter also noted that the proposed allocations are consistent with FDA's final determination on albuterol non-essentiality and that EPA's phaseout timeline fully agrees with FDA's conclusions that an effective and orderly transition to HFA MDIs would be complete by December 31, 2008.

One commenter supported EPA's choice to allocate only a portion of the essential use allowances granted to the United States by the Parties to the Montreal Protocol. The commenter stated that it supports EPA's decision to eliminate essential use allowances for those companies currently marketing both CFC and non-CFC albuterol MDIs. The commenter stated that the existing CFC stockpiles in the United States will be adequate to assure a smooth and timely transition to non-CFC albuterol inhalers.

EPA received two sets of CBI comments from one commenter, both of which were received after the close of the comment period, but which EPA considered, which supported EPA's proposed zero allocation for the manufacture of CFC-albuterol MDIs. EPA has placed redacted versions of the comments in the docket. The commenter supported the proposed allocations, specifically the proposed zero allocations for albuterol MDIs containing CFCs. The commenter argued that the proposed zero allocation will facilitate the orderly transition to HFA albuterol inhalers, minimize the confusion and related compliance and safety issues raised by patients alternating between CFC and HFA

inhalers, and ensure that additional CFCs are not needlessly released into the environment.

The commenter noted that it had already begun to transition its supply of CFC-based albuterol inhalers to HFA inhalers. Additionally, the commenter asserted that an early transition to HFA inhalers would allow manufacturers, physicians, and pharmacists to act in a coordinated manner to educate patients and transition them in an orderly fashion. It noted that there are important differences between CFC and HFA inhalers that require patient counseling and that without an early and orderly transition facilitated by patient education and training, many patients will switch back and forth between the two inhalers or wait until the last minute.

The commenter further noted that to support the transition to HFA-based albuterol, it has dedicated significant resources to support patients, physicians, pharmacists, and other stakeholders. The commenter stated that it had significantly increased the production of HFA albuterol inhalers and that it has the ability to increase production further if there is need. Additionally, the commenter stated that it has implemented a comprehensive plan to communicate information regarding the transition to key stakeholders. The commenter also noted that it has a patient assistance program for low-income patients and patients without health insurance.

EPA allocates essential use allowances annually in accordance with the Act and the Montreal Protocol. For the 2007 control period, EPA, in consultation with FDA, evaluated the medical demand for essential use MDIs and determined the amount of CFCs needed to meet that demand. The U.S. Government first nominated an amount for essential use allowances for 2007 in January 2005 (1,493 MT). The Parties authorized 1,000 MT for the U.S. at the 17th Meeting of the Parties in 2006. Since the U.S. Government submitted its nomination for 2007, EPA and FDA have received more current information on the amount of CFCs needed to manufacture essential use MDIs, amounts of stockpiled CFCs available to manufacturers, and the availability of non-CFC alternatives. Neither the 1,493 MT nominated nor the 1,000 MT authorized accurately reflects the amount of CFCs necessary to meet medical needs in 2007.

In making its determination for 2007 essential use allowances, FDA informed EPA that it undertook a similar analysis as completed in years past. FDA articulated to EPA that for each MDI manufacturer that requested essential use allowances, FDA evaluated a number of factors. FDA informed EPA that it took the following steps in making the 2007 determination for essential use allowances. First, FDA evaluated the medical necessity by evaluating the number of CFC MDIs necessary to protect public health in the U.S. (including consideration of current data on the prevalence of asthma and COPD) and the quantity of CFCs necessary to ensure the manufacture and continuous availability of those MDIs. Second, FDA analyzed the existing inventory of CFCs held by each MDI manufacturer as of May 1, 2006 and updated as of December 31, 2006. Third, FDA accounted for the implementation of the terms of Decision XVII/5, including the provision that manufacturers maintain no more than a one-year operational supply, and considered how manufacturers' existing CFC supplies would be drawn down as essential use MDIs were manufactured throughout the year. As was also articulated in the determination letter, revised May 4, 2007, FDA assumed that all manufacturers would procure the full quantity of CFCs allocated to them for the year.

In response to the comments recommending allocation of essential use CFCs for multiple years, although EPA recognizes the difficulties associated with producing small amounts of CFCs per year, the Parties authorized an essential use exemption for CFC production and import for the 2007 control period only. Therefore, in accordance with the Decisions of the Parties, the United States allocated allowances to MDI manufacturers for 2007 control period. EPA understands that the U.S. manufacturer can increase the efficiency of its production run by combining the amount allocated by EPA for essential use production of pharmaceutical-grade CFCs for domestic use with the amount permitted under the Montreal Protocol, and authorized by EPA, for production of pharmaceutical-grade CFCs for export to Article 5 and non-Article 5 Parties, recognizing that the manufacturer may incur the cost of destroying the non-pharmaceutical grade portion of the run. EPA understands that the design of the Montreal Protocol and Title VI of the Act anticipated that ODS costs would increase during the transition to alternatives. However, the United States Government expects that this issue of a need for campaign production to meet the essential use health needs for CFCs for MDIs globally will be raised by the Parties to the Montreal Protocol at future meetings.

With respect to the comments recommending higher allocations for 2007 to manufacture generic albuterol and generic epinephrine, FDA has informed EPA that additional essential use allowances will be needed for the manufacture of generic epinephrine in 2007. FDA made this determination based on information about the manufacturer's existing inventory, blend requirements, and production need, as well as implementation of the terms of Decision XVII/5, including the provision that manufacturers maintain no more than a one-year operational supply for CFCs for essential uses.

FDA informed EPA that it did not agree with the comment that additional amounts of CFCs need to be allocated for the manufacture of CFC-albuterol in 2007 to meet the overall demand for albuterol. In the September 2006 letter to EPA (revised in May 2007), FDA stated that its determination of the amount of CFCs necessary for production of essential use MDIs is lower than the total amount requested by manufacturers, and in reaching its estimate, FDA took into account the manufacturers' production of MDIs that used CFCs as a propellant in 2006, their estimated production in 2007, and stockpile levels (as of December 31, 2006). FDA also stated that it considered comments received on the proposed rule for the allocation of CFCs in 2007. Finally, as articulated in its letter, FDA took into account that, at the time of the letter, roughly 40 percent of the albuterol MDIs currently produced were propelled by HFAs (HFA–134a) rather than CFCs.

Given the publicly stated plans of Schering-Plough, a major albuterol CFC supplier, FDA has informed EPA that it believes the manufacture of CFC-albuterol will decrease in 2007 (and further decrease in 2008 as the phase-out date approaches). The manufacture and sale of albuterol HFA MDIs will increase sufficiently to meet the medical needs of patients for albuterol. FDA will continue to monitor closely the availability of albuterol to ensure that there is adequate supply to meet patient needs. FDA has informed EPA that HFA inhalers now make up approximately half the overall albuterol-levalbuterol inhaler market. Furthermore, according to FDA, HFA manufacturers report they currently have the ability to produce enough HFA albuterol MDIs to meet total market demand for albuterol MDIs.

With respect to the commenter that requested additional CFCs to manufacture its essential use MDIs (Aerobid, Aerobid M, and Maxair

Autohaler), FDA informed EPA that an increase of CFCs to 65.0 MT was necessary for 2007. FDA informed EPA that its revised determination was based on additional analysis of medical need and on supplementary information received from the MDI manufacturers, including more recent data on quantities of CFCs held. In addition, FDA informed EPA that it applied the terms of Decision XVII/5, including the provision that each manufacturer maintain no more than a one-year operational supply of CFCs for essential uses.

In response to the comment that there should be no exemptions for any ODS and that allowing exemptions discourages the development of alternatives, in this instance, EPA and FDA do not believe that the allocation of essential uses for the manufacture of CFC MDIs precludes the development of alternatives, in part because EPA and FDA consider a company's progress in research and development of alternatives in evaluating a company's request for an essential use exemption.

Finally, two commenters raised specific medical-related issues. One commenter, an asthmatic, expressed concern that the discontinuation of inhalers containing albuterol will leave no alternatives for asthmatics who are allergic to sulfites and sulfates. The commenter notes that he or she is allergic to sulfites and that the generic albuterol inhaler is going to be discontinued.

In response, FDA informed EPA that HFA albuterol MDIs do not contain sulfites. Indeed, unlike CFC albuterol products, each albuterol HFA has a unique formulation, which should allow patients to find a product they tolerate and find effective, even if they feel one particular product is not sufficiently tolerable.

A second commenter argued that the elimination of fluorocarbons is not necessary in aerosol albuterol items. The commenter stated that the non-aerosol form of albuterol poses several problems, such as difficulty in ascertaining when a canister is empty. In addition, the commenter noted that there is no sensation that a dosage of the non-aerosol medication is being received and that this may have profoundly negative medical repercussions. The commenter also asserted that because the disbursement of albuterol aerosol liquid goes into a mouth that is surrounding the canister and seals off the disbursement, no aerosol escapes into the surrounding atmosphere. Lastly, the commenter stated that the elimination of aerosol-dispensed respiratory medications will have a negative effect on patients.

In its March 31, 2005 final rule (70 FR 17168), FDA determined that albuterol will no longer be designated as an ''essential use'' after December 31, 2008. FDA discussed issues associated with the essentiality of albuterol in that rule. Today's final action allocating CFCs for the manufacture of MDIs does not address the essentiality of albuterol. EPA notes that the non-ODS albuterol MDIs (i.e. HFA-albuterol) that are currently available to patients also contain an aerosol, HFA–134a.

B. Consideration of Stocks of CFCs in the Allocation of Essential Use Allowances

One commenter stated that EPA should not allocate any new essential use allowances for 2007, claiming that existing stockpiles of CFCs must be used before new essential use allowances may be granted. The commenter stated that EPA's proposed essential use allowances for 2007 were in contravention of Decision IV/25 of the Montreal Protocol, which provides that production and consumption of CFCs for essential uses is permitted only if the CFCs are ''not available in sufficient quantity and quality from existing stocks.'' The commenter stated that where stockpiles are in excess of essential need, EPA should first seek voluntary transfers, and second redistribute CFC stockpiles to where they are most needed.

The commenter provided three supporting claims. First, the commenter provided data indicating that there are sufficient aggregate stockpiles available in the U.S. to cover the essential needs for 2007. The commenter recognized that these stockpiles are not evenly held by U.S. companies and urged EPA to take steps to redistribute them. Second, the commenter asserted that the Montreal Protocol and the Act support the ''reallocation'' of existing CFC stockpiles before new essential use allowances are allocated. The commenter argued that the objective of the Montreal Protocol supports an interpretation of Decision IV/25 that the Montreal Protocol Parties should deplete the aggregate CFC stockpiles available in their respective markets before allocating new essential use allowances to any MDI manufacturers. The commenter stated that it recognizes that Decisions XVII/5 and XVIII/7 state that Parties must consider the operational supply of each manufacturer in making essential use allowance decisions. However, the commenter asserted that it does not believe that these Decisions conflict with or supersede Decision IV/25 as the Parties can take into account both the aggregate CFC stockpile and each manufacturer's operational supply. Additionally, the commenter argued that Decision XII/2 provides for the transfer of essential use allowances and CFCs held by MDI producing companies in order to avoid unnecessary production. According to the commenter, Decision VII/28 provides for Parties, under certain circumstances, to reallocate excess essential use allowances or CFCs in their respective markets. Thus the commenter asserted that the Montreal Protocol supports compelling U.S. companies with excess CFCs to sell their stockpiles to the U.S. Government for reallocation.

Furthermore, the commenter argued that the Act, specifically Section 615, grants EPA the right to take certain actions to prevent endangerment to public health or welfare. The commenter asserted that unnecessary emissions of CFCs will endanger public health or welfare due to the effects of stratospheric ozone depletion, and that EPA is justified in promulgating regulations that would allow it to mandate the reallocation of excess stockpiled CFCs.

Lastly, the commenter stated that transfers or reallocations of CFCs are subject to all other Montreal Protocol (specifically, Decisions IV/25, XII/2, and XVII/5) and CAA parameters. Further, the commenter stated that EPA may not approve any transfer or reallocation of CFCs for any CFC MDI product approved after December 31, 2000 unless the essentiality criteria set out in paragraph 1(a) of Decision IV/25 are met, or to the extent the intended recipient maintains CFC stockpiles in excess of the one-year operational supply threshold.

In assessing the amount of new CFC production required to satisfy 2007 essential uses, just as in 2006, EPA and FDA applied the terms of Decision XVII/5 including the provision on stocks of CFCs that indicates Parties should allocate such that manufacturers of MDIs maintain no more than a one-year operational supply of CFCs for essential uses. FDA's approach for 2007 was similar to that for 2006; first it calculated the quantity that each MDI manufacturer needed to produce essential use MDIs for the year and then it subtracted from that quantity any CFC stocks owned by that MDI manufacturer exceeding a one-year operational supply. The remainder, if more than zero, is the quantity of newly produced or imported CFCs needed by that manufacturer. In addition, FDA has informed EPA that consistent with

Decision XVII/5, FDA evaluates each company on an individual basis, rather than an aggregate of all MDI manufacturers. So, while amounts of CFCs may be available for purchase in the marketplace, FDA and EPA only account for stocks owned by a particular MDI manufacturer in evaluating that manufacturer's CFC need.

EPA agrees with the commenter that the objective of the Montreal Protocol is to reduce and eventually eliminate the production of ODSs, but that the essential use provision exists to ensure that an adequate supply of CFCs are available for those uses deemed ''essential'' by the Parties. EPA recognizes that in making the determination for essential uses for 2007, FDA took into account a number of considerations in assessing each MDI manufacturer's need, including the amount and type of CFC necessary to produce specific MDIs. The commenter's recommendation about redistribution of excess CFCs is outside the scope of the proposal on which this final rule is based. While the commenter suggests that EPA use Section 615 authority to redistribute excess CFCs, EPA does not believe that government-mandated redistribution is necessary at this time, and has not examined the extent of its authority for such action. EPA regulations currently allow transfer of both essential use allowances and essential use CFCs among essential use allowance holders. These mechanisms provide for redistribution of CFCs with minimal government involvement. The small number of participants in the market for essential use CFCs and the limited quantities of CFCs at issue further suggest that there is no need to expand EPA's role. In addition, any entity that chooses to hold stocks of essential use CFCs rather than sell to a willing purchaser runs the risk that the stocks will decline in value and ultimately become a liability for domestic use.

EPA regulates transfers of essential use CFCs to ensure their proper use, and in approving transfers between domestic MDI manufacturers, EPA requires the companies involved to certify that the MDIs produced with the transferred essential use CFCs were approved by FDA before December 31, 2000. EPA does not apply the terms of Decision XVII/5, including the provision on manufacturers maintaining no more than a one-year operational supply, when assessing whether to approve a transfer of essential use CFCs. However, in determining annual essential use allocations for MDI manufacturers, FDA analyzes each MDI manufacturer's stocks of CFCs. Therefore, if a company obtains essential use CFCs during a particular year from another MDI manufacturer, FDA would account for those stocks in making its determinations for the year. EPA encourages, but does not mandate, such transfers.

A second commenter noted that based on the projected use of its 2006 stockpile amounts, it would require additional CFCs to meet the increased demand for albuterol MDIs and epinephrine mist MDIs. EPA and FDA disagree with the commenter that additional essential use allowances should be allocated in 2007 for the production of CFC-albuterol MDIs. EPA and FDA believe that the commenter's projections assume a level of production exceeding that medically necessary. Further, this comment does not take into account all CFCs available to the company for albuterol production. When these factors are considered, EPA believes, based on consultation with FDA, that no additional CFC allowances for albuterol should be allocated in 2007.

C. Number of Months of Safety Stockpile

One commenter supported the zero allocation for albuterol manufacture in 2007, but voiced concern with the method by which FDA calculated essential use allowances. The commenter noted that while FDA appeared to have based its allocation recommendation on the operational supply rule established by paragraph 2 of Decision XVII/5, FDA implemented this paragraph by setting the minimum stockpile threshold at 12 months (as articulated in EPA's final rule allocating 2006 essential use allowances) while the Decision states that 12 months is the maximum operational supply that may be maintained by an MDI manufacturer. Recognizing that the Decision allows Parties to set the operational supply threshold at less than one year, the commenter recommended a threshold of one to three months.

A second commenter noted that FDA applied the twelve-month cap on each company's operational supply of CFCs, as stated in paragraph 2 of Decision XVII/5, to determine that no allocations for manufacturers of CFC albuterol MDIs were necessary. The commenter stated that this interpretation was ''logical, reasonable, and equitable,'' but further stated that the twelve-month stockpile supply is a maximum amount and that a six-month supply stockpile allowance should be used in any future assessments of allocations.

A third commenter expressed support for the calculation of anticipated CFC requirements for future manufacture of albuterol MDIs, as described in the proposed rule, and stated that the calculation is both reasonable and appropriate to ensure a smooth transition. The commenter noted that sufficient stockpiles of CFCs exist to meet albuterol CFC MDI production needs through the end of 2008. In addition, the commenter stated that an orderly transition to albuterol HFA implies a phase-out of albuterol CFC production before the December 31, 2008 deadline. After that deadline, section 610 of the Clean Air Act will prohibit the sale or distribution of albuterol CFC MDIs in interstate commerce. Therefore, the commenter states, retailers and suppliers must have adequate time to deplete their stock before then.

Paragraph 2 of Decision XVII/5 states that Parties ''shall take into account pre- and post-1996 stocks of controlled substances as described in paragraph 1(b) of Decision IV/25, such that no more than a one-year's operational supply is maintained by that manufacturer.'' In making its determination for allocation of essential use allowances, FDA acted consistent with this provision by allowing manufacturers to maintain a supply of up to 12 months of the manufacturing operations. FDA calculates volumes to allow the manufacturer to end the calendar year with the appropriate level of stock. EPA and FDA do not agree that allowing manufacturers to maintain up to a 12-month supply is excessive because, in part, maintaining such an amount accounts for unexpected variability in the demand for MDI products or other unexpected occurrences in the market and therefore ensures that MDI manufacturers are able to produce their essential use MDIs.

D. Rulemaking Process and Timing

One commenter requested that EPA reconsider its allocations in light of Schering-Plough's October 13, 2006 announcement that it would end production of its Warrick Pharmaceutical brand CFC-albuterol MDIs early in 2007. According to the commenter, most customers believe that Warrick brand CFC-albuterol will not be available after early 2007. In this regard, the commenter noted that after the first quarter of 2007, Armstrong will be the sole producer and supplier of albuterol CFCs and that EPA must make an additional CFC allocation to Armstrong in order to avoid a dramatic shortfall in CFC supply relative to projected demand.

With Schering-Plough's announcement, EPA and FDA expected

that the manufacture of CFC-albuterol would be significantly lower in 2007 than 2006 and that this decrease will be balanced by an increase in HFA production and availability sufficient to meet patient needs. EPA and FDA expect a further decrease in albuterol CFC production in 2008, particularly in the months leading up to December 31, 2008, when all sales of CFC albuterol MDIs must cease. FDA has informed EPA that based on information it is receiving from HFA manufacturers, HFA manufacturers currently have the ability to produce enough HFA albuterol MDIs to meet total market demand for albuterol MDIs. Therefore FDA does not anticipate shortages of albuterol MDIs.

One commenter indicated that it believed that CFCs should not be allocated to companies unless they have demonstrated good faith efforts to research and develop CFC-free alternatives. The commenter argued that EPA's interpretation of Paragraph 1 of Decision VIII/10—that the Parties will request information on research and development from companies but not use it as a basis for denying an essential use allowance request—is inadequate. The commenter asserted that the reiteration of the same language from Paragraph 1 of Decision XVIII/10 in Paragraph 3 of Decision XVIII/7 indicates that Parties did not believe that the plain intent of Decision VIII/10 was being followed and that at this stage of the phaseout the Parties are looking for demonstrations of commitment to the transition. The commenter also argued that Decisions VIII/10 and XVIII/7 warrant EPA to require companies requesting essential use allowances to demonstrate ongoing research and development of CFC-free alternatives and that EPA has the authority to do so under Sections 604(d)(2) and 615 of the CAA.

EPA agrees that companies applying for essential use allocations to manufacture MDIs generally should demonstrate ongoing research and development of alternatives to CFC MDIs. To this end, in accordance with Decision VIII/10, since 1997 EPA has requested that applicants provide this information with their applications for CFC essential use nominations. EPA reiterated this policy in the final rules allocating essential use allowances for 2005 and 2006 (70 FR 49836 and 71 FR 58504, respectively). Each company that is receiving an essential use allocation has submitted information to EPA pertaining to its research and development efforts. In its essential use nominations, the U.S. Government articulates that the MDI manufacturers, for which the U.S. Government is submitting an essential use request, have submitted information demonstrating their on-going research and development activities in pursuit of alternatives to CFC MDIs. To this end, today's rulemaking is fully consistent with the Decisions to the Protocol.

One commenter stated that EPA's essential use allowance allocation process and proposed allocations comport with general standards of administrative law. The commenter stated that the proposed rule allocating 2007 allowances clearly meets the non-arbitrariness standard of administrative law that a rulemaking agency must ''examine relevant data'' and that failure to do so could constitute arbitrary decision-making. The commenter specifically commended the use of company-specific stockpile information collected in a follow-up letter sent to companies on May 10, 2006, seeking information under the authority of Section 114 of the CAA. In addition, the commenter stated that the 2007 proposed rule correctly applied the ''one-year operational supply'' provision of Decision XVII/5 and that EPA disclosed FDA's methodology and allowed ample opportunity for public comments. Last, the commenter argued that EPA is required to provide an additional notice and comment opportunity for public comment on any material increase in any company's allocation (e.g. allocating essential use volumes to a company that EPA had proposed would not receive any). The commenter noted that this would include the posting of an explanatory letter from FDA on the docket articulating the reasons for the changes. The commenter requested that EPA provide notice and opportunity for public comment if it is considering allocating any volumes to manufacturers of CFC-albuterol MDIs.

In response to the commenter's request for notice and an opportunity for public comment in the event that EPA issues material changes to a company's allocation, EPA believes that it has reasonably articulated the reasons that two companies are receiving additional allocations in this final rule and that further notice and comment on this issue is unnecessary. As stated in preceding paragraphs, FDA determined, based on additional information received, that essential use allowances should be increased for two companies. With respect to essential use allocations for the manufacture of CFC-albuterol, EPA confirms that it is not allocating any essential use allowances for the manufacture of CFC-albuterol MDIs in the 2007 allocation.

EPA received three comments supporting its timeliness in starting the allocation process and granting allocations in the first quarter of the year to provide for better planning and security of supply.

E. The Transition to Non-CFC MDIs

One commenter provided information showing that HFA products have accounted for a small and largely constant share of the albuterol market over the past four years, and that CFC inhalers represented 92% of total albuterol sales through the first nine months of 2006, according to IMS data. The commenter stated that meeting the demand for CFC-albuterol with the withdrawal of Schering-Plough would require production of CFC-propelled units in 2007 and 2008. The commenter stated that EPA should allocate additional CFC allowances for albuterol production in 2007 and 2008 to allow for an orderly market transition to HFA albuterol. The commenter stated that failure to allocate CFC allowances for albuterol production in 2007 would create marketplace disruption and risk harm to public health, and provided the following justifications to substantiate that claim.

First, the commenter argued that public and private reimbursement has not completely caught up to the changeover to HFA inhalers and gaps remain, particularly in Medicaid and Medicare Part D coverage. Citing IMS data, the commenter maintained that the wholesale prices for HFA albuterol are more than five times higher than for CFC albuterol. A shortage of less-expensive CFC-albuterol MDIs would deprive low-income asthma sufferers of access to inhalers, potentially forcing uninsured patients to seek relief in emergency rooms where treatment may be costly and untimely.

Second, the commenter stated that converting a market from 92% CFC to 100% HFA requires a measured and orderly transition that shifts patients to HFA inhalers while allowing for scale-up of HFA production capacity, education of doctors and patients about the differences between CFC and HFA albuterol, and adaptation to HFA products by pharmacies and insurance companies. The commenter stated that FDA and patient advocates have stressed this point. Further, the commenter argued that a sudden, unexpected unavailability of CFC albuterol might endanger patient health because patients might not have sufficient time to safely transition and because not all formulations of HFA albuterol might be available in sufficient supplies. The commenter also asserted

that HFA inhalers differ from CFC inhalers in taste and delivery feel and that noted that patients may need time to find the most agreeable formulation. Lastly, the commenter stated that pharmacists in states that rely on the Orange Book or the FDA to define ''therapeutic equivalence,'' and do not give discretion to pharmacists to substitute, will not be able to substitute HFA albuterol for CFC albuterol in cases where the prescription provides for CFC albuterol.

Based on input from FDA, EPA disagrees that further allocations of essential use allowances for the manufacture of CFC-albuterol are medically necessary. For 2007 essential use allocations, FDA examined the amount of CFCs available from stocks to manufacture CFC albuterol as well as the supply of HFA albuterol in the marketplace and has determined that there is not a medical need to allocate allowances for CFC albuterol. According to FDA, based on information that FDA is receiving from HFA manufacturers, HFA manufacturers currently have the ability to produce enough HFA-albuterol MDIs to meet total market demand for albuterol MDIs.

EPA and FDA understand that patients may incur additional costs to purchase albuterol inhalers as the market transitions to HFA MDIs. For example, EPA and FDA recognize that patients covered by medical insurance may encounter higher co-payments to purchase HFA albuterol. However, patient assistance programs exist to assist patients with the increased costs. For low-income patients, these programs include free and discounted medicines. To assist patients facing higher co-pays associated with the increased costs of the HFA MDIs, programs such as coupons and discounted HFA MDIs are being made available through physicians, at pharmacies, and at individual manufacturers' Web sites.

Advocacy and non-profit groups have been pursuing education and outreach efforts in preparation for the December 31, 2008 phaseout of CFC-albuterol inhalers. They understand that educating doctors, patients, and pharmacies is paramount. FDA selected December 31, 2008, as the phaseout date largely because it provided sufficient time for the transition to HFA MDIs to occur. This time allows for patients to meet with their doctors and for their doctors to discuss the change to HFA MDIs. FDA is monitoring the supply of albuterol closely and does not anticipate any shortages in 2007.

One commenter supported EPA's proposal to allocate no essential use allowances for 2007 for single-moiety albuterol CFC MDIs because satisfactory alternatives are available. The commenter asserted that the December 31, 2008 effective date of non-essentiality of CFC-albuterol MDIs is overly conservative. Two CFC-free alternatives to CFC-albuterol MDIs have been on the market for several years. In addition, the commenter stated that it is now clear that the bulk of the transition to CFC-free albuterol will occur well before 2008, provided that the companies' efforts to transition the market are not undercut. The commenter noted that two additional CFC-free alternatives to CFC-albuterol MDIs have been introduced into the market since FDA began its rulemaking process to remove the essential use designation for albuterol MDIs. According to the commenter, FDA has determined that approximately 40 percent of albuterol MDIs produced in 2006 used HFA–134a as their propellant and FDA anticipates that this will grow to 60 percent in 2007 and 80 percent in 2008. The commenter stated its belief that this estimate is overly conservative given that Warrick Pharmaceuticals, which currently produces approximately 70 percent of the albuterol CFC MDIs sold in the US, announced plans to cease manufacture of CFC inhalers in early 2007 and plans to transition patients to its HFA alternative.

The commenter also noted that the only remaining risk to the successful transition of the albuterol MDI market is that those companies that do not have albuterol CFC-free alternatives on the market, and therefore have no interest in seeing the transition successfully concluded, may see the transition as an opportunity to gain temporary market share. The commenter argued that these companies could capitalize on patients who are displeased with the new prescriptions, and with adjustments to the inhalers' ''taste and feel,'' associated with alternatives.

One commenter recommended that EPA state that CFC albuterol MDIs are not essential in the U.S. under Montreal Protocol criteria and that new CFC production for such uses is not necessary. The commenter noted that four CFC-free albuterol MDIs have been approved by FDA and are now on the market and that numerous patient assistance programs ensure that low-income and uninsured patients can afford these medications. Therefore, the commenter notes, CFC-albuterol MDIs are no longer essential under the Decision IV/25 criterion and essential use allowances may no longer legally be allocated for that use because technically and economically feasible alternatives are available. The commenter believes that, at a minimum, EPA should state that new production of CFCs for albuterol MDIs is *per se* not necessary.

Similarly, another commenter noted that the preamble to Decision XVIII/7 states the need for Parties to limit essential use allocations. This commenter cites Decision IV/25, which states that CFCs for use in MDIs shall not qualify as essential ''if technically and economically feasible alternatives or substitutes are available,'' and the TEAP report concludes that ''technically satisfactory alternatives'' to CFC-based MDIs are available for short-acting beta-agonists.

In 2005, FDA issued a final rule removing the essential use designation for CFC-albuterol MDIs as of December 31, 2008 (70 FR 17168). FDA based this decision on a comprehensive analysis that addressed, among other issues, the availability and convenience of non-ODS alternatives. FDA determined that December 31, 2008, was an appropriate date because it believed that adequate production capacity and supplies of HFA albuterol would be available to meet patient need. So, while alternatives to CFC-albuterol MDIs were available at that time, the supply and the capacity of manufacturers to produce sufficient amounts of HFA MDIs to meet the demand for albuterol were not yet adequate. A date of December 31, 2008 was chosen to provide time for a smooth and successful transition to occur and to prevent a shortage in the market that would affect patients' ability to receive albuterol. That transition is well underway, but some production of CFC-albuterol remains necessary and albuterol remains listed in 21 CFR 2.125(e).

One commenter stated that based on current market conditions, it believes that the total supply of albuterol MDIs (both HFA and CFC inhalers) in the market should continue to meet demand during the transition to HFA. The commenter noted that it has significantly increased the amount of HFA albuterol inhalers that it produces, and that it is in the position to increase its supply further if the need arises. It further noted that based on publicly available data, it appears that another HFA albuterol inhaler manufacturer has also increased supply of its HFA albuterol inhaler. Lastly, the commenter stated that its communications from FDA indicate that FDA, based on discussions with all manufacturers of albuterol inhalers, is not anticipating near-or medium-short-term shortages of

albuterol MDIs. In this regard, the commenter argued that there is no need for incremental CFC-based albuterol MDIs beyond the previously approved 2006 CFC allocations to meet overall albuterol demand in the United States.

Two commenters supported EPA's proposed allocation and asserted that a gradual transition from CFC albuterol to HFA albuterol would benefit patients. One commenter stated EPA correctly concluded, based on the availability of alternatives, that CFCs for albuterol MDIs are not necessary, as defined by Section 604(d)(2) of the Clean Air Act; and that the proposed allocations would benefit patients by smoothing the transition to alternatives.

One commenter supported the proposed allocation because it provided for a timetable that would enable CFC albuterol supplies to be drawn down while ensuring a steady, reliable supply of HFA product. The commenter stated that a smooth transition requires a gradual conversion of the albuterol market to HFAs and that this transition should be completed sufficiently in advance of December 31, 2008. The commenter noted that an abrupt transition would have potential negative health impacts, present an onerous administrative burden on providers and pharmacies, and waste any potential for transition to improve disease management.

Both commenters cautioned the Agency about the negative health outcomes potentially associated with patients transitioning several times between CFC and HFA inhalers or using both products at once. One commenter stated that specific benchmarks can minimize confusion in pharmacies and that an efficient phase-out period with consistent downward pressure on the availability of CFC MDIs can prevent these problems. The commenter also suggested that nine months would be an appropriate conversion period for CFC and HFA products to coexist in the market.

One commenter noted that the four HFA albuterol MDIs on the market are all different formulations, while the CFC albuterol MDIs were all similar. The commenter asserted that this variety will benefit patients by allowing them to find a formulation that works best for them and to avoid formulations to which they are allergic. The commenter noted that some of the HFA MDIs also have new features that were absent in the CFC models and that the production variety improves security of supply. The commenter also stated that the proposed allocations sent a consistent and appropriate signal to all affected constituencies that the Government is serious about the albuterol transition, which is prompting patient education and outreach.

III. Allocation of Essential Use Allowances for Calendar Year 2007

With this action, EPA is allocating essential use allowances for calendar year 2007 to the entities listed in Table 1. These allowances are for the production or import of the specified quantity of Class I controlled substances solely for the specified essential use.

TABLE 1.—ESSENTIAL USE ALLOWANCES FOR CALENDAR YEAR 2007

Company	Chemical	2007 Quantity (metric tons)
(i) Metered Dose Inhalers (for oral inhalation) for Treatment of Asthma and Chronic Obstructive Pulmonary Disease		
Armstrong Pharmaceuticals	CFC–114 (production of epinephrine MDIs only)	22.4
Inyx (Aventis)	CFC–11 or CFC–12 or CFC–114	39.6
3M Pharmaceuticals	CFC–11 or CFC–12 or CFC–114	65.0
Wyeth	CFC–11 or CFC–12 or CFC–114	40.0

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

EPA prepared an analysis of the potential costs and benefits related to this action. This analysis is contained in the Agency's Regulatory Impact Analysis (RIA) for the entire Title VI phaseout program (U.S. Environmental Protection Agency, ''Regulatory Impact Analysis: Compliance with Section 604 of the Clean Air Act for the Phaseout of Ozone Depleting Chemicals,'' July 1992). A copy of the analysis is available in the docket for this action and the analysis is briefly summarized here. The RIA examined the projected economic costs of a complete phaseout of consumption of ozone-depleting substances, as well as the projected benefits of phased reductions in total emissions of CFCs and other ozone-depleting substances, including essential use CFCs used for metered-dose inhalers.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The recordkeeping and reporting requirements included in this action are already included in an existing information collection burden and this action does not make any changes that would affect the burden. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR 82(a) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0170, EPA ICR number 1432.25. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of

information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

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

For purposes of assessing the impact of today's rule on small entities, small entities are defined as: (1) Pharmaceutical preparations manufacturing businesses (NAICS code 325412) that have fewer than 750 employees; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the proposed rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. This rule provides an otherwise unavailable benefit to those companies that are receiving essential use allowances. We have therefore concluded that today's final rule will relieve regulatory burden for all small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative, if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed a small government agency plan under section 203 of the UMRA. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector, since it merely provides exemptions from the 1996 phase-out of Class I ODSs. Similarly, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments, because this rule merely allocates essential use exemptions to entities as an exemption to the ban on production and import of Class I ODSs.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. Today's rule affects only the companies that requested essential use allowances. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that (1) is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health and safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This final rule is not subject to Executive Order 13045 because it implements the phaseout schedule and exemptions established by Congress in Title VI of the Clean Air Act.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is a not ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The rule affects only the pharmaceutical companies that requested essential use allowances.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This final rule does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

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. Therefore, 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**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective June 12, 2007.

V. Judicial Review

Under section 307(b)(1) of the Act, EPA finds that these regulations are of national applicability. Accordingly, judicial review of the action is available only by the filing of a petition for review in the United States Court of Appeals for the District of Columbia Circuit within sixty days of publication of the action in the **Federal Register**. Under section 307(b)(2), the requirements of this rule may not be challenged later in judicial proceedings brought to enforce those requirements.

VI. Effective Date of This Final Rule

Section 553(d) of the Administrative Procedures Act (APA) generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. Today's final rule is issued under section 307(d) of the CAA, which states, ''The provisions of section 553 through 557 * * * of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies.'' Thus, section 553(d) of the APA does not apply to this rule. EPA nevertheless is acting consistently with the policies underlying APA section 553(d) in making this rule effective June 12, 2007. APA section 553(d) provides an exception for any action that grants or recognizes an exemption or relieves a restriction. Because today's action grants an exemption to the phaseout of production and consumption of CFCs, EPA is making this action effective immediately to ensure continued availability of CFCs for medical devices.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Exports, Imports, Ozone, Reporting and recordkeeping requirements.

Dated: June 6, 2007.

Stephen L. Johnson,

Administrator.

■ 40 CFR Part 82 is amended as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

■ 1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

Subpart A—Production and Consumption Controls

■ 2. Section 82.8 is amended by revising the table in paragraph (a) to read as follows:

§ 82.8 Grants of essential use allowances and critical use allowances.

(a) * * *

TABLE I.—ESSENTIAL USE ALLOWANCES FOR CALENDAR YEAR 2007

Company	Chemical	2007 Quantity (metric tons)
(i) Metered Dose Inhalers (for oral inhalation) for Treatment of Asthma and Chronic Obstructive Pulmonary Disease		
Armstrong Pharmaceuticals	CFC–114 (production of epinephrine MDIs only)	22.4
Inyx (Aventis)	CFC–11 or CFC–12 or CFC–114	39.6
3M Pharmaceuticals	CFC–11 or CFC–12 or CFC–114	65.0
Wyeth	CFC–11 or CFC–12 or CFC–114	40.0

* * * * *

[FR Doc. E7–11319 Filed 6–11–07; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 72, No. 112
Tuesday, June 12, 2007

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 354

[Docket No. APHIS–2006–0137]

RIN 0579–AC22

User Fees; Export Certification for Plants and Plant Products

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the user fee regulations by adjusting the fees charged for export certification of plants and plant products. We are proposing to increase these user fees for fiscal years 2007 through 2012 to reflect the anticipated costs associated with providing these services during each year. We are also proposing to add a new user fee for Federal export certificates for plants and plant products that an exporter obtains from a State or county cooperator in order to recover our administrative costs associated with that service. Finally, we are proposing to make several nonsubstantive changes to the regulations for clarity. These proposed changes would enable us to properly recover the costs of providing export certification services for plants and plant products.

DATES: We will consider all comments that we receive on or before August 13, 2007.

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

- Federal eRulemaking Portal: Go to *http://www.regulations.gov*, select ''Animal and Plant Health Inspection Service'' from the agency drop-down menu, then click ''Submit.'' In the Docket ID column, select APHIS–2006–0137 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–2006–0137, 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–2006–0137.

Reading Room: You may read 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: For information concerning program operations, contact Ms. Karen Bedigian, Senior Export Specialist, Phytosanitary Issues Management, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1236; (301) 734–5712. For information concerning rate development, contact Mrs. Kris Caraher, User Fee Section, Financial Services Branch, Financial Management Division, MRPBS, APHIS, 4700 River Road Unit 54, Riverdale, MD 20737–1232, (301) 734–5901.

SUPPLEMENTARY INFORMATION:

Background

User fees for the issuance of export certificates for plants and plant products are contained in 7 CFR 354.3 (referred to below as the regulations). Export certificates are issued in accordance with the regulations in 7 CFR part 353, and they certify agricultural products as being considered free from plant pests, according to the phytosanitary requirements of the foreign countries to which the plants and plant products may be exported. Export certificates are also issued to certify that reexported plants or plant products conform to the most current phytosanitary requirements of the importing country and that, during storage in the United States, the consignment has not been subjected to risk of infestation or infection. These export certificates must be issued in accordance with 7 CFR part 353 to be accepted in international commerce.[1]

Regulations Proposed in This Document

We are proposing to amend the regulations in § 354.3 to adjust the user fees charged for export certification of plants and plant products. The Animal and Plant Health Inspection Service (APHIS) has not adjusted these particular user fees since the publication of a final rule in the **Federal Register** on January 29, 1996 (61 FR 2660–2665, Docket No. 94–074–2). That rule increased the user fees for certification of plants and plant products to reflect the actual cost of providing those services.

Given the routine increases in operating costs, the current user fees for the certification of plants and plant products must be adjusted in order for APHIS to recover the full cost of providing these services. Therefore, we are proposing to adjust these fees. Specifically, we are proposing to set the fees for fiscal years (FYs) 2007 through 2012 and beyond for each of the following categories of service: (1) Certification for export or reexport of a commercial shipment; (2) certification for export or reexport of a low-value commercial or noncommercial shipment; and (3) replacement of any certificate for export or reexport.

In addition, we are also proposing to add a new user fee for exporters who will be obtaining Federal export certificates for plants and plant products from State or county cooperators. State and county cooperators can issue Federal export certificates and APHIS will print, distribute, and track these State/county issued export certificates, incurring administrative as well as associated overhead costs. In order to cover the administrative costs APHIS incurs in connection with these State and county operations, we are proposing to establish a new user fee which would become effective in FY 2007. We are proposing to set fees for FYs 2007 through 2012.

[1] These export certificates are not commercial documents; they can be issued for noncommercial consignments.

This administrative fee for a Federal export certificate issued by State and county cooperators would be remitted by the exporter directly to APHIS through the Phytosanitary Certificate Issuance and Tracking System (PCIT),[2] provided that the exporter has a PCIT account and submits the application for the export certificate through the PCIT. If the exporter does not have a PCIT account or if the State or county creates export certificates independently using the PCIT or cannot or will not use the system, then the burden of collecting the administrative fee from the exporter and remitting it to APHIS would fall directly on the State or county issuing the Federal export certificate.

Under this proposal, the FY 2007 fees would become effective on the date specified in the final rule, the FY 2008 through FY 2012 rates would become effective on the first day of each of those fiscal years, and the FY 2012 rates would remain in effect until new rates were established. The user fee tables in this document, therefore, do not specify an end date for fees that would become effective on October 1, 2011 (the beginning of FY 2012). Establishing the user fee changes 6 years in advance would allow users of APHIS' services to incorporate the fees into their budget planning. APHIS would review the fees annually and, if necessary, publish a proposal to amend them if the published fees do not properly recover our costs.

Finally, this proposed rule would make several nonsubstantive changes to the regulations for clarity. These changes are described below under the section heading ''Miscellaneous.''

User Fee Accounting

In FY 1992, APHIS established accounting procedures to, among other things, segregate export certification costs for plants and plant products from all other costs. We maintain all export certification user fees we collect in a distinct account, carefully monitor the balance of this account, and only use these funds to pay for our actual costs for providing export certification services.

Types of Program Costs

As part of our accounting procedures, we maintain separate accounting codes to record costs that can be directly related to an inspection activity. These are referred to as ''direct-charge costs.'' At the APHIS field level and below, we direct-charge the following costs to the user fee account: Salaries and benefits, direct labor of supervisors, such as officers-in-charge, and clerical staff; equipment used only in connection with services subject to user fees; contracts; large supply items such as uniforms; and systems costs, which include supporting the PCIT, paper, paper distribution, etc.

Other program-delivery-related costs, at the APHIS field level and below, that cannot be directly charged to individual accounts are charged to ''distributable'' accounts established at the APHIS field level and are referred to as ''distributable costs.'' The following types of costs are charged to distributable accounts: Utilities, rent, telephone, vehicles, office supplies, etc. The costs in these distributable accounts are prorated (or distributed) among all the activities, including export certification services, that benefit from the expense, based on the ratio of the costs that are directly charged to each activity divided by the total costs directly charged to each account at the field level.

Export Program costs also include program direction and support costs we incur at the regional and headquarters level. These are costs related to the overall management of APHIS' Plant Protection and Quarantine (PPQ) program. The PPQ program incurs these costs for functions carried out by PPQ management support staff at headquarters in Riverdale, MD, and by various staffs at APHIS' two regional hubs located in Raleigh, NC, and Fort Collins, CO. The headquarters and regional staffs perform program support activities such as budget planning, formulation, justification, and execution specific to the PPQ program; specialized agreement management; staff-year management; program spending monitoring and projections; and liaison with higher-level internal and external entities.

We also incur Agency-level support costs through activities that support the Export Program, such as recruitment and development; legislative and public affairs; regulation development; regulatory enforcement; and budget, accounting, payroll, purchasing, billing, and collection services.

Departmental charges are assessed for various program costs, including Agency support staffs at the U.S. Department of Agriculture (USDA) Department level, Federal telephone service, mail, processing of payroll and money management, unemployment compensation, Office of Workers Compensation Programs, and central supply depots for storing and issuing commonly used supplies and forms.

Prior Year Cost Identification

As we have noted, the user fees supporting the Export Program have not been adjusted since 1996. In order to properly identify actual total program costs, we employed contractors from Kadix Systems in FY 2004 to develop and document an accurate cost-based analysis of the nationwide Export Program. We also established an Export User Fee Work Group to assist with technical and program expertise; provide financial and budgetary advice; and perform data collection, regulatory analysis, and management review for this project. The contracting project team provided an export user fee report on their review of export certificate issuance trends, direct labor costs, support costs for 5 fiscal years, and fluctuations in activity volumes.

Based on the analysis of the Kadix Systems study, we were able to better identify our true export certification user fee costs. We then added the pro-rata share of the distributable accounts at the APHIS field level and appropriate amounts to recover regional, headquarters, Agency, and departmental level costs, and other costs to identify our full costs for providing export certification services.

Cost Projections for FY 2007 Through FY 2012

We used prior year costs and added inflationary factors and planned new costs, such as new staffing and automation/information technology initiatives, to project our costs for FY 2007 through FY 2012. We then added a reasonable amount to contribute to a reserve in the Export Program user fee accounts to identify our total anticipated costs for those years. Those reserve funds provide us with a means to ensure that we have sufficient operating funds in cases of fluctuations in activity volumes or unanticipated events that could impact the program. We split our total costs for each fiscal year into the certification categories.

Development of Estimated Spending Amounts

The estimated spending amounts for FY 2007 through FY 2012 are based on data from FYs 2004 through 2006. The FY 2007 base costs include the direct-charge and program-delivery costs described above. We added our estimated pay cost increases during FY 2007 and our estimated new costs, including new hires, training, and automation initiatives. We next added

[2] While we are not currently accepting payments through the PCIT, we anticipate that the payment collection system will become fully operational in FY 2007, at which time, payment for applications for, and issuance of, the other certificates referred to above would also become possible through the PCIT.

overhead expenses, including the program direction and support and Agency-level support costs and Departmental charges as described above. We then included rent and a reserve amount.

FY 2007 base cost	$9,423,440
Estimated Pay Costs @ 2.3%	216,739
New Costs	4,718,753
Subtotal	14,358,932
Overhead @ 16.15%	2,318,967
Departmental Charges @ 3.38%	563,985
Rent Costs	299,064
Subtotal	3,182,016
Reserve Component	932,301
FY 2007 Total	$18,473,249

We evaluated our historic cost-distribution percentages and applied them to the costs we identified and estimated for FYs 2007 through 2012 to split our projected costs among the export certificate categories described earlier. The following table indicates the estimated spending amounts for FY 2007 through FY 2012:

TABLE 1.—TOTAL PROJECTED COST FOR ADMINISTERING THE EXPORT PROGRAM, FY 2007–2012

Certificate categories	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Commercial shipment	$15,408,495	$15,763,411	$16,126,748	$16,498,975	$16,880,308	$17,261,762
Noncommercial and low-value shipments	477,026	488,014	499,262	510,786	522,591	534,401
Replacement	97,615	99,864	102,166	104,524	106,940	109,356
State or county issued	2,490,113	2,547,470	2,606,187	2,666,342	2,727,968	2,789,613
Total	18,473,249	18,898,759	19,334,363	19,780,627	20,237,807	20,695,132

Volumes

Once we identified our estimated costs for each of the export certificate categories and estimated our costs in out years using economic factors, we then divided our annual costs by the estimated volumes for each export certification category to obtain our cost per export certification category. We performed extensive volume analyses to project volumes for each fee category in the out years. We reviewed actual data for each service category for FYs 2004 through 2006 and estimated our annual export certification volumes for FYs 2007 through 2012 by reviewing the Kadix Systems volume analysis and conducting surveys of several work units with high volumes of export certifications. The following table identifies volumes for export certificates by service category for FY 2007 through FY 2012.

TABLE 2.—PROJECTED VOLUMES BY SERVICE CATEGORY, FY 2007–2012

Service categories	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Commercial shipment	155,565	157,121	158,692	160,279	161,882	163,501
Noncommercial and low-value shipments	8,348	8,432	8,517	8,601	8,687	8,774
Replacement	6,845	6,913	6,982	7,052	7,123	7,194
APHIS subtotal	170,759	172,467	174,191	175,933	177,692	179,469
State or county issued	155,206	156,758	158,326	159,909	161,508	163,123
Grand total	325,965	329,225	332,517	335,482	339,200	342,592

User Fees for Export Certification of Plants and Plant Products

Once we established the total annual costs to administer the Export Program, including the amount necessary to maintain the account reserve at a reasonable level for each of the service categories, we began the calculation of our fees. In calculating the user fees, we divided the sum of the costs of providing each service by the projected volumes (i.e., numbers of export certificates issued), thereby arriving at ''raw'' fees. We then rounded up or down to the nearest whole dollar to obtain the final fees and ensure adequate reserve funds. Also, unlike the fees for international air passengers, where the service volumes are so high, in the case of the export certification program, there would be no impact from rounding these user fees to the nearest whole dollar. Our current user fees for export certification of plants and plant products and the user fees we are proposing to charge for these services for each fiscal year from 2007 through 2012 are shown in table 3 below. The proposed user fees would be listed in § 354.3, in a new paragraph (g)(3).

The proposed user fees provide for the maintenance of a reasonable reserve of up to 5 months' operating expenses in each of the export certification accounts. We intend to monitor the reserve balances closely and propose adjustments in our fees as necessary. If we determine that any fees are too high and are contributing to unreasonably high reserve levels, we will undertake rulemaking to lower the fees as quickly as possible. Conversely, if it becomes necessary to increase any fees because reserve levels are being drawn too low, we will undertake rulemaking to increase the fees.

TABLE 3.—USER FEES FOR EXPORT OR REEXPORT CERTIFICATION OF PLANTS AND PLANT PRODUCTS

Certificate categories	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Commercial shipment	$50	$99	$100	$102	$103	$104	$106
Noncommercial shipment	23	57	58	59	59	60	61
Low value shipment	23	57	58	59	59	60	61
Replacement	7	14	14	15	15	15	15

TABLE 3.—USER FEES FOR EXPORT OR REEXPORT CERTIFICATION OF PLANTS AND PLANT PRODUCTS—Continued

Certificate categories	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
State or county issued	.....	16	16	17	17	17	17

Miscellaneous

We are also proposing to make several changes to the regulations in addition to those described above. These changes are needed for clarity and to ensure that APHIS is fully compensated for all the export-certification services it performs.

We have been allowing, and would continue to allow, exporters to purchase prepaid ''blocks'' of certificates (we do not specify the number of certificates in a block) for commercial shipments only. The current regulations do not indicate clearly that only commercial shipment certificates may be purchased this way. We would amend the regulations in § 354.3(g) to remove any ambiguity on this point.

We are also proposing to amend the regulations in § 354.3(g) to make clear that work necessary to issue an export certificate that must be conducted outside of normal business hours is subject to our reimbursable overtime rates (7 CFR 354.1), in addition to the applicable user fee. This change is necessary to ensure that APHIS is properly compensated for services provided outside of normal business hours.

The current regulations in § 354.3(g) do not clearly reflect that we charge user fees for issuing reexport certificates for noncommercial shipments in connection with the export of plants and plant products. To eliminate confusion, we are proposing to add a specific reference to this existing fee in § 354.3(g).

We would make several changes to § 354.3(h)(1), which currently provides that a shipper who pays for a block of export certificates to cover commercial shipments may obtain a refund or a credit against future AQI user fees under the following circumstances:

- If a certificate from the block is voided;
- If a certificate from the block is returned unused;
- If the shipper pays for inspection outside of normal business hours (8 a.m. to 4:30 p.m.) under § 354.1;
- If a certificate from the block is used for a noncommercial shipment; or
- If a certificate from the block is used to reissue another certificate.

We would amend § 354.3(h)(1)(i) to indicate that the shipper would be eligible for a refund only if an export certificate is voided prior to its being signed by a certifying official. If APHIS issues a certificate and the exporter then decides to void it, there should be no refund because APHIS will have already performed the work of processing and issuing the certificate and will have incurred the associated costs.

We would also amend the paragraph to eliminate the reference to obtaining credit against future AQI user fees. We do not offer such credits.

We would amend § 354.3(h)(1)(ii) to indicate that the shipper would be eligible for a refund only if an unused export certificate is returned in its original unused condition. This clarification is needed because if a certificate is not in its original condition, *i.e.*, if anything has been written on it, it may no longer be used.

We would remove current paragraph (h)(1)(iii), pertaining to inspection outside normal business hours, because a shipper would no longer be eligible for a refund under the circumstances described in the paragraph. Under proposed paragraph (g)(2), described above, work necessary to issue an export certificate that is conducted outside of normal business hours would be subject to both overtime rates and the applicable user fee.

Current paragraph (h)(1)(iv), concerning refunds for export certificates for noncommercial shipments, would be redesignated as (h)(1)(iii) but would not undergo any substantive changes. Current paragraph (h)(1)(v) provides that a shipper is eligible for a refund if a certificate from the block is used to ''reissue'' another certificate. Because the term ''reissue'' may be subject to different interpretations, we are proposing to revise this provision to state that a refund may be issued if a certificate from a block is used to replace another certificate that has been lost or destroyed, provided that the certificate is issued as a duplicate certificate, without changes. This paragraph would be redesignated as (h)(1)(iv).

Current paragraph (h)(2) states that the amount of any refund or credit will be the amount overcharged, less $7 to cover APHIS administrative expenses. In order to make the paragraph consistent with the changes to the fees that we are proposing elsewhere in this proposed rule and to enable us to cover our costs, we would amend the paragraph to indicate that the amount of any refund (we would also remove the existing reference to a credit from this paragraph) for a certificate issued by APHIS would be determined by APHIS based on the difference between the cost of purchasing the certificate and the cost that would be applicable to its actual use or disposition. For example, if a commercial certificate were purchased as part of a block of certificates for $99 and then applied to a noncommercial shipment, the certificate for which could be purchased for $57, then the amount of the refund would total $42. We would further state that, in the case of a certificate issued on behalf of APHIS by a designated State or county inspector, the amount of the proposed new administrative fee would be withheld from any refund.

Section 354.3 lists definitions for terms, including the terms *export certificate for processed plant products, phytosanitary certificates,* and *phytosanitary certificate for reexport.* These existing definitions add no useful information to the regulations and are unnecessary, provided that we include a definition of *certificate* in the regulations. Therefore, we are proposing to amend the regulations by removing the definitions for the three types of certificates and adding a definition of *certificate* to the regulations to read as follows: ''Any certificate issued by or on behalf of APHIS describing the phytosanitary condition of a shipment of plants or plant products for export, including but not limited to, Phytosanitary Certificate (PPQ Form 577), Export Certificate for Processed Plant Products (PPQ Form 578), and Phytosanitary Certificate for Reexport (PPQ Form 579).''

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been reviewed under Executive Order 12866. The rule 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.

For this proposed rule, we have prepared an economic analysis. The economic analysis provides a cost-benefit analysis as required by Executive Order 12866 and an initial regulatory flexibility analysis that examines the potential economic effects on small entities as required by section

603 of the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available by contacting the persons listed under **FOR FURTHER INFORMATION CONTACT** and may be viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

This proposed rule would amend the user fees for certifying plants and plant products for export (7 CFR 354.3(g)). This proposed rule would also make several other changes to clarify the regulations. In addition to updating and clarifying the current user fees, this proposal would add an administrative user fee for each export certificate issued on behalf of APHIS by a U.S. State or county in order to recover administrative costs associated with providing that service.[3]

The adjusted and new fees proposed in this rule are designed to recover our full costs for providing plant and plant product export certification services and to allow for a reasonable reserve to ensure that we have sufficient operating funds in cases of fluctuations in activity volumes or unanticipated events that could impact the program. The proposed fees are based on an analysis of our costs for providing these services in FYs 2004 through 2006, as well as our best projections of what it would cost us to provide these services in FYs 2007 through 2012. APHIS is updating these fees to take into account the routine increases in the cost of doing business, such as inflation, replacing equipment, maintaining databases, etc., as well as to properly cover our costs for new hires, training, automation initiatives, and rent, and to build a reserve balance in this account.

A wide variety of commodities are potentially eligible for certification under the APHIS export certification program. Eligibility requirements vary by commodity and in some cases by the degree of processing or treatment that has occurred. The demand for certification by exporters is driven by the phytosanitary requirements of importing countries. Eligible commodities generally include live plants, fresh and some dried fruits, vegetables and nuts, unroasted coffee, cereals, milling products, oil seeds, raw sugar, tobacco, wood, and cotton. We cannot place a specific value on the commodities that have been certified for export. However, in 2004, exports of the covered commodity categories were valued at nearly $41 billion.[4] In addition, products in these commodity categories valued at more than $1.5 billion were reexported in 2004.

The export certification services covered in this proposal are provided to U.S. exporters of plants and plant products. These exporters include those entities shipping plant and plant products to foreign destinations for commercial as well as noncommercial purposes. These exporters would be the main affected entities of this proposal. In addition, State and county governments would be affected by this proposal.

Under this proposed rule, the user fee for the certification of a commercial or reexport shipment would increase from $50 to $99 in FY 2007. Additional yearly increases would raise the fee to $106 by FY 2012. This proposed rule would also increase the user fee for low-value commercial or reexport shipments and noncommercial shipments from $23 to $57 in FY 2007 and to $61 by FY 2012, with yearly increases. The user fee for replacing any export certificate would rise from $7 to $14 in FY 2007 and to $15 by FY 2012. The proposed new administrative user fee for each certificate issued on behalf of APHIS by a U.S. State or county would be set at $16 in FY 2007 and ultimately rise to $17 by FY 2012.

Table 4 shows the projected collections under the user fees covered in this proposal for FY 2007 through FY 2012. The increased revenues would go to cover the projected costs of administering the program and building a reserve to ensure that we have sufficient operating funds in cases of fluctuations in activity volumes or unanticipated events that could impact the program. The largest increase in collections would occur in FY 2007.

TABLE 4.—PROJECTED REVENUE COLLECTIONS FROM PROPOSED USER FEES

[In millions of dollars]

Service	Collections from proposed user fees					
	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Commercial shipment	$15.4	$15.7	$16.2	$16.5	$16.8	$17.3
Noncommercial and low-value shipments	0.5	0.5	0.5	0.5	0.5	0.5
Replacement	0.1	0.1	0.1	0.1	0.1	0.1
State or county issued	2.5	2.5	2.5	2.7	2.7	2.8
Total	18.5	18.8	19.3	19.8	20.2	20.7

To the extent that the proposed changes in user fees would impact exporters' operational costs, any entity that utilizes APHIS' export certification services that are subject to user fees could be affected by this proposed change. The degree to which any entity may be affected would depend on its market power (the ability to which costs can be either absorbed or passed on to its buyers). While the lack of information on profit margins and operational expenses of the affected entities, or the supply responsiveness of the affected industry,[5] prevents the precise prediction of the scale of impacts, some conclusions on overall potential impacts on domestic and international commerce can be drawn.

The proposed percentage increases in user fees would be significant primarily in the first year. In all cases, the increase over current fees would be at least 98 percent in FY 2007. If the user fees

[3] In California, county inspectors are authorized to issue Federal export certificates under a memorandum of understanding (MOU) between the California Department of Agriculture (CDFA) and 55 participating counties. This MOU mirrors the requirements set forth between USDA and States.

[4] These values may overstate the value of commodities certified by APHIS, PPQ in these years. In order to have been certified, a given commodity must have met the eligibility requirements, and have been presented for certification. However, these are the categories covering potentially eligible commodities, and commodities within these general categories that are categorically not eligible for certification, such as refined sugar and frozen fruit and vegetables, are not included here.

[5] The measurement of supply responsiveness would provide information on the likely impact on an entity's production due to changes in operating costs.

cannot be passed on, the profit margins of some entities may decline as user fees are increased. If a user fee does not cover all associated costs, those costs are shifted away from those receiving and benefitting from the service and onto APHIS, and thus ultimately to the taxpayer.

As noted above, this proposed rule would increase the user fee for commercial export and reexport certification from $50 to $99 in FY 2007 and to $106 by FY 2012. In comparison with the current fees, these adjusted fees could generate additional annual collections of $7.6 million in the first year of the proposal period and about $8.7 million in FY 2012. This fee would increase by a total of 108 percent over its current level during the period covered by the proposed rule. However, the total impact of these changes should be small. The total dollar value of the fee increases covered in this proposal, $56, would represent a tiny fraction of the value of those shipments. To put these fees in perspective, at the proposed level, this fee category is projected to generate total collections of $15.4 million in FY 2007, while exports and reexports of eligible commodities were valued at more than $42 billion in 2004. The total collections would represent less than 0.04 percent of the value of those shipments.

The Regulatory Flexibility Act requires that agencies specifically consider the economic impact of their rules on small entities. As noted earlier, exporters of plants and plant products would be the domestic entities most affected by this proposed rule. The overwhelming majority of these entities (at least 96 percent of each of the categories described below) fall under the Small Business Administration's (SBA's) definition of small entities.

Exporters of plants and plant products are part of the wholesale trade sector of the U.S. economy. These entities either sell goods on their own account (export merchants) or arrange for the sale of goods owned by others (export agents and brokers). Exporters of wood fall under the North American Industry Classification System (NAICS) code 423310, ''Lumber, plywood, millwork, and wood panel merchant wholesalers.'' The average firm in this category had sales of $11.6 million in 2002. Exporters of Fruit and Vegetables fall under NAICS code 424480, ''Fresh fruit and vegetable merchant wholesalers.'' The average firm in this category had sales of $10 million in 2002. Exporters of grains, such as corn, wheat, oats, barley, and unpolished rice, as well as dry beans and soybeans, are under NAICS code 424510, ''Grain and field bean merchant wholesalers.'' The average firm in this category had sales of $28 million in 2002. Exporters of leaf tobacco are covered under NAICS code 4245902, ''Leaf tobacco merchant wholesalers.'' The average firm in this category had sales of $8.1 million in 2002. Exporters of cotton are under NAICS code 4245904, ''Cotton merchant wholesalers.'' The average firm in this category had sales of $35.3 million in 2002. Exporters of plant seeds and plant bulbs are under NAICS code 424910, ''Farm supplies merchant wholesalers.'' The average firm in this category had sales of $11 million. Exporters of flowers and nursery stock are under NAICS code 434930 ''Flower, nursery stock, and florists' supplies merchant wholesalers.'' The average firm in this category had sales of $2.4 million in 2002. Exporters of various other farm product raw materials, such as Christmas trees, fall under NAICS code 4249904, ''Other nondurable goods merchant wholesalers.'' The average firm in this category had sales of $2.2 million in 2002.

Based on the above, it can be seen that our proposed fee increases would be very small relative to the revenues generated by exporters of plants and plant products, the overwhelming majority of which are small, according to SBA criteria. Thus, we expect that the impact of the fee increases on small entities should be limited. We welcome any additional information or comments from the public regarding the impact of this proposed rule on small entities.

If a commercial export or reexport shipment is valued at less than $1,250, the fee for certification in this proposal for FY 2007 would be $57, an increase from $23. The new fee would represent at least 4.6 percent of the value of the shipment. This is not an insignificant percentage. However, the impact of the fee increase may be mitigated to the degree that individual low-value shipments can be consolidated into single shipments for certification.

This proposed rule would increase the user fee for noncommercial export and reexport certification from $23 to $57 in FY 2007, and to $61 by FY 2012. Combined with the changes for low-value commercial shipments, these changes could generate additional annual collections of $284,000 in the first year of the proposal period, increasing to about $333,000 in FY 2012. These fees would increase by a total of 161 percent over current levels during the period covered by the proposed rule. However, it is estimated that only about 8,500 of these certificates are issued annually.

This proposed rule would increase the user fee for replacing any export certificate from $7 to $14 in FY 2007, and to $15 by FY 2012. Compared with the current fees, these adjusted fees could generate additional annual collections of $48,000 in the first year of the proposal period and about $58,000 in FY 2012. While this increase is a doubling of the fee, its impact should still be small.

There are administrative costs to APHIS associated with the running of the export certification program nationwide, regardless of whether APHIS or a State or county cooperator issues the certificate. The proposed user fees for APHIS-issued certificates would recover these administrative costs. This proposed rule would initiate an administrative user fee for each export certificate issued on behalf of APHIS by a State or county in order to recover the costs APHIS incurs in supporting these State and county operations. The user fee for State-or county-issued Federal export certificates would be set at $16 in FY 2007 and increase to $17 by FY 2012. These changes could generate additional annual collections of $2.5 million in the first year of the proposal period and about $2.8 million by FY 2012.

As noted earlier, the administrative fee for Federal export certificates issued by State and county cooperators could be collected directly from the exporter by APHIS through the PCIT; however, in certain circumstances, such as when the exporter cannot or will not use the PCIT, the burden of collecting this administrative fee and remitting it to APHIS would fall directly on the State or county issuing the Federal export certificate. As a result, States and counties that do not utilize the PCIT would be likely to incur some administrative and recordkeeping costs. However, additional costs should be low because in most cases, alternative mechanisms are already in place for collecting export certification fees. To the extent that a State or county were to increase the fees it charges in order to incorporate the new administrative fee and pass the increased administrative and recordkeeping costs onto exporters, it would shift the burden of the fee to the user.

Any fee charged for export services performed by a State or county is determined by the individual State or county performing the service. Currently, States/counties charge from $0 to $212 [6] for a commercial export

[6] One county has a sliding scale based upon the commodity being shipped that ranges from $22 to $212.

certificate, with an average of about $28; and from $0 to $50 for a noncommercial certificate, with an average of about $19. States/counties currently charge from $0 to $75, with an average of about $16 to replace a commercial certificate, and from $0 to $50, with an average of about $15 to replace a noncommercial certificate. Thirty-five States have charges for issuing certificates. Twelve States have fee structures that duplicate APHIS' fee structure.[7] These fees could well change following the implementation of this rule to incorporate the Federal administrative fee, thereby shifting the burden of the fee to the users.

About 70 percent of export certificates issued in California in 2003 were written in eight counties, six of which have rate structures currently higher than those of the USDA. Only 10 States and 2 California counties do not have current legislative authority to charge for these certificates. These 10 States and 2 counties account for approximately one-tenth of the certificates issued by States/counties in a given year.

In assessing the need for this proposed rule, we considered alternatives to the chosen course of action. These alternatives are discussed below.

One alternative to this proposed rule would be to leave the regulations unchanged. In this case, the fees would remain unchanged. However, these fees were last updated in 1996 and will no longer recover the full cost of providing certification services. The existing fees will not cover the routine increases in the cost of doing business, such as inflation, replacing equipment, maintaining databases, etc. If APHIS were to continue to collect user fees at the current rates in FYs 2007 through 2012, total collections would be about $63 million short of projected program costs over that period. Therefore, this alternative was rejected.

Another alternative we considered was not adding the proposed administrative user fee for each certificate issued on behalf of APHIS by a U.S. State or county. However, APHIS' activities support these State and county operations, as well as our nationwide export certification functions. APHIS' costs for printing, distributing, and tracking these State/county issued certificates, as well as associated overhead costs, would not be recovered under the current user fees. The users who obtain export certification issued by a State or county on APHIS' behalf would only pay the costs that the State or county incurs in issuing the certificate. Therefore, this alternative was rejected.

[7] Kadix systems. United States Department of Agriculture, Animal & Plant Heath Inspection Service, Plant Protection and Quarantine; Analysis of the Export User Fee Program; Final Report. December 2004.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This proposed rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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.

Accordingly, we propose to amend 7 CFR part 354 as follows:

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

1. The authority citation for part 354 would continue to read as follows:

Authority: 7 U.S.C. 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 49 U.S.C. 80503; 7 CFR 2.22, 2.80, and 371.3.

2. Section 354.3 would be amended as follows:

a. In paragraph (a), by removing the definitions of *export certificate for processed products, phytosanitary certificate,* and *phytosanitary certificate for reexport,* and adding a new definition of *certificate,* in alphabetical order, to read as set forth below.

b. In paragraph (g), by removing paragraphs (g)(2) and (g)(5); by redesignating paragraphs (g)(3) and (g)(4) as (g)(4) and (g)(5), respectively; and by revising paragraph (g)(1) and adding new paragraphs (g)(2) and (g)(3) to read as set forth below.

c. By revising paragraph (h) to read as set forth below.

§ 354.3 User fees for certain international services.

(a) * * *

* * * * *

Certificate. Any certificate issued by or on behalf of APHIS describing the condition of a shipment of plants or plant products for export, including but not limited to Phytosanitary Certificate (PPQ Form 577), Export Certificate for Processed Plant Products (PPQ Form 578), and Phytosanitary Certificate for Reexport (PPQ Form 579).

* * * * *

(g) * * * (1) For each certificate issued by APHIS personnel, the recipient must pay the applicable AQI user fee at the time and place the certificate is issued, or, in the case of a prepaid block of certificates (only certificates for commercial shipments may be purchased in this way), at the time the certificates are given to the shipper.

(2) When the work necessary for the issuance of a certificate is performed by APHIS personnel on a Sunday or holiday, or at any other time outside the regular tour of duty of the APHIS personnel issuing the certificate, in addition to the applicable user fee, the recipient must pay the applicable overtime rate in accordance with 7 CFR part 354.

(3)(i) Each exporter who receives an export or reexport certificate issued on behalf of APHIS by a designated State or county inspector must pay an AQI user fee, as shown in the following table. The AQI user fee will be remitted by the exporter directly to APHIS through the Phytosanitary Certificate Issuance and Tracking System (PCIT), provided that the exporter has a PCIT account and submits the application for the export certificate through the PCIT. If the PCIT is not used, the State or county issuing the certificate is responsible for collecting the fee and remitting it monthly to the U.S. Bank, United States Department of Agriculture, APHIS, AQI, P.O. Box 979043, St. Louis, MO 63197–9000.

Effective dates	Amount per certificate
[*Effective date of final rule*] through September 30, 2007	$16
October 1, 2007, through September 30, 2008	16
October 1, 2008, through September 30, 2009	17

Effective dates	Amount per certificate
October 1, 2009, through September 30, 2010	17
October 1, 2010, through September 30, 2011	17
Beginning October 1, 2011 ..	17

(ii) The AQI user fees for an export or reexport certificate for a commercial shipment are shown in the following table.

Effective dates	Amount per shipment
[*Effective date of final rule*] through September 30, 2007	$99
October 1, 2007, through September 30, 2008	100
October 1, 2008, through September 30, 2009	102
October 1, 2009, through September 30, 2010	103
October 1, 2010, through September 30, 2011	104
Beginning October 1, 2011 ..	106

(iii) The AQI user fees for an export or reexport certificate for a low-value commercial shipment are shown in the following table. A commercial shipment is a low-value commercial shipment if the items being shipped are identical to those identified on the certificate; the shipment is accompanied by an invoice which states that the items being shipped are worth less than $1,250; and the shipper requests that the user fee charged be based on the low value of the shipment.

Effective dates	Amount per shipment
[*Effective date of final rule*] through September 30, 2007	$57
October 1, 2007, through September 30, 2008	58
October 1, 2008, through September 30, 2009	59
October 1, 2009, through September 30, 2010	59
October 1, 2010, through September 30, 2011	60
Beginning October 1, 2011 ..	61

(iv) The AQI user fees for an export or reexport certificate for a noncommercial shipment are shown in the following table.

Effective dates	Amount per shipment
[*Effective date of final rule*] through September 30, 2007	$57
October 1, 2007, through September 30, 2008	58
October 1, 2008, through September 30, 2009	59
October 1, 2009, through September 30, 2010	59
October 1, 2010, through September 30, 2011	60
Beginning October 1, 2011 ..	61

(v) The AQI user fees for replacing any certificate are shown in the following table.

Effective dates	Amount per certificate
[*Effective date of final rule*] through September 30, 2007	$14
October 1, 2007, through September 30, 2008	14
October 1, 2008, through September 30, 2009	15
October 1, 2009, through September 30, 2010	15
October 1, 2010, through September 30, 2011	15
Beginning October 1, 2011 ..	15

* * * * *

(h) *Refunds of AQI user fees.* (1) A shipper who pays for a block of certificates to cover commercial shipments may obtain a refund under the following circumstances:

(i) If a certificate from the block is voided prior to its being signed by a certifying official;

(ii) If a certificate from the block is returned in its original, unused condition;

(iii) If a certificate from the block is used for a noncommercial shipment; or

(iv) If a certificate from a block is used to replace another certificate that has been lost or destroyed, provided that the certificate is issued as a duplicate certificate, without changes.

(2) The amount of any refund for a certificate issued by APHIS will be determined by APHIS based on the difference between the cost of purchasing the certificate and the cost that applies to its actual use or disposition. In the case of a certificate issued on behalf of APHIS by a designated State or county inspector, the amount listed in paragraph (g)(3)(i) of this section will not be refunded.

* * * * *

Done in Washington, DC, this 6th day of June 2007.

Bruce Knight,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. E7–11278 Filed 6–11–07; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28068; Directorate Identifier 2007–CE–043–AD]

RIN 2120–AA64

Airworthiness Directives; Hawker Beechcraft Corporation (Type Certificate No. A00010WI previously held by Raytheon Aircraft Company) Model 390 Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Hawker Beechcraft Corporation Model 390 Airplanes. This proposed AD would require you to inspect the starter-generator to determine the serial number (S/N) and suffix letter, which indicates if the part is defective, and replace any defective starter-generator with one of new design. This proposed AD results from reports of a manufacturing error where certain starter-generators may have been improperly shimmed. We are proposing this AD to detect and replace defective starter-generators, which could result in premature starter-generator failure. This failure could lead to increased chances of dual starter-generator failure on the same flight.

DATES: We must receive comments on this proposed AD by August 13, 2007.

ADDRESSES: Use one of the following addresses to comment on this proposed AD:

- *DOT Docket Web site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- *Fax:* (202) 493–2251.
- *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 instructions for submitting comments.

For service information identified in this proposed AD, contact Hawker Beechcraft Company, P.O. Box 85, Wichita, Kansas 67201–0085; telephone: (800) 429–5372 or (316) 676–3140.

FOR FURTHER INFORMATION CONTACT: Philip Petty, Aerospace Engineer, Wichita Aircraft Certification Office, FAA, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4139; fax: (316) 946–4107; e-mail: *philip.petty@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number, ''FAA–2007–28068; Directorate Identifier 2007–CE–043–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive concerning this proposed AD.

Discussion

We received reports of premature starter-generator failure on several Hawker Beechcraft Corporation Model 390 airplanes. We determined the cause of the premature failure to be a result of a manufacturing error in which certain starter-generators, Raytheon Aircraft Company (RAC) part number (P/N) 390–389001–0001 and Advance Industries, Inc. (AI) P/N MG94A–1 without an ''A'' suffix letter, may have been improperly shimmed.

This condition, if not corrected, could result in premature starter-generator failure. This failure could lead to increased chances of dual starter-generator failure on the same flight.

Relevant Service Information

We have reviewed RAC Mandatory Service Bulletin SB 24–3790, Issued: August, 2006.

The service information describes procedures for:

- Inspecting the left-hand and right-hand starter-generators to determine the serial number and suffix letter, which indicates whether the part is defective; and
- Replacing any defective starter-generator found with one of new design.

FAA's Determination and Requirements of the Proposed AD

We are proposing this AD because we evaluated all information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design. This proposed AD would require you to inspect the starter-generator to determine the serial number (S/N) and suffix letter, which indicates whether the part is defective, and replace any defective starter-generator with one of new design.

Costs of Compliance

We estimate that this proposed AD would affect 105 airplanes in the U.S. registry.

We estimate the following costs to do the proposed inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 work-hour × $80 per hour = $80	Not applicable	$80	$8,400

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

Labor cost	Parts cost	Total cost per generator
5 work-hours × $80 per hour = $400	$9,648 for new part $6,593 for overhauled part	$10,048 for new part. $6,993 for overhauled part.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket that contains the proposed AD, the regulatory evaluation, any comments received, and other information on the Internet at *http://dms.dot.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone (800) 647–5227) is located at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Hawker Beechcraft Corporation (Type Certificate No. A00010WI previously held by Raytheon Aircraft Company): Docket No. FAA–2007–28068; Directorate Identifier 2007–CE–043–AD.

Comments Due Date

(a) We must receive comments on this airworthiness directive (AD) action by August 13, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model 390 airplanes, serial numbers RB–1 and RB–4 through RB–149, that are certificated in any category.

Unsafe Condition

(d) This AD results from reports of a manufacturing error where certain starter-generators may have been improperly shimmed. We are issuing this AD to detect and replace defective starter-generators, which could result in premature starter-generator failure. This failure could lead to increased chances of dual starter-generator failure on the same flight.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Do a one-time inspection of the left-hand and right-hand starter-generators, Raytheon Aircraft Company (RAC) part number (P/N) 390–389001–0001 or Advance Industries, Inc. (AI) P/N MG94A–1, to determine the serial number and suffix letter, which indicates whether the part is defective.	Within the next 50 hours time-in-service (TIS) after the effective date of this AD or within the next 3 months after the effective date of this AD, whichever occurs first.	Follow RAC Mandatory Service Bulletin SB 24–3790, Issued: August, 2006.
(2) If any defective starter-generator(s) is/are found during the inspection required in paragraph (e)(1) of this AD, replace any defective starter-generator with one of new design.	As follows: (i) If both starter-generators are found defective, replace at least one within 10 hours after the inspection required in paragraph (e)(1) of this AD. Replace the other within the next 200 hours TIS after the effective date of this AD or within the next 12 months after the effective date of this AD, whichever occurs first. (ii) If one starter-generator is found defective, replace within the next 200 hours TIS after the effective date of this AD or within the next 12 months after the effective date of this AD, whichever occurs first.	Follow RAC Mandatory Service Bulletin SB 24–3790, Issued: August, 2006.
(3) If a defective starter-generator is not found during the inspection required in paragraph (e)(1) of this AD, no further action is required.	Not applicable	Follow RAC Mandatory Service Bulletin SB 24–3790, Issued: August, 2006.
(4) Do not install on any airplane any RAC P/N 390–389001–0001 or AI P/N MG94A–1, unless it is inspected following paragraph (e)(1) of this AD and found not to be defective.	Before further flight after the inspection required in paragraph (e)(1) of this AD.	Follow RAC Mandatory Service Bulletin SB 24–3790, Issued: August, 2006.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Wichita Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Philip Petty, Aerospace Engineer, Wichita ACO, FAA, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4139; fax: (316) 946–4107; e-mail: *philip.petty@faa.gov.* Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Related Information

(g) To get copies of the service information referenced in this AD, contact Hawker Beechcraft Company, P.O. Box 85, Wichita, Kansas 67201–0085; telephone: (800) 429–5372 or (316) 676–3140. To view the AD docket, go to the Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC, or on the Internet at *http://dms.dot.gov.* The docket number is Docket No. FAA–2007–28068; Directorate Identifier 2007–CE–043–AD.

Issued in Kansas City, Missouri, on June 5, 2007.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–11244 Filed 6–11–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 137

[USCG–2006–25708]

RIN 1625–AB09

Landowner Defenses to Liability Under the Oil Pollution Act of 1990: Standards and Practices for Conducting All Appropriate Inquiries

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish standards and practices

concerning the ''all appropriate inquiries'' element of a defense to liability of an owner or operator of a facility that is the source of a discharge or substantial threat of discharge of oil into the navigable waters or adjoining shorelines or the exclusive economic zone. To be entitled to the defense, those persons must show, among other elements not addressed in this rulemaking, that, before acquiring the real property on which the facility is located, they had made all appropriate inquiries into its previous ownership and uses to determine the presence or likely presence of oil. This proposed rule is consistent with a final rule on this subject published by the Environmental Protection Agency.

DATES: Comments and related material must reach the Docket Management Facility on or before September 10, 2007. Comments sent to the Office of Management and Budget (OMB) on collection of information must reach OMB on or before September 10, 2007.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2006–25708 to the Docket Management Facility at the U.S. Department of Transportation. Two different locations are listed under the mail and delivery options below because the Document Management Facility is moving May 30, 2007. To avoid duplication, please use only one of the following methods:

(1) *Web Site: http://dms.dot.gov.*

(2) *Mail:*

- Address mail to be delivered before May 30, 2007, as follows: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590–0001.
- Address mail to be delivered on or after May 30, 2007, as follows: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 2059.

(3) *Fax:* 202–493–2251.

(4) *Delivery:*

- Before May 30, 2007, deliver comments to: Room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC 20590.
- On or after May 30, 2007, deliver comments to: Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590.

At either location, deliveries may be made between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(5) *Federal eRulemaking Portal: http://www.regulations.gov.*

You must also send comments on collection of information to the Office of Information and Regulatory Affairs, Office of Management and Budget. To ensure that the comments are received on time, the preferred method is by e-mail at *nlesser@omb.eop.gov* or fax at 202–395–6566. An alternate, though slower, method is by U.S. mail to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, ATTN: Desk Officer, U.S. Coast Guard.

You may inspect the material referenced in this part at room 1013, National Pollution Funds Center, Coast Guard, 4200 Wilson Boulevard, Arlington, VA 22203–1804, between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–493–6863. Copies of the material are available as indicated in the ''References'' section of this preamble.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Benjamin White, National Pollution Funds Center, Coast Guard, telephone 202–493–6863. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–493–0402.

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://dms.dot.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's ''Privacy Act'' paragraph below.

Submitting comments: If you submit a comment, please include your name and address, identify the docket number for this rulemaking (USCG–2006–25708), indicate the specific section of this document 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 your comments and material 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. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Viewing comments and documents: To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://dms.dot.gov* at any time, click on ''Simple Search,'' enter the last five digits of the docket number for this rulemaking, and click on ''Search.'' 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 into any of our 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 Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov.*

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the Docket Management Facility 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**.

Need for This Rulemaking

This rulemaking will codify the requirement of 33 U.S.C. 2703(d)(4)(B). It applies to persons planning to acquire real property on which a facility, as defined under 33 U.S.C. 2701(9), is located who choose to take steps necessary to protect themselves from liability should unknown oil that is the subject of a discharge or substantial threat of discharge be found at the facility after they acquire it. We call these persons ''landowners'' or ''owners'' in this preamble. Should prospective landowners opt for this protection, they may find that they have already complied with this proposed rule if they have complied with ASTM International (ASTM) E 1527–05, ''Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.'' The industry standard ASTM E 1527–05, is consistent with this proposed rule and is compliant with the

statutory criteria for all appropriate inquiries. Persons conducting all appropriate inquiries may use the procedures included in the ASTM E 1527–05 standard to comply with this proposed rule. For more information on the ASTM standard, see the ''ASTM Standard E 1527–05'' section in this preamble.

Note that this proposed rule addresses only one of several elements that must be complied with in order to avail oneself of this protection. The element addressed in this proposed rule is called the ''all-appropriate-inquiries'' element found in 33 U.S.C. 2703(d)(4).

Background and Purpose

In general, under the Oil Pollution Act of 1990 (33 U.S.C. 2701, *et seq.*) (OPA 90), an owner or operator of a facility that is the source of a discharge, or a substantial threat of discharge, of oil into the navigable waters or adjoining shorelines or the exclusive economic zone is liable for damages and removal costs resulting from the discharge or threat. See 33 U.S.C. 2702(a). Under OPA 90, that person is known as a ''responsible party.'' See 33 U.S.C. 2701(32).

The Coast Guard and Maritime Transportation Act of 2004 (Pub. L. 108–293) (the 2004 Act) amended OPA 90, at 33 U.S.C. 2703(d)(4), by creating an ''innocent landowner'' defense to liability for those persons who could demonstrate, among other requirements, that before acquiring the real property on which the facility is located, they did not know, and had no reason to know that oil that is the subject of the discharge or substantial threat of discharge was located on, in, or at the facility. See 33 U.S.C. 2703(d)(2)(A). This is done by establishing that, before it acquired the real property on which the facility is located, it carried out ''all appropriate inquiries'' into its previous ownership and uses according to ''generally accepted good commercial and customary standards and practices.'' See 33 U.S.C. 2703(d)(4)(A)(i). The Coast Guard is required to establish, by regulation, the standards and practices for carrying out all appropriate inquiries (33 U.S.C. 2703(d)(4)(B)), which is the subject of this rulemaking.

Scope of the Proposed Rule

Congress included in the 2004 Act a list of criteria that the Coast Guard must address in their regulations for establishing standards and practices for conducting all appropriate inquiries. The criteria may be found in 33 U.S.C. 2703(d)(4)(C). This rulemaking is limited only to providing those standards and practices relative to the ''all appropriate inquiries'' element. This rulemaking does not address the other requirements in 33 U.S.C. 2703 which also must be met to qualify for the innocent-landowner defense.

The proposed rule would not apply to real property purchased by a non-governmental entity or non-commercial entity for residential use or other similar uses where an inspection and a title search of the facility and the real property on which the facility is located reveal no basis for further investigation. In those cases, 33 U.S.C. 2703(d)(4)(E) states that the inspection and title search satisfy the requirements for all appropriate inquiries.

Also, the proposed rule would not affect the existing OPA 90 liability protections for State and local governments that acquire a facility involuntarily in their functions as sovereigns under 33 U.S.C. 2701(26)(B)(i) and 33 U.S.C. 2703(d)(2)(B). Involuntary acquisition of facilities by State and local governments do not fall under the all-appropriate-inquiries provision of 33 U.S.C. 2703(d)(4).

Consultation With Other Agencies

Under 33 U.S.C. 2703(d)(4)(B), we are required to consult with the Environmental Protection Agency (EPA) to develop regulations establishing standards and practices for conducting ''all appropriate inquiries.'' On November 1, 2005, EPA published a final rule in the **Federal Register** (70 FR 66070) establishing standards and practices for conducting all appropriate inquiries as required by sections 101(35)(B)(ii) and (iii) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)(42 U.S.C. 9601, *et seq.*) found at 42 U.S.C. 9601(35)(B)(ii) and (iii). CERCLA applies to ''hazardous substances'', which is defined to exclude most forms of oil. These regulations are located in 40 CFR part 312. EPA used a negotiated rulemaking process to develop their standards and practices for conducting all appropriate inquiries under CERCLA. EPA's Negotiated Rulemaking Committee included interested parties from—

- Environmental interest groups;
- The Environmental Justice Community;
- Federal, State, tribal, and local Governments;
- Real estate developers, bankers and lenders; and
- Environmental professionals.

The all-appropriate-inquiries provisions of OPA 90 and CERCLA are similar in many respects, but not identical. The CERCLA provision has a broader scope than the OPA provision. It addresses certain liability defense provisions that are unique to CERCLA, involving persons who may not be affected by this proposed rule, such as contiguous property owners and individuals receiving Federal Brownfield grant monies under 40 U.S.C. 9604(k)(2)(B). While differences between OPA 90 and CERCLA have required certain differences between the Coast Guard's proposed rule and EPA's final rule, the two rules have been rendered as consistent as possible within statutory constraints. Maintaining consistency between the two rules helps standardize practices within the Federal Government.

ASTM Standard E 1527–05

ASTM International (ASTM) E 1527–05, ''Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,'' is the current voluntary industry standard that defines good commercial and customary practice in the United States for conducting an environmental site assessment of a parcel of commercial real estate with respect to oil under OPA 90 and hazardous substances under CERCLA. The 2004 Act, at 33 U.S.C. 2703(d)(4)(D)(ii), refers to ASTM E 1527–97, which is no longer available from ASTM and has been replaced by ASTM E 1527–05. Both the EPA and the Coast Guard agree that the new ASTM E 1527–05 is the active industry standard and is consistent with Congressional intent. Persons conducting all appropriate inquiries may use the procedures included in the ASTM E 1527–05 standard to comply with this proposed rule.

Discussion of the Proposed Rule

The proposed provisions addressed here warrant further discussion. The following discussion is intended to help prospective landowners understand and comply with the proposed rule.

Sections 137.15 and 137.20. These sections concern the reference of an industry standard. See the discussion in the ''ASTM Standard E 1527–05'' section in this preamble.

Section 137.25. The qualifications for an environmental professional in proposed § 137.25 are the same as those published in EPA's final rule. See 40 CFR part 312.10(b).

Section 137.30(a) and (b). We believe that basing the regulations on a set of specific objectives and overall performance factors lends clarity and flexibility to the standards. Such an approach also allows for the application

of professional judgment and expertise to account for site-specific circumstances. In many cases, one piece of documentation may provide information satisfying more than one of the statutory criteria. For example, a chain of title document is historic documentation that may also include information on environmental cleanup liens and past oil use at the facility and the real property on which the facility is located. To avoid duplication of effort, the parties undertaking all appropriate inquiries must keep in mind the primary objectives of the proposed rule, as described in proposed § 137.30(a), and the performance factors for achieving those objectives, as described in proposed § 137.30(b).

It is important to note that the determination of whether or not the all-appropriate-inquiries standard is met remains within the discretion of an adjudicator, whether a court or, in the context of a claim to the Oil Spill Liability Trust Fund, the NPFC.

Section 137.30(a)(6). This provision would require the identification of institutional controls placed on the facility and the real property on which the facility is located. Institutional controls (*e.g.*, zoning restrictions, building permits, and easements) are typically used whenever the presence of environmental contaminants including oil precludes unlimited use of the facility and the real property on which the facility is located. Thus, institutional controls may have been needed both before and after completion of a past removal action or may have been employed in place of a removal action. Because institutional controls often must remain in place for an indefinite duration and, therefore, generally need to survive ownership changes (*i.e.*, run with the land) to be legally and practically effective, they can indicate past presence of oil at the facility and the real property on which it is located.

Section 137.33. The proposed rule includes provisions addressing each of the 10 statutory criteria for the conduct of all appropriate inquiries under 33 U.S.C. 2703(d)(4)(C). The proposed rule and 33 U.S.C. 2703(d)(4)(C) require that all appropriate inquiries include an inquiry by an environmental professional. The statute, however, does not require that all of the inquiries be conducted by, or under the supervision or responsible charge of, an environmental professional. The inquiries in §§ 137.55, 137.70, 137.75, and 137.80 must be conducted by either the prospective landowner or by, or under the supervision or responsible charge of, an environmental professional. All other required inquiries (*i.e.*, those in proposed §§ 137.35(c), 137.45, 137.50, 137.60, 137.65, and 137.85) must be conducted by, or under the supervision or responsible charge of, an environmental professional.

Under 33 U.S.C. 2703(d)(4)(A), the landowner must conduct all appropriate inquiries on or before the date on which the landowner acquired the real property on which the facility is located. To most closely reflect the intent of Congress, the date on which a person received documentation transferring title or possession should be the date that the landowner acquired the real property on which the facility is located.

Section 137.33(e). The proposed rule requires prospective landowners and environmental professionals to identify data gaps that affect their ability to identify conditions indicative of the presence or likely presence of oil. While the proposed rule does not require sampling and analysis as part of the all-appropriate-inquiries investigation, sampling and analysis may be valuable in determining the presence or likely presence of oil at a facility and on the real property on which the facility is located. In addition, the fact that the all-appropriate-inquiry standards do not require sampling and analysis does not prevent a court, or in the context of a claim to the Oil Spill Liability Trust Fund the NPFC, from concluding that, under the circumstances of a particular case, sampling and analysis should have been conducted to meet ''the degree of obviousness of the presence or likely presence of oil at the facility and on the real property on which the facility is located, and the ability to detect the oil by appropriate investigation'' criterion and obtain protection from OPA 90 liability. In addition, sampling and analysis may help explain existing data gaps. Prospective landowners should be mindful of all the statutory requirements for obtaining the OPA 90 liability protections when considering whether or not to conduct sampling and analysis prior to or after acquiring the real property on which the facility is located.

Sections 137.35(c). We propose no requirements regarding the format of the written report under proposed § 137.35(c). The report may use the same format as required under ASTM E 1527–05. In addition, there are no requirements that the report be submitted to the Coast Guard or other government agency or that the written report be maintained on-site for any length of time.

The written report may allow any person claiming the innocent-landowner liability protection under OPA 90 to offer documentation in support of his or her claim that all appropriate inquiries were conducted in compliance with Federal regulations. While the proposed rule does not require parties conducting all appropriate inquiries to retain the written report or any other documentation discovered, consulted, or created in the course of conducting the inquiries, the retention of the documentation may be helpful should the owner need to assert protection from OPA 90 liability after acquiring the real property on which the facility is located. Nothing in this regulation or preamble is intended to suggest that any particular documentation prepared in conducting all appropriate inquiries will be admissible in court in any litigation where a party raises the innocent-landowner liability protection or will in any way alter the judicial rules of evidence.

Section 137.35(c)(2). This paragraph would require that the report identify data gaps in the information collected that affect the ability of the environmental professional to render the opinion. Given that the burden of potential OPA 90 liability ultimately falls upon the person specified in § 137.1(a), a prospective landowner does not have to provide the results of an inquiry or related information to the environmental professional hired to undertake other aspects of the all-appropriate-inquiries investigation. However, if the lack of this information affects the ability of the environmental professional to identify conditions that indicate the presence or likely presence of oil at the facility and the real property on which the facility is located, he or she must note the data gap in their report under § 137.35(c).

Section 137.35(d). This provision would require the environmental professional, who conducts or oversees all appropriate inquiries, to sign the written report. There are two reasons for requiring that the report be signed. First, the individual signing the report must declare, on the signature page, that he or she meets the requirements for an environmental professional in proposed § 137.25. Second, the environmental professionals must declare that all appropriate inquiries have been developed and performed according to the standards and practices in proposed part 137.

Section 137.45. The primary purpose for the interviews portion of all appropriate inquiries is to obtain information regarding the current and

past ownership, current and past uses, and the potential environmental conditions at the facility and real property on which the facility is located. All interviews must be conducted by the environmental professional or by someone under their supervision or responsible charge. The intent is that an individual meeting the requirements of an environmental professional under proposed § 137.35 must oversee the conduct of, or review and approve the results of, the interviews to ensure that the interviews are conducted in compliance with the objectives and performance factors in proposed § 137.30(a) and (b). This is to ensure that the information obtained from the interviews provides sufficient information, in conjunction with the results of all other inquiries, to allow the environmental professional to render an opinion with regard to conditions at the facility and the real property on which the facility is located that may be indicative of the presence or likely presence of oil.

The proposed rule does not prescribe particular questions that must be asked during the interview. The type and content of any questions asked during interviews would depend upon the site-specific conditions and circumstances and the extent of the knowledge of the environmental professional (or other individual under the supervision or responsible charge of the environmental professional) of the facility and the real property on which the facility is located before conducting the interviews. Interviews with current and past owners and occupants may provide opportunities to collect information that was not previously recorded nor well documented and may provide valuable perspectives on how to find or interpret information required to complete other aspects of all the appropriate inquiries.

In the case of facilities and the real properties on which they are located where there may be more than one owner or occupant, the proposed rule does not specify the number of owners and occupants to be interviewed. Instead, proposed § 137.45 requires that interviews be conducted with major occupants, as well as those occupants likely to use, store, treat, handle or dispose of oil or those who likely have done so in the past. The environmental professional may use their professional judgment to determine the specific occupants to be interviewed and the total number of occupants to be interviewed in seeking to comply with the objectives and performance factors for the inquiries. In the case of abandoned properties, it most likely will be difficult to identify or interview current or past owners and occupants of the property. Therefore, the proposed rule requires that at least one owner or occupant of a neighboring property be interviewed to obtain information regarding past owners or uses of the abandoned property.

Section 137.50. The proposed rule requires that historical records on the real property on which the facility is located be searched by the environmental professional, or by a person under their supervision or responsible charge, for information dating as far back in time as there is documentation that the real property contained structures or was placed into use of some form.

The proposed rule does allow the environmental professional to exercise his or her professional judgment in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records. We believe that this provides sufficient flexibility to allow for any circumstances where, due to the availability of other information about a real property, an environmental professional may conclude that a comprehensive search of historical records is not necessary to meet the objectives and performance factors in proposed § 137.30(a) and (b).

The proposed rule also does not require that any specific type of historic information be collected. The proposed rule allows for the environmental professional to use professional judgment when determining what types of historical documentation may provide the most useful information about a real property's ownership, uses, and potential environmental conditions when seeking to comply with the objectives and performance factors for the inquiries. In addition, nothing in the proposed rule prohibits the use of secondary sources (e.g., a previously conducted title search) when gathering information about historical ownership and usage of a real property. Information from secondary sources would also be required to be updated if it was last collected more than 180 days prior to the date of acquisition under proposed § 137.33(b)(3).

Section 137.55. Searching for recorded environmental cleanup liens is required to be conducted by either the environmental professional (or a person under their supervision or responsible charge) or by a person specified in § 137.1(a). Recorded environmental cleanup liens often provide an indication that environmental conditions either currently exist or previously existed at a facility and the real property on which the facility is located that may include the presence or likely presence of oil.

Environmental cleanup liens that are not recorded by government entities or agencies are not addressed by the language of the statute. The statute speaks only of ''recorded liens.'' Therefore, the proposed rule requires that only a search for recorded environmental liens be included in the all-appropriate-inquiries investigation.

Section 137.60. The proposed rule describes, in § 137.60(b), the types of Federal, State, tribal, and local government records or data bases of governmental records to be reviewed to obtain information on the subject facility, the real property on which the facility is located, and nearby properties necessary to meet the proposed rule's objectives and performance factors in § 137.30(a) and (b). The review of actual records is not necessary, provided that the same information contained in the government records is attainable by searching available data bases.

The proposed rule allows the environmental professional to adjust the search distances for reviewing government records of nearby properties based upon his or her professional judgment. Environmental professionals may consider one or more of the factors in § 137.60(d)(1) through (d)(7), when determining an alternative appropriate search distance. The proposed § 137.60 requires environmental professionals to document the rationale for making any modifications to the required minimum search distances.

Section 137.65. The visual on-site inspection of a facility, the real property on which the facility is located, and adjoining properties during the conduct of all appropriate inquiries may be the most important aspect of the inquiries and the primary source of information regarding environmental conditions.

In all cases, every effort must be made to conduct an on-site visual inspection of a facility and the real property on which the facility is located when conducting all appropriate inquiries. The proposed rule requires that the on-site visual inspection be conducted by an environmental professional (or by someone under their supervision or responsible charge) to achieve the objectives and performance factors in § 137.30(a) and (b).

The proposed rule requires that a visual on-site inspection be conducted in all but a few very limited cases. In those cases where physical limitations restrict the portions of the facility and the real property on which the property is located that may be visually inspected, physical limitations encountered during the visual on-site

inspection (*e.g.*, weather conditions, physical obstructions) must be documented.

We understand that, in some limited circumstances, it may not be possible to obtain on-site access to a facility and the real property on which the property is located due to extreme and prolonged weather conditions, remote locations, or refusal by the owner of the facility and the real property on which the facility is located to allow access, even after the party exercises all good faith efforts to gain access (*e.g.*, by seeking the assistance of government officials). However, the mere refusal of an owner to allow access to the facility and the real property on which the facility is located does not justify the failure to conduct an on-site inspection, where a party has failed to exercise all good faith efforts to gain access.

If on-site access is not possible despite the exercise of good faith efforts, the proposed rule requires that the facility and the real property on which the facility is located be visually inspected, or observed by another method such as through the use of aerial photography, or be inspected or observed from the nearest accessible vantage point, such as the property line or a public road that runs through or along the real property. In addition, the proposed rule requires that the all-appropriate-inquiries report include documentation of efforts undertaken to obtain on-site access to the facility and the real property on which the facility is located and include an explanation of why good faith efforts to gain access were unsuccessful.

The proposed rule also requires that the all-appropriate-inquiries investigation include visual inspections of properties that adjoin the subject real property. Visual inspections of adjoining properties may provide excellent information on the potential for the facility and the real property on which the facility is located to be affected by oil migrating from adjoining properties. Visual inspections of adjoining properties may be conducted from the real property's property line, one or more public rights-of-way, or other vantage point (e.g., by aerial photography). Where practicable, a visual on-site inspection is recommended and may provide greater specificity of information. The visual inspections of adjoining properties must include observing areas where oil currently may be, or previously may have been, stored, treated, handled, or disposed and must also be conducted to achieve the objectives and performance factors in proposed § 137.30(a) and (b) for all the appropriate inquiries. Physical limitations to the visual inspections of adjoining properties must be noted in the report.

Section 137.70. The proposed rule requires that the specialized knowledge of prospective landowners and the persons responsible for undertaking the all appropriate inquiries be taken into account when conducting the all appropriate inquiries for the purposes of identifying conditions indicative of the presence or likely presence of oil at a facility and the real property on which the facility is located to achieve the objectives and performance factors in § 137.30(a) and (b). Including the specialized knowledge of the environmental professional or a person under their supervision or responsible charge is not required.

Section 137.75. Addressing the relationship of the purchase price to the value of the facility and the real property on which the facility is located if oil was not present is required to be conducted by either the environmental professional (or a person under their supervision or responsible charge) or by a person specified in § 137.1(a). There may be many reasons that the price paid for a particular facility and the real property on which the facility is located is not an accurate reflection of the fair market value. The all-appropriate-inquiries investigation need only include a consideration of whether a significant difference between the price paid and the fair market value is an indication that oil may be at the facility and the real property on which the facility is located.

The proposed rule does not require that a real estate appraisal be conducted to achieve compliance with this requirement. The objective is not to ascertain the exact value of the facility and the real property on which the facility is located, but to determine whether or not the purchase price paid generally is reflective of its fair market value.

In the case of many real estate transactions, a formal appraisal may be conducted for other purposes (*e.g.*, to establish the value of the facility and the real property on which the facility is located for the purposes of establishing the conditions of a mortgage or to provide information of relevance where a windfall lien may be filed). In cases where the results of a formal appraisal are available, the appraisal results may serve as an excellent source of information on the fair market value of the facility and the real property on which the facility is located.

In cases where the results of a formal appraisal are not available, the determination of fair market value may be made by comparing the price paid for a particular facility and the real property on which the facility is located to prices paid for similar facilities and real properties on which they are located in the same vicinity, or by consulting a real estate expert familiar with properties in the general locality and who may be able to provide a comparability analysis.

Section 137.80. The inclusion of commonly known or reasonably ascertainable information into the inquiry is required by either the environmental professional (or a person under their supervision or responsible charge) or by a person specified in § 137.1(a) to satisfy objectives and performance factor in proposed § 137.30(a) and (b). Information about a facility and the real property on which the facility is located, including its ownership and uses, that is commonly known or reasonably ascertainable within the community or neighborhood may be valuable to identifying conditions indicative of the presence or likely presence of oil. Commonly known or reasonably ascertainable information includes information about a facility and the real property on which the facility is located that generally is known to the public within the community and can be easily sought and found from individuals familiar with the facility and the real property on which the facility is located or from easily attainable public sources of information.

This information may be ascertained from the owner or occupant of a facility and the real property on which the facility is located, members of the local community, including owners or occupants of neighboring properties, local or state government officials, local media sources, and local libraries and historical societies. In many cases, this information may be incidental to other information collected during the inquiries, and separate or distinct efforts to collect the information may not be necessary.

Section 137.85. The proposed rule requires that persons conducting all appropriate inquiries consider all the information collected during the conduct of the inquiries in totality to assess whether or not an obvious conclusion may be drawn that there are conditions indicative of the presence or likely presence of oil at the facility and the real property on which the facility is located.

We interpret the statutory criterion to require the environmental professional or a person under their supervision or responsible charge to consider information already obtained during the

conduct of all-appropriate-inquiries investigation which achieves the objectives and performance factors in § 137.30(a) and (b) and not as a requirement to collect additional information.

References

Material referenced appears in § 137.15. You may inspect this material at the National Pollution Funds Center where indicated under **ADDRESSES**. Copies of the material are available from the sources listed in § 137.15.

Regulatory Analysis and Review

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.

Draft Regulatory Evaluation

Compliance with this proposed rule is required only for those persons engaging in a commercial real estate transaction who choose to take steps necessary to protect themselves from liability should unknown oil that is the subject of a discharge or substantial threat of discharge be found at the facility after they acquire it.

The following analysis of the economic impacts associated with this proposed rule relies heavily upon the data collected and the assumptions made in the Environmental Impact Analysis of EPA's final rule, ''Economic Impact Analysis for the Final All Appropriate Inquiries Regulation,'' Docket ID No. SFUND–2004–0001 found at *http://www.regulations.gov/fdmspublic/component/main* or at EPA Docket Center, EPA West Building, room B102, 1301 Constitution Avenue, NW., Washington, DC. EPA surveyed all publicly available literature on environmental assessments of sites to determine what standard industry was customarily using. These assessments correspond to the all appropriate inquiries provision being addressed in this rulemaking and are commonly known as Phase I environmental site assessments (Phase I ESAs). EPA determined that the 2000 edition of ASTM E 1527 (*i.e.*, ASTM E 1527–00) would be their regulatory baseline. This baseline represented the ''no action'' scenario to which all regulatory alternatives were compared and their economic impacts were measured. ASTM E 1527–00 would have been applied by industry absent EPA's regulation, because this voluntary industry standard represented ''generally accepted good commercial and customary practices.'' This assumption was confirmed by the members of EPA's Negotiated Rulemaking Committee (See the ''Consultation with Other Agencies'' section of this preamble.). To further validate their assumption, EPA received no public comments on this aspect of its Economic Impact Analysis. In addition, ASTM International states that ASTM E 1527–97 (the edition referred to in the 2004 Act) is no longer available because, when a new version of a standard is released, previous versions of the standard are no longer the active industry standard. The Coast Guard, after independently contacting ASTM International, concurs that the ASTM E 1527–00 standard more accurately reflects the current market conditions than the E 1527–97 standard referenced in OPA 90 as the acceptable interim standard (33 U.S.C. 2703(d)(4)(D)(ii)). The Coast Guard therefore uses the ASTM E 1527–00 standard as its regulatory baseline for its analysis of the economic impacts associated with this proposed rule.

Historically, Phase I ESAs have been used towards providing liability protection to individuals under CERCLA. A recent survey conducted by Environmental Data Resources, Inc. (EDR) indicates that approximately 55 percent of all Phase I ESAs are driven exclusively by a need for the landowner to qualify for protection from CERCLA liability. The remaining 45 percent are driven by a desire to assess other business environmental risk concerns (*i.e.*, asbestos, lead-based paint, oil, etc.).

As previously discussed in the ''Consultation with Other Agencies'' section of this preamble, this proposed rule is consistent with EPA's final rule. The scope of EPA's rulemaking however is much larger than this proposed rule. As such, the economic impacts of this proposed rule are a subset of the impacts estimated by EPA's rulemaking. This reduction in economic impact results primarily from the lower number of Phase I ESAs expected to be conducted annually under this proposed rule compared to EPA's final rule.

As was the case with EPA's rulemaking, this proposed rule is expected to result in the following economic impacts:

(1) A reduced burden for the conduct of interviews in those cases where the facility and the real property on which the facility is located is abandoned. The new requirement requires only that neighboring property owners and occupants be interviewed and not the current owners and occupants of the abandoned property. This burden would range from no change to a decrease of 0.5 hour per Phase I ESA depending on the type and size of the facility and the real property on which the facility is located.

(2) An increased burden in those cases where past owners or occupants of the facility and the real property on which the facility is located need to be interviewed. This would involve the additional effort required to locate and interview past owners and occupants. This increased burden would range from 1 hour to 2 hours per Phase I ESA depending on the type and size of the facility and the real property on which the facility is located.

(3) An increased burden associated with documenting recorded environmental cleanup liens. This increased burden would involve additional time spent in preparing the Phase I ESA report. This increased burden would range from an additional 0.5 hour to 1 hour per Phase I ESA depending on the size and type of the facility and the real property on which the facility is located.

(4) An increased burden for documenting the reasons for the price and fair market value of a facility and the real property on which the facility is located in those cases where the purchase price paid is significantly below its fair market value. This increased burden would involve interviews with local government officials and increased time spent in preparing the Phase I ESA report. This increased burden would reflect an additional 0.5 hour per Phase I ESA for all sizes and types of facilities and the real properties on which the facilities are located.

(5) An increased burden for recording information about the degree of obviousness of the presence or likely presence of oil at a facility and the real property on which the facility is located. This increased burden would involve additional time spent in preparing the Phase I Environmental report. This increased burden would range from 0.5 hour to 1 hour per Phase I ESA depending on the type and size of the facility and the real property on which the facility is located.

Using a weighted labor rate of $51.20/hour applied to the activities (as outlined above) required as a result of their regulation (as they vary from those required in their regulatory baseline), EPA determined that there would be an incremental cost ranging from $52 to $58 per Phase I ESA (the low end estimate assumes that 15 percent of

properties are abandoned, while the high end estimate assumes that 28 percent of properties are abandoned). Our analysis simplifies this range as an average incremental cost of $55 per Phase I ESA.

A. Analysis Calculations and Results

Using data from EPA's final rule and extrapolated for the period from 2007 to 2016, there would be an average of 332,038 Phase I ESAs conducted annually. As previously mentioned, the incremental cost of conducting a Phase I ESA to comply with EPA's rulemaking above and beyond what was required under ASTM E 1527–00 as calculated by EPA's rulemaking would be approximately $55 per ESA.

B. Estimated Annual Number of OPA 90-Related Phase I ESAs

This analysis is severely limited by the lack of data available which would allow the number of Phase I ESAs conducted applicable to this proposed rule to be segregated from the total population of Phase I ESAs conducted.

In order to put an upward bound on the costs associated with this proposed rule, this analysis first describes the absolute upper bound scenario (*i.e.*, that all commercial real estate transactions not exclusively conducted for CERCLA liability protection requiring a Phase I ESA would be impacted by this proposed rule). Next the Coast Guard attempts to develop a more likely scenario that takes into account that Phase I ESAs for certain commercial real estate transactions are outside the scope of this proposed rule. We acknowledge that, of all of the commercial real estate transactions that occur annually, a likely small percentage would involve—

1. A facility and the real property on which the facility is located where a discharge or substantial threat of discharge of oil may impact the navigable waters or exclusive economic zone of the United States; and

2. A Phase I ESA that was conducted for establishment of the innocent landowner liability protection provision under OPA 90 and not to assess environmental risk concerns not related to oil (*e.g.*, lead-based paint contamination, asbestos, CERCLA hazardous substances, etc.).

C. Upper Bound Cost Scenario

The estimated incremental cost of this scenario, where all future Phase I ESAs not conducted specifically for CERCLA liability protection (*i.e.*, 45 percent as per the results of EDR's survey mentioned above) are impacted by this proposed rule, would be approximately $8.2 Million per year.

Cost Calculation 1—Estimated Annual Number of Coast Guard related Phase I ESAs

332,038 Phase I ESAs × 0.45 = 149,417 Phase I ESAs

Estimated Annual Cost of Coast Guard related Phase I ESAs

149,417 Phase I ESAs × $55/ESA = $8,217,935 per year.

D. Most Likely Cost Scenario

To more accurately reflect the scope of this proposed rule, certain commercial real estate transactions involving a Phase I ESA from EPA's analysis would have to be removed from this analysis. Those include transactions where a discharge or substantial threat of discharge of oil from a facility and the real property on which the facility is located would not have the possibility of impacting the navigable waters or exclusive economic zone of the United States and transactions which are conducted for substances other than oil. Absent the data to make more than an approximation, we assumed that five percent of the total number of Phase I ESAs may realistically reflect the number of Phase I ESAs within the scope of this proposed rule. Under this assumption, the estimated cost associated with this proposed rule would be significantly reduced. The estimated incremental cost under this scenario is approximately $913,110 per year.

Cost Calculation 2—Estimated Annual Number of Coast Guard related Phase I ESAs

332,038 Phase I ESAs × 0.05 = 16,602 Phase I ESAs

Estimated Annual Cost of Coast Guard related Phase I ESAs

16,602 Phase I ESAs × $55/ESA = $913,110 per year.

ASTM International has since updated their ASTM E 1527 standard. Their new standard is ASTM E 1527–05. Both EPA and Coast Guard recognize that this new standard is consistent with their rulemakings on the subject. See **Federal Register** (70 FR 66081). Because the new standard is consistent with the EPA final rule, which went into effect on November 1, 2006, and provides documentation for both hazardous substances and oil, it is likely that all prudent prospective commercial landowners will be using the more rigorous ASTM standard for their real estate transactions well before our rule becomes effective. Thus, the possible economic impact attributed to this proposed rule might be reduced to a negligible value. The Coast Guard further notes that there have been no instances to date where a responsible party has attempted to use the interim innocent-landowner defense to liability provision under OPA 90.

EPA qualitatively assessed the benefits for their final rule. Of these benefits, only one is applicable to our proposed rule due to our much smaller regulatory scope, namely the increased level of certainty with regard to OPA 90 liability provided to prospective owners of facilities and the real properties on which they are located with potential oil discharges. The Coast Guard, as was the case with EPA's analysis, is not able to quantify, with any significant level of confidence, the exact proportion of benefits associated with the proposed rule. For these reasons, the costs and benefits can not be directly compared. However, because complying with this proposed rule is required only for those persons who choose to take steps necessary to protect themselves from liability should unknown oil that is the subject of a discharge or substantial threat of discharge be found at the facility after they acquire it, it can be assumed that persons would only do so if the potential benefits to them associated with this protection from liability outweigh their costs of compliance.

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.

As previously stated in the above regulatory evaluation section, compliance with this proposed rule is only required for those entities, regardless of their operations, involved in a real estate transaction who choose to take steps necessary to protect themselves from liability should unknown oil that is the subject of a discharge or substantial threat of discharge be found at the facility after they acquire it. Therefore, it assumed that entities across all industries, as defined by the North American Industry Classification System (NAICS), could potentially be affected.

The Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act of 1996 require Federal agencies to measure the regulatory impacts of the rule to determine whether there will be a significant economic impact on a substantial

number of small entities. Entities, however, may operate at multiple physical locations. For example, most family-owned restaurants operate at a single location, while chain restaurants have multiple locations. Thus, the annual number of transactions per entity, and therefore the demand for Phase I ESAs, is a function of the number of establishments an entity owns.

According to 2001 U.S. Census data, the distribution of establishments by entity size of the regulated community is as follows:

Less than 100 employees: 81%.
100 to 499 employees: 5%.
500 to 1,499 employees: 2%.
1,500 employees or more: 12%.

According to EPA's Office of Policy, Economics, and Innovations and EPA's National Center for Environmental Economics, it is a common practice when a proposed regulation has the potential of affecting all industries to consider all entities with less than 500 employees as small. According to 2001 U.S. Census data, when small entities are defined as entities with less than 500 employees, small entities own 86 percent of all establishments. Using EPA's assumption that small entities are equally likely to engage in commercial real estate transactions as large ones, we estimate that 86 percent of all commercial real estate transactions completed annually involve small entities. Applying this 86 percent to the ''Most Likely Cost Scenario'' and the ''Upper Bound Cost Scenario'' (See ''Regulatory Evaluation'' in this preamble.) provides a range in the number of potential transactions occurring annually of between 14,278 and 128,499.

Based on 2001 Census Bureau data, the average annual revenue per employee for an entity is approximately $24,000. Therefore, even for a small entity receiving the minimum average annual revenue of $24,000 that makes one transaction a year (a very conservative assumption), the annual cost impact of $55 would represent only 0.23 percent of annual revenues.

Therefore, 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. 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 to the Docket Management Facility at the address under **ADDRESSES**. In your comment, explain 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 consult Benjamin White, National Pollution Funds Center, Coast Guard, telephone 202–493–6863. 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.

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 proposed rule would call for a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). As defined in 5 CFR 1320.3(c), ''collection of information'' comprises reporting, recordkeeping, monitoring, posting, labeling, and other, similar actions. The title and description of the information collections, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

Title: Landowner Defenses to Liability under the Oil Pollution Act of 1990: Standards and Practices for Conducting All Appropriate Inquiries.

Summary of the Collection of Information: For landowners choosing to avail themselves of the innocent-landowner defense, they or their environmental professionals must conduct the all appropriate inquiries specified in the proposed rule. Depending upon the particular case, this may involve interviews, research, and reports.

Need for Information: This proposed rule is needed to assist prospective landowners in establishing the innocent-landowner defense.

Proposed Use of Information: The information could be used by persons if their liability under OPA 90 for the discharge or substantial threat of discharge of oil were challenged in a court.

Description of the Respondents: The respondents include anyone engaging in a commercial real estate transaction that may desire to assert an innocent landowner defense to liability under OPA 90.

Number of Respondents: We estimate that there would be 16,602 respondents. This is based on an estimate made in the ''Draft Regulatory Evaluation'' section of this preamble.

Frequency of Response: 1 hour per response.

Burden of Response: $67 per response.

Estimate of Total Annual Burden: 16,602 respondents × 1 hour per response × $67 per response = $1,112,334.

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), we have submitted a copy of this proposed rule to the Office of Management and Budget (OMB) for its review of the collection of information.

We ask for public comment on the proposed collection of information to help us determine how useful the information is; whether it is readily available elsewhere; how accurate our estimate of the burden of collection is; how valid our methods for determining burden are; how we can improve the quality, usefulness, and clarity of the information; and how we can minimize the burden of collection.

If you submit comments on the collection of information, submit them both to OMB and to the Docket Management Facility where indicated under **ADDRESSES**, by the date under **DATES**.

You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the requirements for this collection of information become effective, we will publish notice in the **Federal Register** of OMB's decision to approve, modify, or disapprove the collection.

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 references the following voluntary consensus standard: ASTM E 1527–05, ''Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.'' The proposed section that references this standard and the location where this standard is available is listed in proposed § 137.15. Persons conducting all appropriate inquiries may use the procedures included in the ASTM E 1527–05 standard to comply with this proposed rule.

Environment

We have analyzed this proposed 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 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)(a), of the Instruction, from further environmental documentation. This proposed rule concerns the making of inquiries into the previous ownership and uses of facilities and the real property on which they are located, before they are acquired, to determine the presence or likely presence of oil. It has no effect on the environment.

A preliminary ''Environmental Analysis Check List'' is available in the docket where indicated under the ''Public Participation and Request for Comments'' section of this preamble. 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 137

Environmental protection, Administrative practice and procedure, Petroleum, Intergovernmental relations, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Coast Guard proposes to add 33 CFR part 137 as follows:

1. Add part 137 to read as follows:

PART 137—OIL SPILL LIABILITY: STANDARDS FOR CONDUCTING ALL APPROPRIATE INQUIRIES UNDER THE INNOCENT LAND-OWNER DEFENSE

Subpart A—Introduction

Sec.

137.1 Purpose and applicability.
137.5 Disclosure obligations.
137.10 How are terms used in this part defined?
137.15 References: Where can I get a copy of the publications mentioned in this part?

Subpart B—Standards and Practices

137.18 Duties of persons specified in § 137.1(a).
137.20 May voluntary industry standards be used to comply with this regulation?
137.25 Qualifications of the Environmental Professional.
137.30 Objectives and performance factors.
137.33 General All Appropriate Inquiries requirements.
137.35 Inquiries by an environmental professional.
137.40 Additional inquiries.
137.45 Interviews with past and present owners, operators, and occupants.
137.50 Reviews of historical sources of information.
137.55 Searches for recorded environmental cleanup liens.
137.60 Reviews of Federal, State, tribal and local government records.
137.65 Visual inspections of the facility, the real property on which the facility is located, and adjoining properties.
137.70 Specialized knowledge or experience on the part of persons specified in § 137.1(a).
137.75 The relationship of the purchase price to the value of the facility and the real property on which the facility is located, if oil was not at the facility or on the real property.
137.80 Commonly known or reasonably ascertainable information about the

facility and the real property on which the facility is located.

137.85 The degree of obviousness of the presence or likely presence of oil at the facility and the real property on which the facility is located and the ability to detect the oil by appropriate investigation.

Authority: 33 U.S.C. 2703(d)(4); Department of Homeland Security Delegation No. 14000.

Subpart A—Introduction

§ 137.1 Purpose and applicability.

(a) In general under the Oil Pollution Act of 1990 (33 U.S.C. 2701, *et seq.*), an owner or operator of a facility (as defined in § 137.10) that is the source of a discharge, or a substantial threat of discharge, of oil into the navigable waters or adjoining shorelines or the exclusive economic zone is liable for damages and removal costs resulting from the discharge or threat. However, if that person can demonstrate, among other criteria not addressed in this part, that they did not know and had no reason to know at the time of their acquisition of the real property on which the facility is located that oil was located on, in, or at the facility, the person may be eligible for the innocent landowner defense to liability under 33 U.S.C. 2703(d)(4). One element of the defense is that the person made all appropriate inquiries into the nature of the real property on which the facility is located before acquiring it. The purpose of this part is to prescribe standards and practices for making those inquiries.

(b) Under 33 U.S.C. 2703(d)(4)(E), this part does not apply to real property purchased by a non-governmental entity or non-commercial entity for residential use or other similar uses where a property inspection and a title search reveal no basis for further investigation. In those cases, the property inspection and title search satisfy the requirements of this part.

(c) This part does not affect the existing OPA 90 liability protections for State and local governments that acquire a property involuntarily in their functions as sovereigns under 33 U.S.C. 2703(d)(2)(B). Involuntary acquisition of properties by State and local governments fall under the provisions of 33 U.S.C. 2703(d)(2)(B), not under the all-appropriate-inquiries provision of 33 U.S.C. 2703(d)(4) and this part.

§ 137.5 Disclosure obligations.

(a) Under 33 U.S.C. 2703(c)(1), persons specified in § 137.1(a), including environmental professionals, must report the incident as required by law if they know or have reason to know of the incident.

(b) This part does not limit or expand disclosure obligations under any Federal, State, tribal, or local law. It is the obligation of each person, including environmental professionals, conducting inquiries to determine his or her respective disclosure obligations under Federal, State, tribal, and local law and to comply with them.

§ 137.10 How are terms used in this part defined?

(a) The following terms have the same definitions as in 33 U.S.C. 2701: ''damages;'' ''discharge;'' ''incident;'' ''liable'' or ''liability;'' ''oil;'' ''owner or operator;'' and ''removal costs.''

(b) As used in this part—

Abandoned property means a property that, because of its general disrepair or lack of activity, a reasonable person could believe that there is an intent on the part of the current owners to surrender their rights to the property.

Adjoining property means real property the border of which is shared in part or in whole with that of the subject property or that would be shared in part or in whole with that of the property but for a street, road, or other public thoroughfare separating the properties.

Data gap means a lack of, or inability to, obtain information required by subpart B of this part despite good faith efforts by the environmental professional or persons specified in § 137.1(a), as appropriate, to gather the information under § 137.33.

Environmental professional means an individual who meets the requirements of § 137.25.

Facility means any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: Exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes.

Good faith means the absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations in the conduct or transaction concerned.

Institutional controls means non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to oil discharge and/or protect the integrity of a removal action.

Relevant experience means participation in the performance of all-appropriate-inquiries investigations, environmental site assessments, or other site investigations that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of the presence or likely presence of oil at the facility and the real property on which the facility is located.

§ 137.15 References: Where can I get a copy of the publications mentioned in this part?

Section 137.20 of this part refers to ASTM E 1527–05, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process. That document is available from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959. It is also available for inspection at the Coast Guard National Pollution Funds Center, 4200 Wilson Boulevard, Suite 1013, Arlington, VA 22203–1804.

Subpart B—Standards and Practices

§ 137.18 Duties of persons specified in § 137.1(a).

In order to make all appropriate inquiries, persons seeking to establish the liability protection under § 137.1(a) must conduct the inquiries and investigations as required in this part and ensure that the inquiries and investigations required to be made by environmental professionals are made.

§ 137.20 May voluntary industry standards be used to comply with this regulation?

The industry standards in ASTM E 1527–05, (Referenced in § 137.15) may be used to comply with the requirements set forth in §§ 137.45 through 137.85 of this part.

§ 137.25 Qualifications of the environmental professional.

(a) An environmental professional is an individual who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of the presence or likely presence of oil at a facility and the real property on which the facility is located sufficient to meet the objectives and performance factors in § 137.30(a) and (b).

(1) Such a person must—

(i) Hold a current Professional Engineer's or Professional Geologist's license or registration from a State, tribe, or U.S. territory (or the Commonwealth

of Puerto Rico) and have the equivalent of 3 years of full-time relevant experience;

(ii) Be licensed or certified by the Federal government, a State, tribe, or U.S. territory (or the Commonwealth of Puerto Rico) to perform environmental inquiries under § 137.35 and have the equivalent of 3 years of full-time relevant experience;

(iii) Have a Baccalaureate or higher degree from an accredited institution of higher education in a discipline of engineering or science and the equivalent of 5 years of full-time relevant experience; or

(iv) Have the equivalent of 10 years of full-time relevant experience.

(2) An environmental professional should remain current in his or her field through participation in continuing education or other activities.

(3) The requirements for an environmental professional in this section do not preempt State professional licensing or registration requirements, such as those for a professional geologist, engineer, or site-remediation professional. Before commencing work, a person should determine the applicability of State professional licensing or registration laws to the activities to be undertaken as part of an inquiry under § 137.35(b).

(4) A person who does not qualify as an environmental professional under this section may assist in the conduct of all appropriate inquiries according to this part if the person is under the supervision or responsible charge of an environmental professional meeting the requirements of this section when conducting the inquiries.

§ 137.30 Objectives and performance factors.

(a) *Objectives.* This part is intended to result in the identification of conditions indicative of the presence or likely presence of oil at the facility and the real property on which the facility is located. In order to meet the objectives of this regulation, persons specified in § 137.1(a) and the environmental professional must seek to identify, through the conduct of the standards and practices in this subpart, the following types of information about the facility and the real property on which the facility is located:

(1) Current and past uses and occupancies of the facility and the real property on which the facility is located.

(2) Current and past uses of oil.

(3) Waste management and disposal activities that indicate presence or likely presence of oil.

(4) Current and past corrective actions and response activities that indicate presence or likely presence of oil.

(5) Engineering controls.

(6) Institutional controls, such as zoning restrictions, building permits, and easements.

(7) Properties adjoining or located nearby the facility and the real property on which the facility is located that have environmental conditions that could have resulted in conditions indicative of the presence or likely presence of oil at the facility and the real property on which the facility is located.

(b) *Performance factors.* In order to meet this part and to meet the objectives stated in paragraph (a) of this section, the persons specified in § 137.1(a) or the environmental professional (as appropriate to the particular standard and practice) must—

(1) Gather the information that is required for each standard and practice listed in this subpart that is publicly available, is obtainable from its source within a reasonable time and cost, and can be reviewed practicably; and

(2) Review and evaluate the thoroughness and reliability of the information gathered in complying with each standard and practice listed in this subpart taking into account information gathered in the course of complying with the other standards and practices of this part.

§ 137.33 General all appropriate inquiries requirements.

(a) All appropriate inquiries must be conducted within 1 year before the date of acquisition of the real property on which the facility is located, as evidenced by the date of receipt of the documentation transferring title to, or possession of, the real property and must include:

(1) An inquiry by an environmental professional, as provided in § 137.35.

(2) The collection of information under § 137.40 by persons specified in § 137.1(a).

(b) The following components of the all appropriate inquiries must be conducted or updated within 180 days before the date of acquisition of the real property on which the facility is located:

(1) Interviews with past and present owners, operators, and occupants. See § 137.45.

(2) Searches for recorded environmental cleanup liens. See § 137.55.

(3) Reviews of Federal, State, tribal, and local government records. See § 137.60.

(4) Visual inspections of the facility, the real property on which the facility is located, and adjoining properties. See § 137.65.

(5) The declaration by the environmental professional. See § 137.35(d).

(c) All appropriate inquiries may include the results of and information contained in an inquiry previously conducted by, or on behalf of, persons specified in § 137.1(a) who are responsible for the inquiries for the facility and the real property on which the facility is located if—

(1) The information was collected during the conduct of an all-appropriate-inquiries investigation under this part.

(2) The information was collected or updated within 1 year before the date of acquisition of the real property on which the facility is located.

(3) The following components of the inquiries were conducted or updated within 180 days before the date of acquisition of the real property on which the facility is located:

(i) Interviews with past and present owners, operators, and occupants. See § 137.45.

(ii) Searches for recorded environmental cleanup liens. See § 137.55.

(iii) Reviews of Federal, State, tribal, and local government records. See § 137.60.

(iv) Visual inspections of the facility, the real property on which the facility is located, and the adjoining properties. See § 137.65.

(v) The declaration by the environmental professional. See § 137.35(d).

(4) Previously collected information is updated by including relevant changes in the conditions of the facility and the real property on which the facility is located and specialized knowledge, as outlined in § 137.70, of the persons conducting the all appropriate inquiries for the facility and the real property on which the facility is located, including persons specified in § 137.1(a) and the environmental professional.

(d) All appropriate inquiries may include the results of an environmental professional's report under § 137.35(c) that have been prepared by or for other persons if—

(1) The reports meet the objectives and performance factors in § 137.30(a) and (b); and

(2) The person specified in § 137.1(a) reviews the information and conducts the additional inquiries under §§ 137.70, 137.75, and 137.80 and updates the inquiries requiring an update under paragraph (b) of this section.

(e) To the extent there are data gaps that affect the ability of persons specified in § 137.1(a) and environmental professionals to identify conditions indicative of the presence or likely presence of oil, the gaps must be identified in the report under § 137.35(c)(2). In addition, the sources of information consulted to address data gaps should be identified and the significance of the gaps noted. Sampling and analysis may be conducted to develop information to address data gaps.

(f) Any conditions indicative of the presence or likely presence of oil identified as part of the all-appropriate-inquiries investigation should be noted in the report.

§ 137.35 Inquiries by an environmental professional.

(a) Inquiries by an environmental professional must be conducted either by the environmental professional or by a person under the supervision or responsible charge of an environmental professional.

(b) The inquiry of the environmental professional must include the requirements in §§ 137.45 (interviews with past and present owners), 137.50 (reviews of historical sources), 137.60 (reviews of government records), 137.65 (visual inspections), 137.80 (commonly known or reasonably ascertainable information) and 137.85 (degree of obviousness of the presence or likely presence of oil). In addition, the inquiry should take into account information provided to the environmental professional by the person specified in § 137.1(a) conducting the additional inquiries under § 137.40.

(c) The results of the inquiry by an environmental professional must be documented in a written report that, at a minimum, includes the following:

(1) An opinion as to whether the inquiry has identified conditions indicative of the presence or likely presence of oil at the facility and the real property on which the facility is located.

(2) An identification of data gaps in the information developed as part of the inquiry that affect the ability of the environmental professional to identify conditions indicative of the presence or likely presence of oil at the facility and the real property on which the facility is located. The report must also indicate whether the gaps prevented the environmental professional from reaching an opinion regarding the identification of conditions indicative of the presence or likely presence of oil.

(3) The qualifications of the environmental professional.

(4) An opinion regarding whether additional appropriate investigation is necessary.

(d) The environmental professional must place the following statements in the written document identified in paragraph (c) of this section and sign the document: ''[I, We] declare that, to the best of [my, our] professional knowledge, [I, we] meet the requirements under 33 CFR 137.25 for an environmental professional.'' and ''[I, We] have the specific qualifications based on education, training, and experience to assess the nature, history, and setting of a facility and the real property on which it is located. [I, We] have developed and conducted all appropriate inquiries according to the standards and practices in 33 CFR part 137.''

§ 137.40 Additional inquiries.

(a) Persons specified in § 137.1(a) must conduct inquiries in addition to those conducted by the environmental professional under § 137.35 and may provide the information associated with these additional inquiries to the environmental professional responsible for conducting the activities listed in § 137.35—

(1) As required by § 137.55 and if not otherwise obtained by the environmental professional, environmental cleanup liens against the facility and the real property on which it is located that are filed or recorded under Federal, State, tribal, or local law.

(2) As required by § 137.70, specialized knowledge or experience of the person specified in § 137.1(a).

(3) As required by § 137.75, the relationship of the purchase price to the fair market value of the facility and the real property on which the facility is located if the oil was not at the facility and the real property on which it is located.

(4) As required by § 137.80 and if not otherwise obtained by the environmental professional, commonly known or reasonably ascertainable information about the facility and the real property on which it is located.

§ 137.45 Interviews with past and present owners, operators, and occupants.

(a) Interviews with owners, operators, and occupants of the facility and the real property on which the facility is located must be conducted for the purposes of achieving the objectives and performance factors of § 137.30(a) and (b).

(b) The inquiry of the environmental professional must include interviewing the current owner and occupant of the facility and the real property on which the facility is located. If the facility and the real property on which the facility is located has multiple occupants, the inquiry of the environmental professional must include interviewing major occupants, as well as those occupants likely to use, store, treat, handle or dispose of oil or those who have likely done so in the past.

(c) The inquiry of the environmental professional also must include, to the extent necessary to achieve the objectives and performance factors in § 137.30(a) and (b), interviewing one or more of the following persons:

(1) Current and past facility and real property managers with relevant knowledge of uses and physical characteristics of the facility and the real property on which the facility is located.

(2) Past owners, occupants, or operators of the facility and the real property on which the facility is located.

(3) Employees of current and past occupants of the facility and the real property on which the facility is located.

(d) In the case of inquiries conducted at abandoned properties where there is evidence of potential unauthorized uses or evidence of uncontrolled access, the environmental professional's inquiry must include an interview of at least one owner or occupant of a neighboring property from which it appears possible that the owner or occupant of the neighboring property could have observed use or other presence or likely presence of oil.

§ 137.50 Reviews of historical sources of information.

(a) Historical documents and records must be reviewed for the purposes of achieving the objectives and performance factors of § 137.30(a) and (b). Historical documents and records may include, but are not limited to, aerial photographs, fire insurance maps, building department records, chain of title documents, and land use records.

(b) Historical documents and records reviewed must cover a period of time as far back in the history of the real property to when the first structure was built or when it was first used for residential, agricultural, commercial, industrial, or governmental purposes. The environmental professional may exercise professional judgment in context of the facts available at the time of the inquiry as to how far back in time it is necessary to search historical records.

§ 137.55 Searches for recorded environmental cleanup liens.

(a) All appropriate inquiries must include a search for the existence of environmental cleanup liens against the facility and the real property on which the facility is located that are filed or recorded under Federal, State, tribal, or local law.

(b) All information collected by persons specified in § 137.1(a) rather than an environmental professional regarding the existence of environmental cleanup liens associated with the facility and the real property on which the facility is located may be provided to the environmental professional or retained by the applicable party.

§ 137.60 Reviews of Federal, State, tribal, and local government records.

(a) Federal, State, tribal, and local government records or data bases of government records of the facility, the real property on which the facility is located, and adjoining properties must be reviewed for the purposes of achieving the objectives and performance factors of § 137.30(a) and (b).

(b) With regard to the facility and the property on which the facility is located, the review of Federal, State, and tribal government records or data bases of the government records and local government records and data bases of the records should include—

(1) Records of reported oil discharges present, including site investigation reports for the facility and the real property on which the facility is located;

(2) Records of activities, conditions, or incidents likely to cause or contribute to discharges or substantial threat of discharges of oil, including landfill and other disposal unit location records and permits, storage tank records and permits, hazardous waste handler and generator records and permits, federal, tribal and state government listings of sites identified as priority cleanup sites, and spill reporting records;

(3) Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) records;

(4) Public health records;

(5) Emergency Response Notification System records;

(6) Registries or publicly available lists of engineering controls; and

(7) Registries or publicly available lists of institutional controls, including environmental land use restrictions, applicable to the facility and the real property on which the facility is located.

(c) With regard to nearby or adjoining properties, the review of Federal, State, tribal, and local government records or databases of government records should include the identification of the following:

(1) Properties for which there are government records of reported discharges or substantial threat of discharges of oil. Such records or databases containing such records and the associated distances from the facility and the real property on which the facility is located for which such information should be searched include the following:

(i) Records of National Priorities List (NPL) sites or tribal- and state-equivalent sites (one mile).

(ii) Resource Conservation and Recovery Act (RCRA) properties subject to corrective action (one mile).

(iii) Records of Federally-registered, or State-permitted or registered, hazardous waste sites identified for investigation or remediation, such as sites enrolled in State and tribal voluntary cleanup programs and tribal- and State-listed brownfield sites (one-half mile).

(iv) Records of leaking underground storage tanks (one-half mile).

(2) Properties that previously were identified or regulated by a government entity due to environmental concerns at the facility and the real property on which the facility is located. The records or databases containing the records and the associated distances from the facility and the real property on which the facility is located for which the information should be searched include the following:

(i) Records of delisted NPL sites (one-half mile).

(ii) Registries or publicly available lists of engineering controls (one-half mile).

(iii) Records of former CERCLIS sites with no further remedial action notices (one-half mile).

(3) Properties for which there are records of Federally-permitted, State-permitted or -registered, or tribal-permitted or -registered waste management activities. The records or data bases that may contain the records include the following:

(i) Records of RCRA small quantity and large quantity generators (adjoining properties).

(ii) Records of Federally-permitted, State-permitted or -registered, or tribal-permitted landfills and solid waste management facilities (one-half mile).

(iii) Records of registered storage tanks (adjoining property).

(4) A review of additional government records with regard to sites identified under paragraphs (c)(1) through (c)(3) of this section may be necessary in the judgment of the environmental professional for the purpose of achieving the objectives and performance factors of §§ 137.30 (a) and (b).

(d) The search distance from the real property boundary for reviewing government records or databases of government records listed in paragraph (c) of this section may be modified based upon the professional judgment of the environmental professional. The rationale for the modifications must be documented by the environmental professional. The environmental professional may consider one or more of the following factors in determining an alternate appropriate search distance—

(1) The nature and extent of a discharge.

(2) Geologic, hydrogeologic, or topographic conditions of the property and surrounding environment.

(3) Land use or development densities.

(4) The property type.

(5) Existing or past uses of surrounding properties.

(6) Potential migration pathways (*e.g.*, groundwater flow direction, prevalent wind direction).

(7) Other relevant factors.

§ 137.65 Visual inspections of the facility, real property on which the facility is located, and adjoining properties.

(a) For the purpose of achieving the objectives and performance factors of § 137.30(a) and (b), the inquiry of the environmental professional must include the following:

(1) A visual on-site inspection of the facility and the real property on which the facility is located, and the improvements at the facility and real property, including a visual inspection of the areas where oil may be or may have been used, stored, treated, handled, or disposed. Physical limitations to the visual inspection must be noted.

(2) A visual inspection of adjoining properties, from the subject real property line, public rights-of-way, or other vantage point (*e.g.*, aerial photography), including a visual inspection of areas where oil may be or may have been stored, treated, handled or disposed. A visual on-site inspection is recommended, though not required. Physical limitations to the inspection of adjacent properties must be noted.

(b) Except as in paragraph (c) of this section, a visual on-site inspection of the facility and the real property on which the facility is located must be conducted.

(c) An on-site inspection is not required if an on-site visual inspection

of the facility and the real property on which the facility is located cannot be performed because of physical limitations, remote and inaccessible location, or other inability to obtain access to the facility and the real property on which the facility is located after good faith efforts have been taken to obtain access. The mere refusal of a voluntary seller to provide access to the facility and the real property on which the facility is located is not justification for not conducting an on-site inspection. The inquiry of the environmental professional must include—

(1) Visually inspecting the facility and the real property on which the facility is located using another method, such as aerial imagery for large properties, or visually inspecting the facility and the real property on which the facility is located from the nearest accessible vantage point, such as the property line or public road for small properties;

(2) Documenting the efforts undertaken to obtain access and an explanation of why such efforts were unsuccessful; and

(3) Documenting other sources of information regarding the presence or likely presence of oil at the facility and the real property on which the facility is located that were consulted according to § 137.30(a). The documentation should include comments, if any, by the environmental professional on the significance of the failure to conduct a visual on-site inspection of the facility and the real property on which the facility is located with regard to the ability to identify conditions indicative of the presence or likely presence of oil at the facility and the real property.

§ 137.70 Specialized knowledge or experience on the part of persons specified in § 137.1(a).

(a) For the purpose of identifying conditions indicative of the presence or likely presence of oil at the facility and the real property on which the facility is located, persons specified in § 137.1(a) must take into account their own specialized knowledge of the facility and the real property on which the facility is located, the area surrounding the facility and the real property on which the facility is located, and the conditions of adjoining properties and their experience relevant to the inquiry.

(b) The results of all appropriate inquiries under § 137.33 must take into account the relevant and applicable specialized knowledge and experience of the persons specified in § 137.1(a) responsible for undertaking the inquiry.

§ 137.75 The relationship of the purchase price to the value of the facility and the real property on which the facility is located, if oil was not at the facility or on the real property.

(a) Persons specified in § 137.1(a) must consider whether the purchase price of the facility and the real property on which the facility is located reasonably reflects the fair market value of the facility and real property if oil was not present or likely present.

(b) If the persons conclude that the purchase price does not reasonably reflect the fair market value of that facility and real property if oil was not at the facility and the real property, they must consider whether or not the differential in purchase price and fair market value is due to the presence or likely presence of oil.

§ 137.80 Commonly known or reasonably ascertainable information about the facility and the real property on which the facility is located.

(a) Throughout the inquiries, persons specified in § 137.1(a) and environmental professionals conducting the inquiry must take into account commonly known or reasonably ascertainable information within the local community about the facility and the real property on which the facility is located and consider that information when seeking to identify conditions indicative of the presence or likely presence of oil at the facility and the real property.

(b) Commonly known information may include information obtained by the person specified in § 137.1(a) or by the environmental professional about the presence or likely presence of oil at the facility and the real property on which the facility is located that is incidental to the information obtained during the inquiry of the environmental professional.

(c) To the extent necessary to achieve the objectives and performance factors of § 137.30(a) and (b), the person specified in § 137.1(a) and the environmental professional must gather information from varied sources whose input either individually or taken together may provide commonly known or reasonably ascertainable information about the facility and the real property on which the facility is located; the environmental professional may refer to one or more of the following sources of information:

(1) Current owners or occupants of neighboring properties or properties adjacent to the facility and the real property on which the facility is located.

(2) Local and state government officials who may have knowledge of, or information related to, the facility and the real property on which the facility is located.

(3) Others with knowledge of the facility and the real property on which the facility is located.

(4) Other sources of information, such as newspapers, Web sites, community organizations, local libraries, and historical societies.

§ 137.85 The degree of obviousness of the presence or likely presence of oil at the facility and the real property on which the facility is located and the ability to detect the oil by appropriate investigation.

(a) Persons specified in § 137.1(a) and environmental professionals conducting an inquiry of a facility and the real property on which it is located on their behalf must take into account the information collected under §§ 137.45 through 137.80 in considering the degree of obviousness of the presence or likely presence of oil at the facility and the real property on which the facility is located.

(b) Persons specified in § 137.1(a) and environmental professionals conducting an inquiry of a facility and the property on which the facility is located on their behalf must take into account the information collected under §§ 137.45 through 137.80 in considering the ability to detect the presence or likely presence of oil by appropriate investigation. The report of the environmental professional should include an opinion under § 137.35(c)(4) regarding whether additional appropriate investigation is necessary.

Dated: May 29, 2007.

Thad W. Allen,

Admiral, Commandant, United States Coast Guard.

[FR Doc. E7–11110 Filed 6–11–07; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2007–0001; FRL–8326–4]

Redesignation of the Toledo, Ohio Area to Attainment for the 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Ohio Environmental Protection Agency (Ohio EPA) submitted a request on December 22, 2006, and supplemented it on March 9, 2007, for redesignation of the Toledo, Ohio area which includes Lucas and

Wood Counties to attainment for the 8-hour ozone standard. EPA is proposing to approve several elements associated with of this request. First, EPA is making a determination that complete, quality-assured ambient air quality data indicate that the Toledo area has attained the 8-hour ozone standard. Second, EPA is proposing to approve, as revisions to the Ohio State Implementation Plan (SIP), the State's plans for maintaining the 8-hour ozone NAAQS through 2018. Third, EPA is proposing to redesignate the Toledo area to attainment for the 8-hour ozone standard, based on a finding that the requirements for this redesignation have been satisfied. Fourth, EPA finds adequate and is proposing to approve the State's 2009 and 2018 Motor Vehicle Emission Budgets (MVEBs) for the Toledo area.

DATES: Comments must be received on or before July 12, 2007.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2007–0001, by one of the following methods:

- *http://www.regulations.gov/*. Follow the on-line instructions for submitting comments.
- *E-mail: mooney.john@epa.gov.*
- *Fax:* (312) 886–5824.
- *Mail:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch, (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
- *Hand delivery:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch, (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, 18th floor, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2007–0001. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *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 *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site 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 *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public 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. For additional instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.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 in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. We recommend that you telephone Michael Leslie, Environmental Engineer, at (312) 353–6680 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Michael Leslie, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–6680, *leslie.michael@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

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I. What Should I Consider as I Prepare My Comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

2. Follow directions—The EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

4. Describe any assumptions and provide any technical information and/or data that you used.

5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns, and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

II. What Actions Is EPA Proposing To Take?

EPA is proposing to take several related actions. EPA is proposing to determine that the Toledo nonattainment area has attained the 8-hour ozone standard. EPA is also proposing to approve Ohio's maintenance plan SIP revision for the Toledo area. The maintenance plan is designed to keep the Toledo nonattainment area in attainment of the ozone NAAQS through 2018. EPA is proposing that the Toledo area has met the requirements for redesignation under Section 107(d)(3)(E) of the Clean Air Act (CAA). EPA is thus proposing to approve Ohio's request to change the legal determination of Toledo area from nonattainment to attainment for the 8-hour ozone National Ambient Air Quality Standard (NAAQS). Finally, EPA is announcing its action on the Adequacy Process for the newly established 2009 and 2018 MVEBs for

the area. The adequacy comment period for the 2009 and 2018 MVEBs began on March 6, 2007, with EPA's posting of the availability of these submittals on EPA's Adequacy Web site (*http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm*). The adequacy comment period for these MVEBs ended on April 5, 2007. EPA did not receive any requests for these submittals or adverse comments on these submittals during the adequacy comment period. Therefore, we find adequate and are proposing to approve the State's 2009 and 2018 MVEBs for transportation conformity purposes.

III. What Is the Background for These Actions?

On December 22, 2006, Ohio requested that EPA redesignate the Toledo area to attainment for the 8-hour ozone standard. The request was supplemented on March 9, 2007. The redesignation request included three years of complete, quality-assured data for the periods of 2004 through 2006, indicating that the 8-hour NAAQS for ozone has been attained for the Toledo area. Under the CAA, nonattainment areas may be redesignated to attainment if sufficient complete, quality-assured data are available for the Administrator to determine that the area has attained the standard, and the area meets the other CAA redesignation requirements in section 107(d)(3)(E).

A. General Background Information

EPA has determined that ground-level ozone is detrimental to human health. On July 18, 1997, EPA promulgated an 8-hour ozone NAAQS of 0.08 parts per million parts of air (0.08 ppm) (80 parts per billion (ppb)) (62 FR 38856). This 8-hour ozone standard replaced a prior 1-hour ozone NAAQS, which had been promulgated on February 8, 1979 (44 FR 8202), and which was revoked on June 15, 2005 (69 FR 23858).

Ground-level ozone is not emitted directly by sources. Rather, emitted NO_X and VOC react in the presence of sunlight to form ground-level ozone along with other secondary compounds. NO_X and VOC are referred to as ''ozone precursors.'' Control of ground-level ozone concentrations is achieved through controlling VOC and NO_X emissions.

The CAA required EPA to designate as nonattainment any area that violated the 8-hour ozone NAAQS. The **Federal Register** notice promulgating these designations and classifications was published on April 30, 2004 (69 FR 23857).

The CAA contains two sets of provisions—subpart 1 and subpart 2—that address planning and emission control requirements for nonattainment areas. Both are found in title I, part D of the CAA. Subpart 1 contains general, less prescriptive requirements for all nonattainment areas for any pollutant governed by a NAAQS. Subpart 2 contains more specific requirements for certain ozone nonattainment areas, and applies to ozone nonattainment areas classified under section 181 of the CAA.

In the April 30, 2004, designation rulemaking, EPA divided 8-hour ozone nonattainment areas into the categories of subpart 1 nonattainment (''basic'' nonattainment) and subpart 2 nonattainment (''classified'' nonattainment). EPA based this division on the area's 8-hour ozone design values (i.e., on the three-year averages of the annual fourth-highest daily maximum 8-hour ozone concentrations at the worst-case monitoring sites in the areas) and on their 1-hour ozone design values (i.e., on the fourth-highest daily maximum 1-hour ozone concentrations over the three-year period at the worst-case monitoring sites in the areas). EPA classified 8-hour ozone nonattainment areas with 1-hour ozone design values equaling or exceeding 121 ppb as subpart 2, classified nonattainment areas. EPA classified all other 8-hour nonattainment areas as subpart 1, basic nonattainment areas. The basis for area classification was explained in a separate April 30, 2004, final rule (the Phase 1 implementation rule) (69 FR 23951).

Emission control requirements for classified nonattainment areas are linked to area classifications. Areas with more serious ozone pollution problems are subject to more prescribed requirements and later attainment dates. The prescribed emission control requirements are designed to bring areas into attainment by their specified attainment dates.

In the April 30, 2004, ozone designation/classification rulemaking, EPA designated the Toledo area as a subpart 1 basic nonattainment area for the 8-hour ozone NAAQS. EPA based the designation on ozone data collected during the 2001–2003 period.

On December 22, 2006, the State of Ohio requested redesignation of Toledo area to attainment of the 8-hour ozone NAAQS based on ozone data collected in this area counties from 2004–2006.

B. What Is the Impact of the December 22, 2006, United States Court of Appeals Decision Regarding EPA's Phase 1 Implementation Rule?

1. Summary of Court Decision

On December 22, 2006, the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's Phase 1 Implementation Rule for the 8-hour Ozone Standard. (69 FR 23951, April 30, 2004). South Coast Air Quality Management Dist. v. EPA, 472 F.3d 882 (D.C.Cir. 2006). The Court held that certain provisions of EPA's Phase 1 Rule were inconsistent with the requirements of the CAA. The Court rejected EPA's reasons for implementing the 8-hour standard in nonattainment areas under Subpart 1 in lieu of subpart 2 of Title I, part D of the Act. The Court also held that EPA improperly failed to retain four measures required for 1-hour nonattainment areas under the anti-backsliding provisions of the regulations: (1) Nonattainment area New Source Review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) Section 185 penalty fees for 1-hour severe or extreme nonattainment areas; (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9)of the Act, on the contingency of an area not making reasonable further progress toward attainment of the 1-hour NAAQS, or for failure to attain that NAAQS; and (4) certain conformity requirements for certain types of Federal actions. The Court upheld EPA's authority to revoke the 1-hour standard provided there were adequate anti-backsliding provisions.

This section sets forth EPA's views on the potential effect of the Court's ruling on this redesignation action. For the reasons set forth below, EPA does not believe that the Court's ruling alters any requirements relevant to this redesignation action so as to preclude redesignation, and does not prevent EPA from finalizing this redesignation. EPA believes that the Court's decision, as it currently stands, or as it may be modified based upon any petition for rehearing that has been filed, imposes no impediment to moving forward with redesignation of this area to attainment, because in either circumstance redesignation is appropriate under the relevant redesignation provisions of the Act and longstanding policies regarding redesignation requests.

2. Requirements Under the 8-Hour Standard

With respect to the 8-hour standard, the Court's ruling rejected EPA's reasons for classifying areas under Subpart 1 for the 8-hour standard, and remanded that

matter to the Agency. Consequently, it is possible that this area could, during a remand to EPA, be reclassified under Subpart 2. Although any future decision by EPA to classify this area under Subpart 2 might trigger additional future requirements for the area, EPA believes that this does not mean that redesignation cannot now go forward. This belief is based upon (1) EPA's longstanding policy of evaluating State submissions in accordance with the requirements due at the time the request is submitted; and, (2) consideration of the inequity of applying retroactively any future requirements.

First, at the time the redesignation request was submitted, the Toledo area was classified under Subpart 1 and was obligated to meet Subpart 1 requirements. Under EPA's longstanding interpretation of section 107(d)(3)(E) of the CAA, to qualify for redesignation, states requesting redesignation to attainment must meet only the relevant SIP requirements that came due prior to the submittal of a complete redesignation request. September 4, 1992, Calcagni memorandum (''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division) See also Michael Shapiro Memorandum, September 17, 1993, and 60 FR 12459, 12465–66 (March 7, 1995) (Redesignation of Detroit-Ann Arbor). See *Sierra Club* v. *EPA*, 375 F.3d 537 (7th Cir. 2004), which upheld this interpretation. See, *e.g.* also 68 FR 25418, 25424, 25427 (May 12, 2003) (redesignation of St. Louis).

Moreover, it would be inequitable to retroactively apply any new SIP requirements that were not applicable at the time the request was submitted. The D.C. Circuit has recognized the inequity in such retroactive rulemaking, See *Sierra Club* v. *Whitman*, 285 F. 3d 63 (D.C. Cir. 2002), in which the D.C. Circuit upheld a District Court's ruling refusing to make retroactive an EPA determination of nonattainment that was past the statutory due date. Such a determination would have resulted in the imposition of additional requirements on the area. The Court stated: ''Although EPA failed to make the nonattainment determination within the statutory time frame, Sierra Club's proposed solution only makes the situation worse. Retroactive relief would likely impose large costs on the States, which would face fines and suits for not implementing air pollution prevention plans in 1997, even though they were not on notice at the time.'' Id. at 68. Similarly here it would be unfair to penalize the area by applying to it for purposes of redesignation additional SIP requirements under Subpart 2 that were not in effect at the time it submitted its redesignation request.

3. Requirements Under the 1-Hour Standard

With respect to the requirements under the 1-hour standard, the Toledo area was an attainment area subject to a CAA section 175A maintenance plan under the 1-hour standard. The Court's ruling does not impact redesignation requests for these types of areas.

First, there are no conformity requirements that are relevant for redesignation requests for any standard, including the requirement to submit a transportation conformity SIP. Under longstanding EPA policy, EPA believes that it is reasonable to interpret the conformity SIP requirement as not applying for purposes of evaluating a redesignation request under section 107(d) because State conformity rules are still required after redesignation and Federal conformity rules apply where State rules have not been approved. 40 CFR 51.390. See *Wall* v. *EPA*, 265 F.3d 426 (6th Cir. 2001), upholding this interpretation. See also 60 FR 62748 (Dec. 7, 1995) (Tampa, FL redesignation). Federal transportation conformity regulations apply in all States prior to approval of transportation conformity SIPs. The Toledo, Ohio 1-hour ozone area was redesignated to attainment without approved State transportation conformity regulations because the Federal regulations were in effect in Ohio. When challenged, these 1-hour ozone redesignations, which were approved without State regulations, were upheld by the courts. See *Wall* v. *EPA*, 265 F.3d 426 (6th Cir. 2001). See also 60 FR 62748 (December 7, 1995) (Tampa, Florida). Although Ohio does not have approved State transportation conformity regulations, it has developed memoranda of understanding, signed by all parties involved in conformity, to address conformity consultation procedures. The Federal transportation conformity regulations, which apply in Ohio, require the approved 1-hour ozone budgets to be used for transportation conformity purposes prior to 8-hour ozone budgets being approved.

Second, with respect to the three other anti-backsliding provisions for the 1-hour standard that the Court found were not properly retained, the Toledo area is an attainment area subject to a maintenance plan for the 1-hour standard, and the NSR, contingency measure (pursuant to section 172(c)(9) or 182(c)(9)) and fee provision requirements no longer apply to an area that has been redesignated to attainment of the 1-hour standard.

Thus, the decision in South Coast should not alter requirements that would preclude EPA from finalizing the redesignation of this area.

IV. What Are the Criteria for Redesignation?

Section 107(d)(3)(E) of the CAA allows for redesignation from nonattainment to attainment provided that: (1) The Administrator determines that the area has attained the applicable NAAQS; (2) the Administrator has fully approved the applicable implementation plan for the area under section 110(k); (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions; (4) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A; and, (5) the State containing such area has met all requirements applicable to the area under section 110 and part D.

EPA provided guidance on redesignation in the General Preamble for the Implementation of Title I of the CAA Amendments of 1990, on April 16, 1992 (57 FR 13498), and supplemented this guidance on April 28, 1992 (57 FR 18070). EPA has provided further guidance on processing redesignation requests in several guidance documents. A listing of pertinent documents is provided in other redesignation actions including a September 9, 2005 notice; 70 FR 53606.

V. Why Is EPA Proposing To Take These Actions?

On December 22, 2006, Ohio requested redesignation of the Toledo area to attainment for the 8-hour ozone standard. EPA believes that the area has attained the standard and has met the requirements for redesignation set forth in section 107(d)(3)(E) of the CAA.

VI. What Is the Effect of These Actions?

Approval of the redesignation request would change the official designation of the Toledo area for the 8-hour ozone NAAQS found at 40 CFR part 81. It would also incorporate into the Ohio SIP a plan for maintaining the 8-hour ozone NAAQS through 2018. The maintenance plans include contingency measures to remedy future violations of the 8-hour NAAQS. The maintenance

plan also established MVEBs for the years 2009 and 2018.

MOTOR VEHICLE EMISSIONS BUDGETS FOR THE TOLEDO, OHIO AREA

Year	VOC (tons/day)	NO_X (tons/day)
2009	18.99	33.75
2018	11.20	14.11

These proposed actions pertain to the designation of the Toledo area for the 8-hour ozone NAAQS and to the emission controls in the area related to the attainment and maintenance of the 8-hour ozone NAAQS. If you own or operate a VOC or NO_X emissions source in this area or live in this area, this proposed rule may impact or apply to you. It may also impact you if you are involved in transportation planning or implementation of emission controls in this area. Finally, it may also impact you if you breathe the air in the Toledo area or the air which has passed through this Toledo area, or if you are concerned with clean air, human health or the environment.

VII. What Is EPA's Analysis of the Request?

A. Attainment Determination and Redesignation

EPA is proposing to make a determination that the Toledo area has attained the 8-hour ozone standard and that the Toledo area has met all other applicable section 107(d)(3)(E) redesignation criteria. The basis for EPA's determinations is as follows:

1. The Area Has Attained the 8-Hour Ozone NAAQS, (Section 107(d)(3)(E)(i))

EPA is proposing to make the determination that the Toledo area has attained the 8-hour ozone NAAQS. For ozone, an area may be considered to be attaining the 8-hour ozone NAAQS if there are no violations, as determined in accordance with 40 CFR 50.10 and Part 50, Appendix I, based on three complete, consecutive calendar years of quality-assured air quality monitoring data. For each monitor in the area, EPA computes the average of the fourth-highest daily maximum 8-hour average ozone concentrations from each of the three most recent years. The area is attaining the standard if all monitors have average concentrations at or below 0.08 ppm. Based on the rounding convention described in 40 CFR Part 50, Appendix I, the standard is attained if the design value is 0.084 ppm or below. The data must be collected and quality-assured in accordance with 40 CFR part 58, and recorded in the Aerometric Information Retrieval System (AIRS). The monitors generally should have remained at the same location for the duration of the monitoring period required for demonstrating attainment.

Ohio submitted 2004–2006 ozone monitoring data for the Toledo area. The Ohio EPA quality assured the ambient monitoring data in accordance with 40 CFR 58.10, and recorded it in the AIRS database, thus making the data publicly available. The data meet the completeness criteria in 40 CFR 50, Appendix I, which requires a minimum completeness of 75 percent annually and 90 percent over each three year period. A summary of the monitoring data is presented in Table 1 below.

TABLE 1.—ANNUAL 4TH HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATION AND 3-YEAR AVERAGES OF 4TH HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATIONS

Site ID	County	2003 4th high (ppm)	2005 4th high (ppm)	2006 4th high (ppm)	2004–2006 average (ppm)
39–095–0024	Lucas	67	80	75	74
39–095–0027	Lucas	74	84	69	75
39–095–0034	Lucas	78	87	74	79
39–095–0081	Lucas	78	87	74	79
39–73–0003	Wood	76	84	73	77

In addition, as discussed below with respect to the maintenance plans, Ohio has committed to continue operating an EPA-approved monitoring network in accordance with 40 CFR part 58. In summary, EPA finds that the data submitted by Ohio provide an adequate demonstration that the Toledo area has attained the 8-hour ozone NAAQS.

2. The Area Has Met All Applicable Requirements Under Section 110 and Part D; and the Area Has a Fully Approved SIP Under Section 110(k) (Sections 107(d)(3)(E)(v) and 107(d)(3)(E)(ii))

We have determined that Ohio has met all currently applicable SIP requirements for purposes of redesignation for the Toledo area under Section 110 of the CAA (general SIP requirements). We have also determined that the Ohio SIP meets all SIP requirements currently applicable for purposes of redesignation under Part D of Title I of the CAA (requirements specific to Subpart 1 nonattainment areas), in accordance with section 107(d)(3)(E)(v). In addition, we have determined that the SIP is fully approved with respect to all applicable requirements for purposes of redesignation, in accordance with section 107(d)(3)(E)(ii). In making these determinations, we have ascertained what SIP requirements are applicable to the area for purposes of redesignation, and have determined that the portions of the SIP meeting these requirements are fully approved under section 110(k) of the CAA. As discussed more fully below, SIPs must be fully approved only with respect to currently applicable requirements of the CAA.

a. Toledo, Ohio Has Met All Applicable Requirements Under Section 110 and Part D of the CAA

The September 4, 1992, Calcagni memorandum (see ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992) describes EPA's interpretation of section 107(d)(3)(E) of the CAA. Under this interpretation, a State, and the area it wishes to redesignate, must meet the relevant CAA requirements that are due prior to the State's submittal of a complete redesignation request for the area. See also the September 17, 1993 Michael Shapiro memorandum and 60 FR 12459, 12465–66 (March 7, 1995) (redesignation of Detroit-Ann Arbor, Michigan to attainment of the 1-hour ozone NAAQS). Applicable requirements of the CAA that come due subsequent to the State's submittal of a complete request remain applicable until a redesignation to attainment is approved, but are not required as a prerequisite to redesignation. See section 175A(c) of the CAA. *Sierra Club*

v. *EPA*, 375 F.3d 537 (7th Cir. 2004). See also 68 FR 25424, 25427 (May 12, 2003) (redesignation of the St. Louis/East St. Louis area to attainment of the 1-hour ozone NAAQS).

General SIP requirements. Section 110(a) of title I of the CAA contains the general requirements for a SIP. Section 110(a)(2) provides that the implementation plan submitted by a State must have been adopted by the State after reasonable public notice and hearing, and that, among other things, it includes enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the CAA; provides for establishment and operation of appropriate devices, methods, systems and procedures necessary to monitor ambient air quality; provides for implementation of a source permit program to regulate the modification and construction of any stationary source within the areas covered by the plan; includes provisions for the implementation of part C, Prevention of Significant Deterioration (PSD) and part D, New Source Review (NSR) permit programs; includes criteria for stationary source emission control measures, monitoring, and reporting; includes provisions for air quality modeling; and provides for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires that SIPs contain measures to prevent sources in a State from significantly contributing to air quality problems in another State. To implement this provision, EPA has required certain States to establish programs to address transport of air pollutants (NO_X SIP Call (63 FR 57356), Clean Air Interstate Rule (CAIR) (70 FR 25162)). However, the section 110(a)(2)(D) requirements for a State are not linked with a particular nonattainment area's designation and classification.

EPA believes that the requirements linked with a particular nonattainment area's designation and classifications are the relevant measures to evaluate in reviewing a redesignation request. When the transport SIP submittal requirements are applicable to a State, they will continue to apply to the State regardless of the attainment designation of any one particular area in the State. Therefore, we believe that these requirements should not be construed to be applicable requirements for purposes of redesignation. Further, we believe that the other section 110 elements described above that are not connected with nonattainment plan submissions and not linked with an area's attainment status are also not applicable requirements for purposes of redesignation. A State remains subject to these requirements after an area is redesignated to attainment. We conclude that only the section 110 and part D requirements which are linked with a particular area's designation and classification are the relevant measures which we may consider in evaluating a redesignation request. This approach is consistent with EPA's existing policy on applicability of conformity and oxygenated fuels requirements for redesignation purposes, as well as with section 184 ozone transport requirements. See Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176, October 10, 1996), (62 FR 24826, May 7, 1997); Cleveland-Akron-Lorain, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking (60 FR 62748, December 7, 1995). See also the discussion on this issue in the Cincinnati ozone redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh ozone redesignation (66 FR 50399, October 19, 2001).

As discussed above, we believe that section 110 elements which are not linked to the area's nonattainment status are not applicable for purposes of redesignation. Because there are no section 110 requirements linked to the part D requirements for 8-hour ozone nonattainment areas that have become due, as explained below, there are no Part D requirements applicable for purposes of redesignation under the 8-hour standard.

Part D Requirements. EPA has determined that the Ohio SIP meets applicable SIP requirements under part D of the CAA, since no requirements applicable for purposes of redesignation became due for the 8-hour ozone standard prior to Ohio's submission of the redesignation request for The Toledo area. Under part D, an area's classification determines the requirements to which it will be subject. Subpart 1 of part D, found in sections 172–176 of the CAA, sets forth the basic nonattainment requirements applicable to all nonattainment areas. Section 182 of the CAA, found in subpart 2 of part D, establishes additional specific requirements depending on the area's nonattainment classification. Toledo, Ohio, was classified as a subpart 1 nonattainment area, and, therefore, subpart 2 requirements do not apply.

Part D, Subpart 1 applicable SIP requirements. For purposes of evaluating these redesignation requests, the applicable part D, subpart 1 SIP requirements for the Toledo area are contained in sections 172(c)(1)–(9).

No 8-hour ozone planning requirements applicable for purposes of redesignation under part D became due prior to submission of the redesignation request, and, therefore, none are applicable to the area for purposes of redesignation. Since Ohio has submitted a complete ozone redesignation request for the Toledo area prior to the deadline for any submissions required for purposes of redesignation, we have determined that these requirements do not apply to the Toledo area for purposes of redesignation.

Section 176 conformity requirements. Section 176(c) of the CAA requires States to establish criteria and procedures to ensure that Federally-supported or funded activities, including highway projects, conform to the air quality planning goals in the applicable SIPs. The requirement to determine conformity applies to transportation plans, programs and projects developed, funded or approved under Title 23 of the U.S. Code and the Federal Transit Act (transportation conformity) as well as to all other Federally-supported or funded projects (general conformity). State conformity revisions must be consistent with Federal conformity regulations relating to consultation, enforcement and enforceability, which EPA promulgated pursuant to CAA requirements.

EPA approved Ohio's general and transportation conformity SIPs on March 11, 1996 (61 FR 9646) and May 30, 2000 (65 FR 34395), respectively. In summary, the Toledo area has satisfied all applicable requirements under section 110 and part D of the CAA.

b. Toledo Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA.

EPA has fully approved the Ohio SIP for the Toledo area under section 110(k) of the CAA for all requirements applicable for purposes of redesignation. In approving a redesignation request, EPA may rely on prior SIP approvals plus any additional measures it may approve in conjunction with a redesignation action (See the September 4, 1992 John Calcagni memorandum, page 3, *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984, 989–990 (6th Cir. 1998), *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001)). Since the passage of the CAA of 1970, Ohio has adopted and submitted, and EPA has fully approved, provisions addressing the various required SIP elements applicable to the Toledo area under the 1-hour ozone standard. No Toledo area SIP provisions

are currently disapproved, conditionally approved, or partially approved.

3. The Improvement in Air Quality Is Due to Permanent and Enforceable Reductions in Emissions (Section 107(d)(3)(E)(iii))

EPA finds that Ohio has demonstrated that the observed air quality improvement in the Toledo area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal measures, and other State-adopted measures.

In making this demonstration, the State has calculated the change in emissions between 2002 and 2004, one of the years on which the Toledo area monitored attainment. The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of regulatory control measures that Ohio has implemented.

a. Permanent and Enforceable Controls Implemented.

The following is a discussion of permanent and enforceable measures that have been implemented in the area:

NO_X rules. In compliance with EPA's NO_X SIP call, Ohio developed rules to control NO_X emissions from Electric Generating Units (EGUs), major non-EGU industrial boilers, and major cement kilns. These rules required sources to begin reducing NO_X emissions in 2004. However, statewide NO_X emissions actually had begun to decline before 2004, as sources phased in emission controls needed to comply with the State's NO_X emission control regulations. From 2004 on, NO_X emissions from EGUs in the Eastern United States have been capped at a level well below pre-2002 levels, such that EGU emissions in the Toledo area, and elsewhere in Ohio, can be expected to remain well below 2002 levels. Ohio expects that NO_X emissions will further decline as the State meets the requirements of EPA's Phase II NO_X SIP call (69 FR 21604 (April 21, 2004)).

Federal Emission Control Measures. Reductions in VOC and NO_X emissions have occurred statewide as a result of Federal emission control measures, with additional emission reductions expected to occur in the future as the State implements additional emission controls. Federal emission control measures include: Tier 2 emission standards for vehicles, gasoline sulfur limits, low sulfur diesel fuel standards, and heavy-duty diesel engine standards. In addition, in 2004, EPA issued the Clean Air Non-road Diesel Rule (69 FR 38958 (July 29, 2004)). EPA expects this rule to reduce off-road diesel emissions through 2010, with emission reductions starting in 2008.

b. Emission Reductions

Ohio is using 2002 for the nonattainment inventory and included area, mobile and point source emissions. Area sources were taken from the Ohio 2002 periodic inventory submitted to EPA. These projections were made from the United States Department of Commerce Bureau of Economic Analysis growth factors, with some updated local information. Mobile source emissions were calculated from MOBILE6.2 produced emission factors. Non-road emissions were generated using the EPA's National Mobile Inventory Model (NMIM) 2002 application. Point source information was compiled from Ohio's 2002 annual emission inventory database and the 2002 EPA Clean Air Markets Acid Rain database.

Based on the inventories described above, Ohio's submittal documents changes in VOC and NO_X emissions from 2002 to 2004. Summaries of emissions data are shown in Tables 2 through 4.

TABLE 2.—THE TOLEDO, OHIO AREA: TOTAL VOC AND NO_X EMISSIONS FOR NONATTAINMENT YEAR 2002 (TONS/DAY)

Sector	Lucas county	Wood county	Total			
			VOC	NO_X	VOC	NO_X
Point	7.65	38.88	0.95	3.23	8.60	42.11
Area	22.71	0.97	7.91	0.64	30.62	1.61
Non-Road Mobile	8.49	16.80	2.86	10.06	11.35	26.86
On-Road Mobile	19.77	31.51	9.93	18.73	29.70	50.24
Toledo Area Total	.....	.....	.....	.....	80.27	120.82

TABLE 3.—THE TOLEDO, OHIO AREA TOTAL VOC AND NO_X EMISSIONS FOR ATTAINMENT YEAR 2004 (TONS/DAY)

	Lucas		Wood		Total	
	VOC	NO_X	VOC	NO_X	VOC	NO_X
Point	7.44	35.54	0.91	3.23	8.35	38.77
Area	22.71	1.03	7.43	0.67	30.55	1.7
Nonroad	7.66	15.68	2.65	9.14	10.31	24.82
Onroad	16.57	27.05	8.41	16.26	24.98	43.31
Total	.....	.....	.....	.....	74.19	108.6

TABLE 4.—THE TOLEDO AREA, OHIO: COMPARISON OF 2002 AND 2004 VOC AND NO_X EMISSIONS (TONS/DAY)

	VOC			NO_X		
Sector	2002	2004	Net change (2002–2004)	2002	2004	Net change (2002–2004)
Point	8.6	8.35	−0.25	42.11	38.77	−3.34
Area	30.62	30.55	−0.07	1.61	1.7	0.09

TABLE 4.—THE TOLEDO AREA, OHIO: COMPARISON OF 2002 AND 2004 VOC AND NO_X EMISSIONS (TONS/DAY)—Continued

Sector	VOC			NO_X		
	2002	2004	Net change (2002–2004)	2002	2004	Net change (2002–2004)
Nonroad	11.35	10.31	−1.04	26.86	24.82	−2.04
Onroad	29.7	24.98	−4.72	50.24	43.31	−6.93
Total	80.27	74.19	−6.08	120.82	108.6	−12.22

Table 4 shows that the area reduced VOC emissions by 6.08 tons/day, and NO_X emissions by 12.22 tons/day, between 2002 and 2004. Based on the information summarized above, Ohio has adequately demonstrated that the improvement in air quality is due to permanent and enforceable emissions reductions.

4. The Area Has a Fully Approved Maintenance Plan Pursuant to Section 175a of the CAA (Section 107(d)(3)(E)(iv))

In conjunction with its request to redesignate the Toledo area to attainment status, Ohio submitted SIP revisions to provide for the maintenance of the 8-hour ozone NAAQS in this area through 2018.

a. What is required in a maintenance plan?

Section 175A of the CAA sets forth the required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after the Administrator approves a redesignation to attainment. Eight years after the redesignation, the State must submit a revised maintenance plan which demonstrates that attainment will continue to be maintained for ten years following the initial ten-year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures with a schedule for implementation as EPA deems necessary to assure prompt correction of any future 8-hour ozone violations.

The September 4, 1992, John Calcagni memorandum provides additional guidance on the content of a maintenance plan. The memorandum clarifies that an ozone maintenance plan should address the following items: The attainment VOC and NO_X emissions inventories, a maintenance demonstration showing maintenance for the ten years of the maintenance period, a commitment to maintain the existing monitoring network, factors and procedures to be used for verification of continued attainment of the NAAQS, and a contingency plan to prevent or correct future violations of the NAAQS.

b. Attainment Inventory

Ohio developed a baseline emissions inventory for 2004, one of the years used to demonstrate monitored attainment of the 8-hour NAAQS. The attainment level of emissions is summarized in Table 5, below.

TABLE 5.—THE TOLEDO, OHIO AREA, TOTAL VOC AND NO_X EMISSIONS FOR ATTAINMENT YEAR 2004 (TONS/DAY)

	Lucas		Wood		Total	
	VOC	NO_X	VOC	NO_X	VOC	NO_X
Point	7.44	35.54	0.91	3.23	8.35	38.77
Area	22.78	1.03	7.77	0.67	30.55	1.70
Nonroad	7.66	15.68	2.65	9.14	10.31	24.82
Onroad	16.57	27.05	8.41	16.26	24.98	43.31
Total	.....	.....	.....	.....	74.19	108.60

c. Demonstration of Maintenance

Ohio submitted revisions to the 8-hour ozone SIP to include 11-year maintenance plans for the Toledo area, in compliance with section 175A of the CAA. This demonstration shows maintenance of the 8-hour ozone standard by assuring that current and future emissions of VOC and NO_X area remain at or below attainment year emission levels. A maintenance demonstration need not be based on modeling. See *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), *Sierra Club* v. *EPA,* 375 F. 3d 537 (7th Cir. 2004). See also 66 FR 53094, 53099–53100 (October 19, 2001), 68 FR 25413, 25430–25432 (May 12, 2003).

Ohio is using projected inventories for the years 2009 and 2018. These emission estimates are presented in Table 6.

TABLE 6.—THE TOLEDO, OHIO AREA: COMPARISON OF 2004–2018 VOC AND NO_X EMISSIONS (TONS/DAY)

Sector	VOC				NO_X			
	2004	2009	2018	Net change 2004–2018	2004	2009	2018	Net change 2004–2018
Point	8.35	7.81	8.64	0.29	38.77	30.35	16.03	−22.74
Area	30.55	30.4	32.6	2.05	1.7	1.91	1.97	0.27
Nonroad	10.31	7.78	6.55	−3.76	24.82	19.76	14.91	−9.91
Onroad	24.98	16.51	9.74	−15.24	43.31	29.35	12.27	−31.04
Total	74.19	62.50	57.53	−16.66	108.6	81.37	45.18	−63.42

The emission projections show that Ohio does not expect emissions in the area to exceed the level of the 2004 attainment year inventory during the maintenance period. In the area, Ohio projects that VOC and NO_X emissions will decrease by 16.66 tons/day and 63.42 tons/day, respectively.

As part of its maintenance plan, the State elected to include a ''safety margin'' for the area. A ''safety margin'' is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan which continues to demonstrate attainment of the standard. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. Ohio used 2004 as the attainment level of emissions for the area. In the maintenance plan, Ohio projected emission levels for 2018. The emissions from point, area, non-road, and mobile sources in 2004 equaled 74.19 tons/day of VOC and 108.6 tons/day of NO_X. Ohio projected VOC emissions for the year 2018 to be 57.63 tons/day of VOC and 45.18 tons/day of NO_X. The safety margin is calculated to be the difference between these amounts or, in this case, 16.66 tons/day of VOC and 63.42 tons/day of NO_X for 2018. The safety margin, or a portion thereof, can be allocated to any of the source categories, as long as the total attainment level of emissions is maintained. Ohio EPA allocated 1.46 tons/day of VOC and 1.84 tons/day of NO_X to the MVEB. The SIP submission demonstrates that the area will continue to maintain the standard because emission will continue to be below the attainment level.

d. Monitoring Network

Ohio currently operates five ozone monitors in The Toledo area. Ohio has committed to continue operating and maintaining their approved ozone monitor network in accordance with 40 CFR part 58.

e. Verification of Continued Attainment

Continued attainment of the ozone NAAQS in the area depends, in part, on the State's efforts toward tracking indicators of continued attainment during the maintenance period. The State's plan for verifying continued attainment of the 8-hour standard in the area consists of plans to continue ambient ozone monitoring in accordance with the requirements of 40 CFR part 58. In addition, Ohio will periodically review and revise the VOC and NO_X emissions inventories for the area, as required by the Consolidated Emissions Reporting Rule (40 CFR part 51), to track levels of emissions in the future.

f. Contingency Plan

The contingency plan provisions of the CAA are designed to result in prompt correction or prevention of violations of the NAAQS that might occur after redesignation of an area to attainment of the NAAQS. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to assure that the State will promptly correct a violation of the NAAQS that might occur after redesignation. The maintenance plan must identify the contingency measures to be considered for possible adoption, a schedule and procedure for adoption and implementation of the selected contingency measures, and a time limit for action by the State. The State should also identify specific indicators to be used to determine when the contingency measures need to be adopted and implemented. The maintenance plan must include a requirement that the State will implement all measures with respect to control of the pollutant(s) that were included in the SIP before the redesignation of the area to attainment. See section 175A(d) of the CAA.

As required by section 175A of the CAA, Ohio has adopted a contingency plan to address possible future ozone air quality issues. The contingency plan has two levels of actions/responses depending on whether a violation of the 8-hour ozone standard is only threatened (Warning Level Response) or has actually occurred or appears to be very imminent (Action Level Response).

A Warning Level Response will be triggered whenever an annual (1-year) fourth-high monitored 8-hour ozone concentration of 88 ppb occurs within the ozone maintenance area (Toledo area). A Warning Level Response will consist of a study to determine whether the ozone value indicates a trend toward higher ozone concentrations or whether emissions appear to be increasing. The study will evaluate whether the trend, if any, is likely to continue and, if so, the control measures necessary to reverse the trend, taking into consideration ease and timing for implementation, as well as economic and social consideration. Implementation of necessary controls in response to a Warning Level Response triggering will take place as expeditiously as possible, but in no event later than 12 months from the conclusion of the most recent ozone season.

An Action Level Response will be triggered whenever a two-year average annual fourth-high monitored 8-hour ozone concentration of 85 ppb or greater occurs within the maintenance area (Toledo area). A violation of the 8-hour ozone standard (three-year average fourth-high value of 85 ppb or greater) will also prompt an Action Level Response. In the event that an Action Level Response is triggered and is not due to an exceptional event, malfunction, or noncompliance with a source permit condition or rule requirement, Ohio will determine the additional emission control measures needed to assure future attainment of the ozone NAAQS. Emission control measures that can be implemented in a short time will be selected in order to be in place within 18 months from the close of the ozone season that prompted the Action Level Response. Any new

emission control measure that is selected for implementation will be given a public review. If a new emission control measure is already promulgated and scheduled to be implemented at the Federal or State level and that emission control measure is determined to be sufficient to address the increase in peak ozone concentrations, additional local measures may be unnecessary. Ohio will submit to the EPA an analysis to assess whether the proposed emission control measures are adequate to reverse the increase in peak ozone concentrations and to maintain the 8-hour ozone standard in the area. The selection of emission control measures will be based on cost-effectiveness, emission reduction potential, economic and social considerations, or other factors that Ohio deems to be appropriate. Selected emission control measures will be subject to public review and the State will seek public input prior to selecting new emission control measures.

The State's ozone redesignation request lists the following possible emission control measures as contingency measures in the ozone maintenance portion of the State's submittal:

i. Lower Reid vapor pressure gasoline requirements;

ii. Tighten RACT on existing source covered by USEPA Control Techniques Guidelines issued in response to the 1990 CAA;

iii. Apply RACT to smaller existing sources;

iv. One or more transportation control measures sufficient to achieve at least half a percent reduction in actual area wide VOC emissions. Transportation measures will be selected from the following, based upon the factors listed above after consultation with affected local governments:

a. Trip reduction programs, including, but not limited to, employer-based transportation management plans, area wide rideshare programs, work schedule changes, and telecommuting;

b. Traffic flow and transit improvements; and

c. Other new or innovative transportation measures not yet in widespread use that affects State and local governments deemed appropriate.

v. Alternative fuel and diesel retrofit programs for fleet vehicle operations.

vi. Controls on consumer products consistent with those adopted elsewhere in the United States.

vii. Require VOC and NO_X emissions offsets for new and modified major sources.

viii. Require VOC or NO_X emission offsets for new or modified minor sources.

ix. Increase the ratio of emission offsets required for new sources.

x. Require VOC or NO_X controls on new minor sources (less than 100 tons).

g. Provisions for Future Updates of the Ozone Maintenance Plan.

As required by section 175A(b) of the CAA, Ohio commits to submit to the EPA updated ozone maintenance plans eight years after redesignation to cover an additional 10-year period beyond the initial 10-year maintenance period. Ohio has committed to retain the control measures for VOC and NO_X emissions that were contained in the SIP before redesignation of the area to attainment, as required by section 175(A) of the CAA.

EPA proposes that the maintenance plan adequately addresses the five basic components of a maintenance plan: Attainment inventory, maintenance demonstration, monitoring network, verification of continued attainment, and a contingency plan.

B. Adequacy of Ohio's Motor Vehicle Emissions Budgets (MVEBs)

1. How Are MVEBs Developed and What Are the MVEBs for the Area?

Under the CAA, States are required to submit, at various times, control strategy SIP revisions and ozone maintenance plans for ozone nonattainment areas and for areas seeking redesignation to attainment of the ozone standard. These emission control strategy SIP revisions (*e.g.*, reasonable further progress SIP and attainment demonstration SIP revisions) and ozone maintenance plans create MVEBs based on onroad mobile source emissions for criteria pollutants and/or their precursors to address pollution from cars and trucks. The MVEBs are the portions of the total allowable emissions that are allocated to highway and transit vehicle use that, together with emissions from other sources in the area, will provide for attainment or maintenance.

Under 40 CFR part 93, a MVEB for an area seeking a redesignation to attainment is established for the last year of the maintenance plan. The MVEB serves as a ceiling on emissions from an area's planned transportation system. The MVEB concept is further explained in the preamble to the November 24, 1993, transportation conformity rule (58 FR 62188). The preamble also describes how to establish the MVEB in the SIP and how to revise the MVEB if needed.

Under section 176(c) of the CAA, new transportation projects, such as the construction of new highways, must ''conform'' to (*i.e.*, be consistent with) the part of the SIP that addresses emissions from cars and trucks. Conformity to the SIP means that transportation activities will not cause new air quality violations, worsen existing air quality violations, or delay timely attainment of the NAAQS. If a transportation plan does not conform, most new transportation projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and assuring conformity of such transportation activities to a SIP.

When reviewing SIP revisions containing MVEBs, including attainment strategies, rate-of-progress plans, and maintenance plans, EPA must affirmatively find that the MVEBs are ''adequate'' for use in determining transportation conformity. Once EPA affirmatively finds the submitted MVEBs to be adequate for transportation conformity purposes, the MVEBs are used by State and Federal agencies in determining whether proposed transportation projects conform to the SIP as required by section 176(c) of the CAA. EPA's substantive criteria for determining the adequacy of MVEBs are set out in 40 CFR 93.118(e)(4).

EPA's process for determining adequacy of a MVEB consists of three basic steps: (1) Providing public notification of a SIP submission; (2) providing the public the opportunity to comment on the MVEB during a public comment period; and, (3) EPA's finding of adequacy. The process of determining the adequacy of submitted SIP MVEBs was initially outlined in EPA's May 14, 1999, guidance, ''Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision.'' This guidance was codified in the Transportation Conformity Rule Amendments for the ''New 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments—Response to Court Decision and Additional Rule Change,'' published on July 1, 2004 (69 FR 40004). EPA follows this guidance and rulemaking in making its adequacy determinations.

The Toledo area's maintenance plan contains new VOC and NO_X MVEBs for the years 2009 and 2018. The availability of the SIP submission with these 2009 and 2018 MVEBs was announced for public comment on EPA's Adequacy web page on March 5, 2007, at: *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm.*

The EPA public comment period on adequacy of the MVEBs closed on April 6, 2007. No requests for the submittal or adverse comments on the submittal were received during the adequacy comment period. In a letter dated, April 6, 2007 EPA informed Ohio that we had found the MVEBs to be adequate for use in transportation conformity analyses.

EPA, through this rulemaking, is proposing to approve the MVEBs for use in determining transportation conformity in the Toledo area because the EPA has determined that the area can maintain attainment of the 8-hour ozone NAAQS for the relevant maintenance period with mobile source emissions at the levels of the MVEBs.

MOTOR VEHICLE EMISSIONS BUDGETS FOR THE TOLEDO, OHIO AREA

Year	VOC (tons/day)	NO_X (tons/day)
2009	18.99	33.75
2018	11.20	14.11

2. What Is a Safety Margin?

A ''safety margin'' is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan. As part of its maintenance plan, the State elected to include a ''safety margin'' for the area. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. Ohio used 2004 as the attainment level of emissions for the area. In the maintenance plan, Ohio projected emission levels for 2018. The emissions from point, area, non-road, and mobile sources in 2004 equaled 74.19 tons/day of VOC and 108.6 tons/day of NO_X. Ohio projected VOC emissions for the year 2018 to be 57.63 tons/day of VOC and 45.18 tons/day of NO_X. The safety margin is calculated to be the difference between these amounts or, in this case, 16.66 tons/day of VOC and 63.42 tons/day of NO_X for 2018. The safety margin, or a portion thereof, can be allocated to any of the source categories, as long as the total attainment level of emissions is maintained. Ohio EPA allocated 1.46 tons/day of VOC and 1.84 tons/day of NO_X to the MVEB. The SIP submission demonstrates that the area will continue to maintain the standard.

VIII. What Actions Is EPA Taking Today?

EPA is proposing to make determinations that the Toledo area has attained the 8-hour ozone NAAQS and EPA is proposing to approve Ohio's maintenance plan for assuring that the area will continue to attain this standard. EPA is also proposing to find that the Toledo area meets the redesignation criteria set forth in section 107(d)(3)(E) of the CAA, and on this basis, EPA is proposing to approve the redesignation of the Toledo area from nonattainment to attainment for the 8-hour ozone standard.

Finally, EPA is finding adequate and proposing to approve the 2009 and 2018 VOC and NO_X MVEBs submitted by Ohio in conjunction with the redesignation request.

IX. Statutory and Executive Order Reviews

Executive Order 12866: Regulatory Planning and Review

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.

Paperwork Reduction Act

This proposed 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.*).

Regulatory Flexibility Act

This proposed action merely proposes to approve State law as meeting Federal requirements and imposes no additional requirements beyond those imposed by State law. Redesignation of an area to attainment under section 107(d)(3)(E) of the CAA does not impose any new requirements on small entities. Redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on sources. 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.*).

Unfunded Mandates Reform Act

Because this rule proposes to approve 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).

Executive Order 13132: Federalism

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). Redesignation is an action that merely affects the status of a geographical area, does not impose any new requirements on sources, or allows a State to avoid adopting or implementing other requirements, and does not alter the relationship or the distribution of power and responsibilities established in the CAA.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (65 FR 67249, November 9, 2000) requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule also does not have tribal implications, as specified in Executive Order 13175, because redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on tribes, impact any existing sources of air pollution on tribal lands, nor impair the maintenance of ozone national ambient air quality standards in tribal lands. Thus, Executive Order 13175 does not apply to this rule.

Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This proposed 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.

Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

Because it is not a ''significant regulatory action'' under Executive Order 12866 or a ''significant energy action,'' 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).

National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTA), 15 U.S.C. 272, requires Federal agencies to use technical standards that are developed or adopted by voluntary consensus to

carry out policy objectives, so long as such standards are not inconsistent with applicable law or otherwise impracticable. In reviewing program submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Absent a prior existing requirement for the State to use voluntary consensus standards, EPA has no authority to disapprove a program submission for failure to use such standards, and it would thus be inconsistent with applicable law for EPA to use voluntary consensus standards in place of a program submission that otherwise satisfies the provisions of the Act. Redesignation is an action that affects the status of a geographical area but does not impose any new requirements on sources. 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.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

40 CFR Part 81

Environmental protection, Air Pollution Control, National parks, Wilderness areas.

Dated: June 1, 2007.

Walter Kovalick,

Acting Regional Administrator, Region 5.

[FR Doc. E7–11305 Filed 6–11–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2007–0025; FRL–8326–3]

Redesignation of the Columbus, OH Area to Attainment for the 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Ohio Environmental Protection Agency (Ohio EPA) submitted a request on December 28, 2006, and supplemented it on January 12, 2007 and March 9, 2007, for redesignation of the Columbus, Ohio area which includes Delaware, Fairfield, Franklin, Knox, Licking, and Madison Counties to attainment for the 8-hour ozone standard. EPA is proposing to approve several elements associated with this request. First, EPA is making a determination that complete, quality-assured ambient air quality data indicate that the Columbus area has attained the 8-hour ozone standard. Second, EPA is proposing to approve, as revisions to the Ohio State Implementation Plan (SIP), the State's plans for maintaining the 8-hour ozone NAAQS through 2018. Third, EPA is proposing to redesignate the Columbus area to attainment for the 8-hour ozone standard, based on a finding that the requirements for this redesignation have been satisfied. Fourth, EPA finds adequate and is proposing to approve the State's 2009 and 2018 Motor Vehicle Emission Budgets (MVEBs) for the Columbus area.

DATES: Comments must be received on or before July 12, 2007.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2007–0001, by one of the following methods:

- *http://www.regulations.gov/*. Follow the on-line instructions for submitting comments.
- *E-mail: mooney.john@epa.gov*.
- *Fax:* (312)886–5824.
- *Mail:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch, (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
- *Hand delivery:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch, (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, 18th floor, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m. excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2007–0001. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *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 *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site 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 www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public 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. For additional instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.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 in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. We recommend that you telephone Michael Leslie, Environmental Engineer, at (312) 353–6680 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Michael Leslie, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–6680, *leslie.michael@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

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I. What Should I Consider as I Prepare My Comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

2. Follow directions—The EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

4. Describe any assumptions and provide any technical information and/or data that you used.

5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns, and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

II. What Actions Is EPA Proposing To Take?

EPA is proposing to take several related actions. EPA is proposing to determine that the Columbus nonattainment area has attained the 8-hour ozone standard. EPA is also proposing to approve Ohio's maintenance plan SIP revision for the Columbus area. The maintenance plan is designed to keep the Columbus nonattainment area in attainment of the ozone NAAQS through 2018. EPA is proposing the that Columbus area has met the requirements for redesignation under Section 107(d)(3)(E) of the Clean Air Act (CAA). EPA is thus proposing to approve Ohio's request to change the legal determination of Columbus area from nonattainment to attainment for the 8-hour ozone National Ambient Air Quality Standard (NAAQS). Finally, EPA is announcing its action on the Adequacy Process for the newly established 2009 and 2018 MVEBs for the area. The adequacy comment period for the 2009 and 2018 MVEBs began on March 6, 2007, with EPA's posting of the availability of these submittals on EPA's Adequacy Web site (*http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm*). The adequacy comment period for these MVEBs ended on April 5, 2007. EPA did not receive any requests for these submittals or adverse comments on these submittals during the adequacy comment period. Therefore, we find adequate and are proposing to approve the State's 2009 and 2018 MVEBs for transportation conformity purposes.

III. What Is the Background for These Actions?

On December 22, 2006, Ohio requested that EPA redesignate the Columbus area to attainment for the 8-hour ozone standard. The request was supplemented on January 12, 2007, and March 9, 2007. The redesignation request included three years of complete, quality-assured data for the periods of 2004 through 2006, indicating that the 8-hour NAAQS for ozone has been attained for the Columbus area. Under the CAA, nonattainment areas may be redesignated to attainment if sufficient complete, quality-assured data are available for the Administrator to determine that the area has attained the standard, and the area meets the other CAA redesignation requirements in section 107(d)(3)(E).

A. General Background Information

EPA has determined that ground-level ozone is detrimental to human health. On July 18, 1997, EPA promulgated an 8-hour ozone NAAQS of 0.08 parts per million parts of air (0.08 ppm) (80 parts per billion (ppb)) (62 FR 38856). This 8-hour ozone standard replaced a prior 1-hour ozone NAAQS, which had been promulgated on February 8, 1979 (44 FR 8202), and which was revoked on June 15, 2005 (69 FR 23858). Ground-level ozone is not emitted directly by sources. Rather, emitted NO_X and VOC react in the presence of sunlight to form ground-level ozone along with other secondary compounds. NO_X and VOC are referred to as ''ozone precursors.'' Control of ground-level ozone concentrations is achieved through controlling VOC and NO_X emissions.

The CAA required EPA to designate as nonattainment any area that violated the 8-hour ozone NAAQS. The **Federal Register** notice promulgating these designations and classifications was published on April 30, 2004 (69 FR 23857).

The CAA contains two sets of provisions—subpart 1 and subpart 2—that address planning and emission control requirements for nonattainment areas. Both are found in title I, part D of the CAA. Subpart 1 contains general, less prescriptive requirements for all nonattainment areas for any pollutant governed by a NAAQS. Subpart 2 contains more specific requirements for certain ozone nonattainment areas, and applies to ozone nonattainment areas classified under section 181 of the CAA.

In the April 30, 2004, designation rulemaking, EPA divided 8-hour ozone nonattainment areas into the categories of subpart 1 nonattainment (''basic'' nonattainment) and subpart 2 nonattainment (''classified'' nonattainment). EPA based this division on the area's 8-hour ozone design values (*i.e.*, on the three-year averages of the annual fourth-highest daily maximum 8-hour ozone concentrations at the worst-case monitoring sites in the areas) and on their 1-hour ozone design values (*i.e.*, on the fourth-highest daily maximum 1-hour ozone concentrations over the three-year period at the worst-case monitoring sites in the areas). EPA classified 8-hour ozone nonattainment areas with 1-hour ozone design values equaling or exceeding 121 ppb as subpart 2, classified nonattainment areas. EPA classified all other 8-hour nonattainment areas as subpart 1, basic nonattainment areas. The basis for area classification was explained in a separate April 30, 2004, final rule (the Phase 1 implementation rule) (69 FR 23951).

Emission control requirements for classified nonattainment areas are linked to area classifications. Areas with more serious ozone pollution problems are subject to more prescribed requirements and later attainment dates. The prescribed emission control requirements are designed to bring areas into attainment by their specified attainment dates.

In the April 30, 2004, ozone designation/classification rulemaking, EPA designated the Columbus area as a subpart 1 basic nonattainment area for the 8-hour ozone NAAQS. EPA based the designation on ozone data collected during the 2001–2003 period.

On December 22, 2006, the State of Ohio requested redesignation of Columbus area to attainment of the 8-hour ozone NAAQS based on ozone data collected in this area from 2004–2006.

B. What Is the Impact of the December 22, 2006, United States Court of Appeals Decision Regarding EPA's Phase 1 Implementation Rule?

1. Summary of Court Decision

On December 22, 2006, the U.S. Court of Appeals for the District of Columbia

Circuit vacated EPA's Phase 1 Implementation Rule for the 8-hour Ozone Standard. (69 FR 23951, April 30, 2004). *South Coast Air Quality Management Dist.* v. *EPA*, 472 F.3d 882 (D.C. Cir. 2006). The Court held that certain provisions of EPA's Phase 1 Rule were inconsistent with the requirements of the CAA. The Court rejected EPA's reasons for implementing the 8-hour standard in nonattainment areas under Subpart 1 in lieu of subpart 2 of Title I, part D of the Act. The Court also held that EPA improperly failed to retain four measures required for 1-hour nonattainment areas under the anti-backsliding provisions of the regulations: (1) Nonattainment area New Source Review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) Section 185 penalty fees for 1-hour severe or extreme nonattainment areas; (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the Act, on the contingency of an area not making reasonable further progress toward attainment of the 1-hour NAAQS, or for failure to attain that NAAQS; and (4) certain conformity requirements for certain types of Federal actions. The Court upheld EPA's authority to revoke the 1-hour standard provided there were adequate anti-backsliding provisions.

This section sets forth EPA's views on the potential effect of the Court's ruling on this redesignation action. For the reasons set forth below, EPA does not believe that the Court's ruling alters any requirements relevant to this redesignation action so as to preclude redesignation, and does not prevent EPA from finalizing this redesignation. EPA believes that the Court's decision, as it currently stands, or as it may be modified based upon any petition for rehearing that has been filed, imposes no impediment to moving forward with redesignation of this area to attainment, because in either circumstance redesignation is appropriate under the relevant redesignation provisions of the Act and longstanding policies regarding redesignation requests.

2. Requirements Under the 8-Hour Standard

With respect to the 8-hour standard, the Court's ruling rejected EPA's reasons for classifying areas under Subpart 1 for the 8-hour standard, and remanded that matter to the Agency. Consequently, it is possible that this area could, during a remand to EPA, be reclassified under Subpart 2. Although any future decision by EPA to classify this area under Subpart 2 might trigger additional future requirements for the area, EPA believes that this does not mean that redesignation cannot now go forward. This belief is based upon (1) EPA's longstanding policy of evaluating State submissions in accordance with the requirements due at the time the request is submitted; and, (2) consideration of the inequity of applying retroactively any future requirements.

First, at the time the redesignation request was submitted, the Columbus area was classified under Subpart 1 and was obligated to meet Subpart 1 requirements. Under EPA's longstanding interpretation of section 107(d)(3)(E) of the CAA, to qualify for redesignation, States requesting redesignation to attainment must meet only the relevant SIP requirements that came due prior to the submittal of a complete redesignation request. September 4, 1992, Calcagni memorandum (''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division) See also Michael Shapiro Memorandum, September 17, 1993, and 60 FR 12459, 12465–66 (March 7, 1995) (Redesignation of Detroit—Ann Arbor). See *Sierra Club* v. *EPA*, 375 F.3d 537 (7th Cir. 2004), which upheld this interpretation. See, *e.g.* also 68 FR 25418, 25424, 25427 (May 12, 2003) (redesignation of St. Louis).

Moreover, it would be inequitable to retroactively apply any new SIP requirements that were not applicable at the time the request was submitted. The D.C. Circuit has recognized the inequity in such retroactive rulemaking, See *Sierra Club* v. *Whitman*, 285 F. 3d 63 (D.C. Cir. 2002), in which the D.C. Circuit upheld a District Court's ruling refusing to make retroactive an EPA determination of nonattainment that was past the statutory due date. Such a determination would have resulted in the imposition of additional requirements on the area. The Court stated: ''Although EPA failed to make the nonattainment determination within the statutory time frame, Sierra Club's proposed solution only makes the situation worse. Retroactive relief would likely impose large costs on the States, which would face fines and suits for not implementing air pollution prevention plans in 1997, even though they were not on notice at the time.'' Id. at 68. Similarly here it would be unfair to penalize the area by applying to it for purposes of redesignation additional SIP requirements under Subpart 2 that were not in effect at the time it submitted its redesignation request.

3. Requirements Under the 1-Hour Standard

With respect to the requirements under the 1-hour standard, the Columbus area was an attainment area subject to a CAA section 175A maintenance plan under the 1-hour standard. The Court's ruling does not impact redesignation requests for these types of areas.

First, there are no conformity requirements that are relevant for redesignation requests for any standard, including the requirement to submit a transportation conformity SIP. Under longstanding EPA policy, EPA believes that it is reasonable to interpret the conformity SIP requirement as not applying for purposes of evaluating a redesignation request under section 107(d) because State conformity rules are still required after redesignation and Federal conformity rules apply where State rules have not been approved. 40 CFR 51.390. See *Wall* v. *EPA*, 265 F.3d 426 (6th Cir. 2001), upholding this interpretation. See also 60 FR 62748 (Dec. 7, 1995) (Tampa, FL redesignation). Federal transportation conformity regulations apply in all States prior to approval of transportation conformity SIPs. The Columbus, Ohio 1-hour ozone area was redesignated to attainment without approved State transportation conformity regulations because the Federal regulations were in effect in Ohio. When challenged, these 1-hour ozone redesignations, which were approved without State regulations, were upheld by the courts. See *Wall* v. *EPA*, 265 F.3d 426 (6th Cir. 2001). See also 60 FR 62748 (December 7, 1995) (Tampa, Florida). Although Ohio does not have approved State transportation conformity regulations, it has developed memoranda of understanding, signed by all parties involved in conformity, to address conformity consultation procedures. The Federal transportation conformity regulations, which apply in Ohio, require the approved 1-hour ozone budgets to be used for transportation conformity purposes prior to 8-hour ozone budgets being approved.

Second, with respect to the three other anti-backsliding provisions for the 1-hour standard that the Court found were not properly retained, Columbus area is an attainment area subject to a maintenance plan for the 1-hour standard, and the NSR, contingency measure (pursuant to section 172(c)(9) or 182(c)(9)) and fee provision requirements no longer apply to an area that has been redesignated to attainment of the 1-hour standard.

Thus, the decision in South Coast should not alter requirements that would preclude EPA from finalizing the redesignation of this area.

IV. What Are the Criteria for Redesignation?

Section 107(d)(3)(E) of the CAA allows for redesignation from nonattainment to attainment provided that: (1) The Administrator determines that the area has attained the applicable NAAQS; (2) the Administrator has fully approved the applicable implementation plan for the area under section 110(k); (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions; (4) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A; and (5) the State containing such area has met all requirements applicable to the area under section 110 and part D.

EPA provided guidance on redesignation in the General Preamble for the Implementation of Title I of the CAA Amendments of 1990, on April 16, 1992 (57 FR 13498), and supplemented this guidance on April 28, 1992 (57 FR 18070). EPA has provided further guidance on processing redesignation requests in several guidance documents. A listing of pertinent documents is provided in other redesignation actions including a September 9, 2005 notice; 70 FR 53606.

V. Why Is EPA Proposing To Take These Actions?

On December 22, 2006, Ohio requested redesignation of the Columbus area to attainment for the 8-hour ozone standard. EPA believes that the area has attained the standard and has met the requirements for redesignation set forth in section 107(d)(3)(E) of the CAA.

VI. What Is the Effect of These Actions?

Approval of the redesignation request would change the official designation of the Columbus area for the 8-hour ozone NAAQS found at 40 CFR part 81. It would also incorporate into the Ohio SIP a plan for maintaining the 8-hour ozone NAAQS through 2018. The maintenance plans include contingency measures to remedy future violations of the 8-hour NAAQS. The maintenance plan also established MVEBs for the years 2009 and 2018.

MOTOR VEHICLE EMISSIONS BUDGETS FOR THE COLUMBUS, OH AREA

Year	VOC (tons/day)	NO_X (tons/day)
2009	72.16	125.43
2018	41.50	56.30

These proposed actions pertain to the designation of the Columbus area for the 8-hour ozone NAAQS and to the emission controls in the area related to the attainment and maintenance of the 8-hour ozone NAAQS. If you own or operate a VOC or NO_X emissions source in this area or live in this area, this proposed rule may impact or apply to you. It may also impact you if you are involved in transportation planning or implementation of emission controls in this area. Finally, it may also impact you if you breathe the air in the Columbus area or the air which has passed through this area, or if you are concerned with clean air, human health or the environment.

VII. What Is EPA's Analysis of the Request?

A. Attainment Determination and Redesignation

EPA is proposing to make a determination that the Columbus area has attained the 8-hour ozone standard and that the Columbus area has met all other applicable section 107(d)(3)(E) redesignation criteria. The basis for EPA's determinations is as follows:

1. The Area Has Attained the 8-Hour Ozone NAAQS (Section 107(d)(3)(E)(i))

EPA is proposing to make the determination that the Columbus area has attained the 8-hour ozone NAAQS. For ozone, an area may be considered to be attaining the 8-hour ozone NAAQS if there are no violations, as determined in accordance with 40 CFR 50.10 and Part 50, Appendix I, based on three complete, consecutive calendar years of quality-assured air quality monitoring data. For each monitor in the area, EPA computes the average of the fourth-highest daily maximum 8-hour average ozone concentrations from each of the three most recent years. The area is attaining the standard if all monitors have average concentrations at or below 0.08 ppm. Based on the rounding convention described in 40 CFR Part 50, Appendix I, the standard is attained if the design value is 0.084 ppm or below. The data must be collected and quality-assured in accordance with 40 CFR part 58, and recorded in the Aerometric Information Retrieval System (AIRS). The monitors generally should have remained at the same location for the duration of the monitoring period required for demonstrating attainment.

Ohio submitted 2004–2006 ozone monitoring data for the Columbus area. The Ohio EPA quality assured the ambient monitoring data in accordance with 40 CFR 58.10, and recorded it in the AIRS database, thus making the data publicly available. The data meet the completeness criteria in 40 CFR 50, Appendix I, which requires a minimum completeness of 75 percent annually and 90 percent over each three year period. A summary of the monitoring data is presented in Table 1 below.

TABLE 1.—ANNUAL 4TH HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATION AND 3-YEAR AVERAGES OF 4TH HIGH DAILY MAXIMUM 8-HOUR OZONE CONCENTRATIONS

Site ID	County	2003 4th high (ppm)	2005 4th high (ppm)	2006 4th high (ppm)	2004–2006 average (ppm)
39–041–0002	Delaware	75	80	75	76
39–049–0028	Franklin	75	86	76	79
39–049–0029	Franklin	78	92	82	84
39–049–0037	Franklin	73	86	79	79
39–049–0081	Franklin	74	86	77	79
39–083–0002	Knox	73	81	75	76
39–089–0005	Licking	74	82	72	76
39–097–0007	Madison	65	81	76	74

In addition, as discussed below with respect to the maintenance plans, Ohio has committed to continue operating an EPA-approved monitoring network in accordance with 40 CFR part 58. In summary, EPA finds that the data submitted by Ohio provide an adequate demonstration that the Columbus area has attained the 8-hour ozone NAAQS.

2. The Area Has Met All Applicable Requirements Under Section 110 and Part D; and the Area Has a Fully Approved SIP Under Section 110(k) (Sections 107(d)(3)(E)(v) and 107(d)(3)(E)(ii))

We have determined that Ohio has met all currently applicable SIP requirements for purposes of redesignation for the Columbus area under Section 110 of the CAA (general SIP requirements). We have also determined that the Ohio SIP meets all SIP requirements currently applicable for purposes of redesignation under Part D of Title I of the CAA (requirements specific to Subpart 1 nonattainment areas), in accordance with section 107(d)(3)(E)(v). In addition, we have determined that the SIP is fully approved with respect to all applicable requirements for purposes of redesignation, in accordance with section 107(d)(3)(E)(ii). In making these determinations, we have ascertained what SIP requirements are applicable to the area for purposes of redesignation, and have determined that the portions of the SIP meeting these requirements are fully approved under section 110(k) of the CAA. As discussed more fully below, SIPs must be fully approved only with respect to currently applicable requirements of the CAA.

a. Columbus, Ohio Has Met All Applicable Requirements Under Section 110 and Part D of the CAA

The September 4, 1992, Calcagni memorandum (see ''Procedures for Processing Requests To Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992) describes EPA's interpretation of section 107(d)(3)(E) of the CAA. Under this interpretation, a State, and the area it wishes to redesignate, must meet the relevant CAA requirements that are due prior to the State's submittal of a complete redesignation request for the area. See also the September 17, 1993 Michael Shapiro memorandum and 60 FR 12459, 12465–66 (March 7, 1995) (redesignation of Detroit-Ann Arbor, Michigan to attainment of the 1-hour ozone NAAQS). Applicable requirements of the CAA that come due subsequent to the State's submittal of a complete request remain applicable until a redesignation to attainment is approved, but are not required as a prerequisite to redesignation. See section 175A(c) of the CAA. *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004). See also 68 FR 25424, 25427 (May 12, 2003) (redesignation of the St. Louis/East St. Louis area to attainment of the 1-hour ozone NAAQS).

General SIP requirements. Section 110(a) of title I of the CAA contains the general requirements for a SIP. Section 110(a)(2) provides that the implementation plan submitted by a State must have been adopted by the State after reasonable public notice and hearing, and that, among other things, it includes enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the CAA; provides for establishment and operation of appropriate devices, methods, systems and procedures necessary to monitor ambient air quality; provides for implementation of a source permit program to regulate the modification and construction of any stationary source within the areas covered by the plan; includes provisions for the implementation of part C, Prevention of Significant Deterioration (PSD) and part D, New Source Review (NSR) permit programs; includes criteria for stationary source emission control measures, monitoring, and reporting; includes provisions for air quality modeling; and provides for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires that SIPs contain measures to prevent sources in a State from significantly contributing to air quality problems in another State. To implement this provision, EPA has required certain States to establish programs to address transport of air pollutants (NO_X SIP Call (63 FR 57356), Clean Air Interstate Rule (CAIR)(70 FR 25162)). However, the section 110(a)(2)(D) requirements for a State are not linked with a particular nonattainment area's designation and classification.

EPA believes that the requirements linked with a particular nonattainment area's designation and classifications are the relevant measures to evaluate in reviewing a redesignation request. When the transport SIP submittal requirements are applicable to a State, they will continue to apply to the State regardless of the attainment designation of any one particular area in the State. Therefore, we believe that these requirements should not be construed to be applicable requirements for purposes of redesignation. Further, we believe that the other section 110 elements described above that are not connected with nonattainment plan submissions and not linked with an area's attainment status are also not applicable requirements for purposes of redesignation. A State remains subject to these requirements after an area is redesignated to attainment. We conclude that only the section 110 and part D requirements which are linked with a particular area's designation and classification are the relevant measures which we may consider in evaluating a redesignation request. This approach is consistent with EPA's existing policy on applicability of conformity and oxygenated fuels requirements for redesignation purposes, as well as with section 184 ozone transport requirements. See Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176, October 10, 1996), (62 FR 24826, May 7, 1997); Cleveland-Akron-Lorain, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking (60 FR 62748, December 7, 1995). See also the discussion on this issue in the Cincinnati ozone redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh ozone redesignation (66 FR 50399, October 19, 2001).

As discussed above, we believe that section 110 elements which are not linked to the area's nonattainment status are not applicable for purposes of redesignation. Because there are no section 110 requirements linked to the part D requirements for 8-hour ozone nonattainment areas that have become due, as explained below, there are no Part D requirements applicable for purposes of redesignation under the 8-hour standard.

Part D Requirements. EPA has determined that the Ohio SIP meets applicable SIP requirements under part D of the CAA, since no requirements applicable for purposes of redesignation became due for the 8-hour ozone standard prior to Ohio's submission of the redesignation request for The Columbus area. Under part D, an area's classification determines the requirements to which it will be subject. Subpart 1 of part D, found in sections 172–176 of the CAA, sets forth the basic nonattainment requirements applicable to all nonattainment areas. Section 182 of the CAA, found in subpart 2 of part D, establishes additional specific requirements depending on the area's nonattainment classification. Columbus, Ohio, was classified as a subpart 1

nonattainment area, and, therefore, subpart 2 requirements do not apply.

Part D, Subpart 1 applicable SIP requirements. For purposes of evaluating these redesignation requests, the applicable part D, subpart 1 SIP requirements for the Columbus area are contained in sections 172(c)(1)–(9).

No 8-hour ozone planning requirements applicable for purposes of redesignation under part D became due prior to submission of the redesignation request, and, therefore, none are applicable to the area for purposes of redesignation. Since Ohio has submitted a complete ozone redesignation request for the Columbus area prior to the deadline for any submissions required for purposes of redesignation, we have determined that these requirements do not apply to the Columbus area for purposes of redesignation.

Section 176 conformity requirements. Section 176(c) of the CAA requires States to establish criteria and procedures to ensure that Federally-supported or funded activities, including highway projects, conform to the air quality planning goals in the applicable SIPs. The requirement to determine conformity applies to transportation plans, programs and projects developed, funded or approved under Title 23 of the U.S. Code and the Federal Transit Act (transportation conformity) as well as to all other Federally-supported or funded projects (general conformity). State conformity revisions must be consistent with Federal conformity regulations relating to consultation, enforcement and enforceability, which EPA promulgated pursuant to CAA requirements.

EPA approved Ohio's general and transportation conformity SIPs on March 11, 1996 (61 FR 9646) and May 30, 2000 (65 FR 34395), respectively. In summary, the Columbus area has satisfied all applicable requirements under section 110 and part D of the CAA.

b. Columbus Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

EPA has fully approved the Ohio SIP for the Columbus area under section 110(k) of the CAA for all requirements applicable for purposes of redesignation. In approving a redesignation request, EPA may rely on prior SIP approvals plus any additional measures it may approve in conjunction with a redesignation action (See the September 4, 1992 John Calcagni memorandum, page 3, *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984, 989–990 (6th Cir. 1998), *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001)). Since the passage of the CAA of 1970, Ohio has adopted and submitted, and EPA has fully approved, provisions addressing the various required SIP elements applicable to the Columbus area under the 1-hour ozone standard. No Columbus area SIP provisions are currently disapproved, conditionally approved, or partially approved.

3. The Improvement in Air Quality Is Due to Permanent and Enforceable Reductions in Emissions (Section 107(d)(3)(E)(iii))

EPA finds that Ohio has demonstrated that the observed air quality improvement in the Columbus area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal measures, and other State-adopted measures.

In making this demonstration, the State has calculated the change in emissions between 2002 and 2004, one of the years in which the Columbus area monitored attainment. The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of regulatory control measures that Ohio has implemented.

a. Permanent and Enforceable Controls Implemented

The following is a discussion of permanent and enforceable measures that have been implemented in the area:

NO_X rules. In compliance with EPA's NO_X SIP call, Ohio developed rules to control NO_X emissions from Electric Generating Units (EGUs), major non-EGU industrial boilers, and major cement kilns. These rules required sources to begin reducing NO_X emissions in 2004. However, statewide NO_X emissions actually had begun to decline before 2004, as sources phased in emission controls needed to comply with the State's NO_X emission control regulations. From 2004 on, NO_X emissions from EGUs in the Eastern United States have been capped at a level well below pre-2002 levels, such that EGU emissions in the Columbus area, and elsewhere in Ohio, can be expected to remain well below 2002 levels. Ohio expects that NO_X emissions will further decline as the State meets the requirements of EPA's Phase II NO_X SIP call (69 FR 21604 (April 21, 2004)).

Federal Emission Control Measures. Reductions in VOC and NO_X emissions have occurred statewide as a result of Federal emission control measures, with additional emission reductions expected to occur in the future as the State implements additional emission controls. Federal emission control measures include: Tier 2 emission standards for vehicles, gasoline sulfur limits, low sulfur diesel fuel standards, and heavy-duty diesel engine standards. In addition, in 2004, EPA issued the Clean Air Non-road Diesel Rule (69 FR 38958 (July 29, 2004)). EPA expects this rule to reduce off-road diesel emissions through 2010, with emission reductions starting in 2008.

b. Emission Reductions.

Ohio is using 2002 for the nonattainment inventory and included area, mobile and point source emissions. Area sources were taken from the Ohio 2002 periodic inventory submitted to EPA. These projections were made from the United States Department of Commerce Bureau of Economic Analysis growth factors, with some updated local information. Mobile source emissions were calculated from MOBILE6.2 produced emission factors. Non-road emissions were generated using the EPA's National Mobile Inventory Model (NMIM) 2002 application. Point source information was compiled from Ohio's 2002 annual emission inventory database and the 2002 EPA Clean Air Markets Acid Rain database.

Based on the inventories described above, Ohio's submittal documents changes in VOC and NO_X emissions from 2002 to 2004. Summaries of emissions data are shown in Tables 2 through 4.

TABLE 2.—THE COLUMBUS AREA TOTAL VOC AND NO_X EMISSIONS FOR NONATTAINMENT YEAR 2002 (TONS/DAY)

Sector	VOC	NO_X
Point	5.39	10.71
Area	65.15	6.84
Non-Road Mobile	28.55	41.90
On-Road Mobile	97.84	163.94
Columbus Area Total	196.93	223.39

TABLE 3.—THE COLUMBUS AREA TOTAL VOC AND NO_X EMISSIONS FOR ATTAINMENT YEAR 2004 (TONS/DAY)

Sector	VOC	NO_X
Point	5.05	10.30
Area	64.75	7.18
Non-Road Mobile	26.20	38.73
On-Road Mobile	87.84	150.89
Columbus Area Total	183.84	207.10

TABLE 4.—THE COLUMBUS, OHIO AREA: COMPARISON OF 2002 AND 2004 VOC AND NO_X EMISSIONS (TONS/DAY)

Sector	VOC			NO_X		
	2002	2004	Net change (2002–2004)	2002	2004	Net change (2002–2004)
Point	5.39	5.05	−0.24	10.71	10.30	−0.41
Area	65.15	64.75	−0.40	6.84	7.18	0.34
Nonroad	28.55	26.20	−2.35	41.90	38.73	−3.17
Onroad	97.84	87.84	−10.00	163.94	150.89	−13.05
Total	196.93	183.84	−13.09	223.39	207.10	−16.29

Table 4 shows that the area reduced VOC emissions by 13.09 tons/day, and NO_X emissions by 16.29 tons/day, between 2002 and 2004. Based on the information summarized above, Ohio has adequately demonstrated that the improvement in air quality is due to permanent and enforceable emissions reductions.

4. The Area Has a Fully Approved Maintenance Plan Pursuant to Section 175a of the CAA (Section 107(d)(3)(E)(iv))

In conjunction with its request to redesignate the Columbus area to attainment status, Ohio submitted SIP revisions to provide for the maintenance of the 8-hour ozone NAAQS in this area through 2018.

a. What is required in a maintenance plan?

Section 175A of the CAA sets forth the required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after the Administrator approves a redesignation to attainment. Eight years after the redesignation, the State must submit a revised maintenance plan which demonstrates that attainment will continue to be maintained for ten years following the initial ten-year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures with a schedule for implementation as EPA deems necessary to assure prompt correction of any future 8-hour ozone violations.

The September 4, 1992, John Calcagni memorandum provides additional guidance on the content of a maintenance plan. The memorandum clarifies that an ozone maintenance plan should address the following items: The attainment VOC and NO_X emissions inventories, a maintenance demonstration showing maintenance for the ten years of the maintenance period, a commitment to maintain the existing monitoring network, factors and procedures to be used for verification of continued attainment of the NAAQS, and a contingency plan to prevent or correct future violations of the NAAQS.

b. Attainment Inventory

Ohio developed a baseline emissions inventory for 2004, one of the years used to demonstrate monitored attainment of the 8-hour NAAQS. The attainment level of emissions is summarized in Table 3, above.

c. Demonstration of Maintenance

Ohio submitted revisions to the 8-hour ozone SIP to include 11-year maintenance plans for the Columbus area, in compliance with section 175A of the CAA. This demonstration shows maintenance of the 8-hour ozone standard by assuring that current and future emissions of VOC and NO_X area remain at or below attainment year emission levels. A maintenance demonstration need not be based on modeling. See *Wall* v. *EPA*, 265 F.3d 426 (6th Cir. 2001), *Sierra Club* v. *EPA*, 375 F. 3d 537 (7th Cir. 2004). See also 66 FR 53094, 53099–53100 (October 19, 2001), 68 FR 25413, 25430–25432 (May 12, 2003).

Ohio is using projected inventories for the years 2009 and 2018. These emission estimates are presented in Table 5.

TABLE 5.—THE COLUMBUS, OHIO AREA: COMPARISON OF 2004–2018 VOC AND NO_X EMISSIONS (TONS/DAY)

Sector	VOC				NO_X			
	2004	2009	2018	Net change 2004–2018	2004	2009	2018	Net change 2004–2018
Point	5.05	4.43	5.20	0.15	10.30	9.38	10.00	−0.30
Area	64.75	63.75	67.24	2.49	7.18	8.06	8.60	1.42
Nonroad	26.20	20.28	18.85	−7.35	38.73	30.72	20.14	−18.59
Onroad	87.84	62.76	36.09	−51.75	150.89	109.07	49.01	−101.88
Total	183.84	151.22	127.38	−56.46	207.10	157.23	87.75	−119.35

The emission projections show that Ohio does not expect emissions in the area to exceed the level of the 2004 attainment year inventory during the maintenance period. In the area, Ohio projects that VOC and NO_X emissions will decrease by 56.46 tons/day and 119.35 tons/day, respectively.

As part of its maintenance plan, the State elected to include a ''safety margin'' for the area. A ''safety margin'' is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan which continues to demonstrate attainment of the standard. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. Ohio used 2004 as the attainment level

of emissions for the area. In the maintenance plan, Ohio projected emission levels for 2018. The emissions from point, area, non-road, and mobile sources in 2004 equaled 183.84 tons/day of VOC and 207.10 tons/day of NO_X. Ohio projected VOC emissions for the year 2018 to be 127.38 tons/day of VOC and 87.75 tons/day of NO_X. The safety margin is calculated to be the difference between these amounts or, in this case, 56.46 tons/day of VOC and 119.35 tons/day of NO_X for 2018. The safety margin, or a portion thereof, can be allocated to any of the source categories, as long as the total attainment level of emissions is maintained. Ohio EPA allocated 5.41 tons/day of VOC and 7.35 tons/day of NO_X to the MVEB. The SIP submission demonstrates that the area will continue to maintain the standard because emission will continue to be below the attainment level.

d. Monitoring Network

Ohio currently operates eight ozone monitors in the Columbus area. Ohio has committed to continue operating and maintaining their approved ozone monitor network in accordance with 40 CFR part 58.

e. Verification of Continued Attainment

Continued attainment of the ozone NAAQS in the area depends, in part, on the State's efforts toward tracking indicators of continued attainment during the maintenance period. The State's plan for verifying continued attainment of the 8-hour standard in the area consists of plans to continue ambient ozone monitoring in accordance with the requirements of 40 CFR part 58. In addition, Ohio will periodically review and revise the VOC and NO_X emissions inventories for the area, as required by the Consolidated Emissions Reporting Rule (40 CFR part 51), to track levels of emissions in the future.

f. Contingency Plan

The contingency plan provisions of the CAA are designed to result in prompt correction or prevention of violations of the NAAQS that might occur after redesignation of an area to attainment of the NAAQS. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to assure that the State will promptly correct a violation of the NAAQS that might occur after redesignation. The maintenance plan must identify the contingency measures to be considered for possible adoption, a schedule and procedure for adoption and implementation of the selected contingency measures, and a time limit for action by the State. The State should also identify specific indicators to be used to determine when the contingency measures need to be adopted and implemented. The maintenance plan must include a requirement that the State will implement all measures with respect to control of the pollutant(s) that were included in the SIP before the redesignation of the area to attainment. See section 175A(d) of the CAA.

As required by section 175A of the CAA, Ohio has adopted a contingency plan to address possible future ozone air quality issues. The contingency plan has two levels of actions/responses depending on whether a violation of the 8-hour ozone standard is only threatened (Warning Level Response) or has actually occurred or appears to be very imminent (Action Level Response).

A Warning Level Response will be triggered whenever an annual (1-year) fourth-high monitored 8-hour ozone concentration of 88 ppb occurs within the ozone maintenance area (Columbus area). A Warning Level Response will consist of a study to determine whether the ozone value indicates a trend toward higher ozone concentrations or whether emissions appear to be increasing. The study will evaluate whether the trend, if any, is likely to continue and, if so, the control measures necessary to reverse the trend, taking into consideration ease and timing for implementation, as well as economic and social consideration. Implementation of necessary controls in response to a Warning Level Response triggering will take place as expeditiously as possible, but in no event later than 12 months from the conclusion of the most recent ozone season.

An Action Level Response will be triggered whenever a two-year average annual fourth-high monitored 8-hour ozone concentration of 85 ppb or greater occurs within the maintenance area (Columbus area). A violation of the 8-hour ozone standard (three-year average fourth-high value of 85 ppb or greater) will also prompt an Action Level Response. In the event that an Action Level Response is triggered and is not due to an exceptional event, malfunction, or noncompliance with a source permit condition or rule requirement, Ohio will determine the additional emission control measures needed to assure future attainment of the ozone NAAQS. Emission control measures that can be implemented in a short time will be selected in order to be in place within 18 months from the close of the ozone season that prompted the Action Level Response. Any new emission control measure that is selected for implementation will be given a public review. If a new emission control measure is already promulgated and scheduled to be implemented at the Federal or State level and that emission control measure is determined to be sufficient to address the increase in peak ozone concentrations, additional local measures may be unnecessary. Ohio will submit to the EPA an analysis to assess whether the proposed emission control measures are adequate to reverse the increase in peak ozone concentrations and to maintain the 8-hour ozone standard in the area. The selection of emission control measures will be based on cost-effectiveness, emission reduction potential, economic and social considerations, or other factors that Ohio deems to be appropriate. Selected emission control measures will be subject to public review and the State will seek public input prior to selecting new emission control measures.

The State's ozone redesignation request lists the following possible emission control measures as contingency measures in the ozone maintenance portion of the State's submittal:

i. Lower Reid vapor pressure gasoline requirements;

ii. Tighten RACT on existing source covered by USEPA Control Techniques Guidelines issued in response to the 1990 CAA;

iii. Apply RACT to smaller existing sources;

iv. One or more transportation control measures sufficient to achieve at least half a percent reduction in actual area wide VOC emissions. Transportation-measures will be selected from the following, based upon the factors listed above after consultation with affected local governments:

a. Trip reduction programs, including, but not limited to, employer-based transportation management plans, area-wide rideshare programs, work schedule changes, and telecommuting;

b. Traffic flow and transit improvements; and

c. Other new or innovative transportation measures not yet in widespread use that affects State and local governments deemed appropriate.

v. Alternative fuel and diesel retrofit programs for fleet vehicle operations.

vi. Controls on consumer products consistent with those adopted elsewhere in the United States.

vii. Require VOC and NO_X emissions offsets for new and modified major sources.

viii. Require VOC or NO_X emission offsets for new or modified minor sources.

ix. Increase the ratio of emission offsets required for new sources.

x. Require VOC or NO_X controls on new minor sources (less than 100 tons).

g. Provisions for Future Updates of the Ozone Maintenance Plan.

As required by section 175A(b) of the CAA, Ohio commits to submit to the EPA updated ozone maintenance plans eight years after redesignation to cover an additional 10-year period beyond the initial 10-year maintenance period. Ohio has committed to retain the control measures for VOC and NO_X emissions that were contained in the SIP before redesignation of the area to attainment, as required by section 175(A) of the CAA.

EPA proposes that the maintenance plan adequately addresses the five basic components of a maintenance plan: attainment inventory, maintenance demonstration, monitoring network, verification of continued attainment, and a contingency plan.

B. Adequacy of Ohio's Motor Vehicle Emissions Budgets (MVEBs)

1. How Are MVEBs Developed and What Are the MVEBs for the Area?

Under the CAA, States are required to submit, at various times, control strategy SIP revisions and ozone maintenance plans for ozone nonattainment areas and for areas seeking redesignation to attainment of the ozone standard. These emission control strategy SIP revisions (*e.g.*, reasonable further progress SIP and attainment demonstration SIP revisions) and ozone maintenance plans create MVEBs based on onroad mobile source emissions for criteria pollutants and/or their precursors to address pollution from cars and trucks. The MVEBs are the portions of the total allowable emissions that are allocated to highway and transit vehicle use that, together with emissions from other sources in the area, will provide for attainment or maintenance.

Under 40 CFR Part 93, a MVEB for an area seeking a redesignation to attainment is established for the last year of the maintenance plan. The MVEB serves as a ceiling on emissions from an area's planned transportation system. The MVEB concept is further explained in the preamble to the November 24, 1993, transportation conformity rule (58 FR 62188). The preamble also describes how to establish the MVEB in the SIP and how to revise the MVEB if needed.

Under section 176(c) of the CAA, new transportation projects, such as the construction of new highways, must ''conform'' to (*i.e.*, be consistent with) the part of the SIP that addresses emissions from cars and trucks. Conformity to the SIP means that transportation activities will not cause new air quality violations, worsen existing air quality violations, or delay timely attainment of the NAAQS. If a transportation plan does not conform, most new transportation projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and assuring conformity of such transportation activities to a SIP.

When reviewing SIP revisions containing MVEBs, including attainment strategies, rate-of-progress plans, and maintenance plans, EPA must affirmatively find that the MVEBs are ''adequate'' for use in determining transportation conformity. Once EPA affirmatively finds the submitted MVEBs to be adequate for transportation conformity purposes, the MVEBs are used by State and Federal agencies in determining whether proposed transportation projects conform to the SIP as required by section 176(c) of the CAA. EPA's substantive criteria for determining the adequacy of MVEBs are set out in 40 CFR 93.118(e)(4).

EPA's process for determining adequacy of a MVEB consists of three basic steps: (1) Providing public notification of a SIP submission; (2) providing the public the opportunity to comment on the MVEB during a public comment period; and, (3) EPA's finding of adequacy. The process of determining the adequacy of submitted SIP MVEBs was initially outlined in EPA's May 14, 1999, guidance, ''Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision.'' This guidance was codified in the Transportation Conformity Rule Amendments for the ''New 8-Hour Ozone and PM2.5 National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments—Response to Court Decision and Additional Rule Change,'' published on July 1, 2004 (69 FR 40004). EPA follows this guidance and rulemaking in making its adequacy determinations.

The Columbus area's maintenance plan contains new VOC and NO_X MVEBs for the years 2009 and 2018. The availability of the SIP submission with these 2009 and 2018 MVEBs was announced for public comment on EPA's Adequacy Web page on March 5, 2007, at: *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm*. The EPA public comment period on adequacy of the MVEBs closed on April 6, 2007. No requests for the submittal or adverse comments on the submittal were received during the adequacy comment period. In a letter dated April 6, 2007 EPA informed Ohio that we had found the MVEBs to be adequate for use in transportation conformity analyses.

EPA, through this rulemaking, is proposing to approve the MVEBs for use in determining transportation conformity in the Columbus area because the EPA has determined that the area can maintain attainment of the 8-hour ozone NAAQS for the relevant maintenance period with mobile source emissions at the levels of the MVEBs.

MOTOR VEHICLE EMISSIONS BUDGETS FOR THE COLUMBUS, OH AREA

Year	VOC (tons/day)	NO_X (tons/day)
2009	72.16	125.43
2018	41.50	56.30

2. What Is a Safety Margin?

A ''safety margin'' is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan. As part of its maintenance plan, the State elected to include a ''safety margin'' for the area. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. Ohio used 2004 as the attainment level of emissions for the area. In the maintenance plan, Ohio projected emission levels for 2018. The emissions from point, area, non-road, and mobile sources in 2004 equaled 183.84 tons/day of VOC and 207.10 tons/day of NO_X. Ohio projected VOC emissions for the year 2018 to be 127.38 tons/day of VOC and 87.75 tons/day of NO_X. The safety margin is calculated to be the difference between these amounts or, in this case, 56.46 tons/day of VOC and 119.35 tons/day of NO_X for 2018. The safety margin, or a portion thereof, can be allocated to any of the source categories, as long as the total attainment level of emissions is maintained. Ohio EPA allocated 5.41 tons/day of VOC and 7.35 tons/day of NO_X to the MVEB. The SIP submission demonstrates that the area will continue to maintain the standard.

VIII. What Actions Is EPA Taking Today?

EPA is proposing to make determinations that the Columbus area has attained the 8-hour ozone NAAQS, and EPA is proposing to approve Ohio's

maintenance plan for assuring that the area will continue to attain this standard. EPA is also proposing to find that the Columbus area meets the redesignation criteria set forth in section 107(d)(3)(E) of the CAA, and on this basis, EPA is proposing to approve the redesignation of the Columbus area from nonattainment to attainment for the 8-hour ozone standard.

Finally, EPA is finding adequate and proposing to approve the 2009 and 2018 VOC and NO_X MVEBs submitted by Ohio in conjunction with the redesignation request.

IX. Statutory and Executive Order Reviews

Executive Order 12866: Regulatory Planning and Review

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.

Paperwork Reduction Act

This proposed 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.*).

Regulatory Flexibility Act

This proposed action merely proposes to approve State law as meeting Federal requirements and imposes no additional requirements beyond those imposed by State law. Redesignation of an area to attainment under section 107(d)(3)(E) of the CAA does not impose any new requirements on small entities. Redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on sources. 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.*).

Unfunded Mandates Reform Act

Because this rule proposes to approve 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).

Executive Order 13132: Federalism

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). Redesignation is an action that merely affects the status of a geographical area, does not impose any new requirements on sources, or allows a State to avoid adopting or implementing other requirements, and does not alter the relationship or the distribution of power and responsibilities established in the CAA.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (65 FR 67249, November 9, 2000) requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule also does not have tribal implications, as specified in Executive Order 13175, because redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on tribes, impact any existing sources of air pollution on tribal lands, nor impair the maintenance of ozone national ambient air quality standards in tribal lands. Thus, Executive Order 13175 does not apply to this rule.

Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This proposed 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.

Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

Because it is not a ''significant regulatory action'' under Executive Order 12866 or a ''significant energy action,'' 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).

National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTA), 15 U.S.C. 272, requires Federal agencies to use technical standards that are developed or adopted by voluntary consensus to carry out policy objectives, so long as such standards are not inconsistent with applicable law or otherwise impracticable. In reviewing program submissions, EPA's role is to approve State choices, provided that they meet the criteria of the CAA. Absent a prior existing requirement for the State to use voluntary consensus standards, EPA has no authority to disapprove a program submission for failure to use such standards, and it would thus be inconsistent with applicable law for EPA to use voluntary consensus standards in place of a program submission that otherwise satisfies the provisions of the Act. Redesignation is an action that affects the status of a geographical area but does not impose any new requirements on sources. 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.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

40 CFR Part 81

Environmental protection, Air Pollution Control, National parks, Wilderness areas.

Dated: June 1, 2007.

Walter Kovalick,

Acting Regional Administrator, Region 5.

[FR Doc. E7–11294 Filed 6–11–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 53 and 58

[EPA–HQ–OAR–2004–0018; FRL–8308–8]

RIN 2060–AO06

Ambient Air Monitoring Regulations: Correcting and Other Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to correct and clarify parts of a recent final rule published on October 17, 2006, that amended the ambient air monitoring requirements for criteria pollutants. The proposed changes include several instances where the wording in the preamble and regulatory text were not completely consistent, several regulatory text passages that contained some imprecise language, two instances

of regulatory text omission, an outdated address reference, and numerous publication errors in tables and equations. EPA is also proposing to allow EPA Regional Administrators to approve departures from the minimum number of PM_{10} monitors otherwise specified in the rule. In the ''Rules and Regulations'' section of this **Federal Register**, we are taking direct final action on the amendments because we view the amendments as non-controversial and anticipate no adverse comments. If we receive no adverse comments, we will take no further action on this proposed rule.

DATES: Written comments must be received by July 12, 2007.

ADDRESSES: Please see the related direct final rule, which is located in the ''Rules and Regulations'' section of this **Federal Register**, for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Mr. Lewis Weinstock, Air Quality Assessment Division (C304–06), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–3661; fax number: (919) 541–1903; e-mail address: *weinstock.lewis@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Why Is EPA Issuing This Proposed Rule?

This document proposes to take action on Ambient Air Monitoring Regulations: Correcting and Other Amendments. We have published a direct final rule identical to this proposal to correct and clarify parts of a recent final rule published on October 17, 2006, that amended the ambient air monitoring requirements for criteria pollutants. We view this as a non-controversial action and anticipate no adverse comment. We have explained our reasons for this action in the preamble to the direct final rule.

If we receive no adverse comment, we will not take further action on this proposed rule. If EPA receives relevant adverse comment on one or more of the amendments included in this proposal, we will publish a timely withdrawal in the **Federal Register** informing the public which amendment or amendments we are withdrawing. The provisions that are not withdrawn will become effective as set out in the DATES section of the direct final rule. We will address these public comments in a subsequent final rule based on this proposal. We will not institute a second comment period on this action. Any persons interested in commenting must do so at this time.

The regulatory text for the proposal is identical to that for the direct final rule published in the ''Rules and Regulations'' section of this **Federal Register**. For further supplementary information, the detailed rationale for the proposal and the regulatory revisions, see the direct final rule published in a separate part of this **Federal Register**.

II. Does This Action Apply to Me?

Categories and entities potentially regulated by this action include:

Category	NAICS code [1]	Examples of regulated entities
Industry	334513 541380	Manufacturer, supplier, distributor, or vendor of ambient air monitoring instruments; analytical laboratories or other monitoring organizations that elect to submit an application for a reference or equivalent method determination under 40 CFR part 53.
Federal Government	924110	Federal agencies (that conduct ambient air monitoring similar to that conducted by States under 40 CFR part 58 and that wish EPA to use their monitoring data in the same manner as State data) or that elect to submit an application for a reference or equivalent method determination under 40 CFR part 53.
State/territorial/local/tribal government	924110	State, territorial, and local air quality management programs that are responsible for ambient air monitoring under 40 CFR part 58 or that elect to submit an application for a reference or equivalent method determination under 40 CFR part 53 or for an approved regional method approved under 40 CFR part 58 appendix C. The proposal also may affect Tribes that conduct ambient air monitoring similar to that conducted by States and that wish EPA to use their monitoring data in the same manner as State monitoring data.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility or Federal, State, local, tribal, or territorial agency is regulated by this action, you should carefully examine the requirements for reference or equivalent method determinations in 40 CFR part 53, subpart A (General Provisions) and the applicability criteria in 40 CFR 51.1 of EPA's requirements for State implementation plans. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it may raise novel legal policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection, as it only corrects printing errors, provides clarifications, and provides new flexibility for PM_{10} monitoring on a case-by-case basis. However, the OMB has previously approved the information collection requirements contained in the existing regulations for 40 CFR part 53 and 40 CFR part 58 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and has assigned OMB control number 2060–0084, EPA ICR number 0940.20. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection

Strategies Division, U.S. Environmental Protection Agency (2822T), 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672. This action does not impose any new information collection burden beyond the already-approved ICR.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

This proposed rule will not impose any requirements on small entities. None of the corrections and clarifications creates additional regulatory requirements on affected entities compared to those that were promulgated in the final rule that was published in the **Federal Register** on October 17, 2006. The proposed rule changes only correct printing errors, provide clarifications, and provide new flexibility for PM_{10} monitoring on a case-by-case basis.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that this proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year, because the changes being made are merely clarifications and corrections. Thus, today's rule is not subject to the requirements of sections 202 and 205 of the UMRA.

The EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. None of the proposed changes creates additional regulatory requirements on affected entities compared to those that were promulgated in the final rule that was published in the **Federal Register** on October 17, 2006. The proposed changes only correct printing errors, provide clarifications, and provide some new flexibility for PM_{10} monitoring on a case-by-case basis. Therefore, this proposed rule is not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications because it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This is because the proposed changes being made only correct printing errors, provide clarifications, and provide some new flexibility for PM_{10} monitoring on a case-by-case basis. Thus, Executive Order 13132 does not apply to this proposed rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal

implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. The EPA consulted with tribal officials early in the process of developing the October 17, 2006, rule to permit them to have meaningful and timely input into its development. Although tribal governments may elect to conduct ambient air monitoring, none of the proposed changes in today's rule apply directly to tribal governments. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62FR19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under EO 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets EO 13045 as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This proposed rule is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The rule merely proposed to amend the October 17, 2006, final monitoring rule (71 FR 61236) by correcting printing errors, providing clarifications, and providing some new flexibility for PM_{10} monitoring on a case-by-case basis.

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. No significant change in the use of energy is expected because the total number of monitors for ambient air quality measurements will not increase above present levels. Further, we have concluded that this rule is not likely to have any adverse energy effects.

J. National Technology Transfer Advancement Act

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

This action does not involve technical standards, other than to make corrections and clarifications. Therefore, EPA did not consider the use of any voluntary consensus standards.

List of Subjects in 40 CFR Parts 53 and 58

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

Dated: April 30, 2007.

Stephen L. Johnson,

Administrator.

[FR Doc. 07–2237 Filed 6–11–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[EPA–HQ–OAR–2007–0297; FRL–8325–7]

RIN A2060–AO44

Protection of Stratospheric Ozone: Allocation of Essential Use Allowances for Calendar Year 2008

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to allocate essential use allowances for import and production of Class I ozone-depleting substances (ODSs) for calendar year 2008. Essential use allowances enable a person to obtain controlled Class I ODSs as part of an exemption to the regulatory ban on the production and import of these chemicals, which became effective as of January 1, 1996. EPA allocates essential use allowances for exempted production or import of a specific quantity of Class I substances solely for the designated essential purpose. The proposed allocations total 27.0 metric tons (MT) of chlorofluorocarbons (CFCs) for use in metered dose inhalers (MDIs) for 2008.

DATES: Written comments on this proposed rule must be received by the EPA Docket on or before July 12, 2007, unless a public hearing is requested. Comments must then be received on or before 30 days following the public hearing. Any party requesting a public hearing must notify the contact listed below under **FOR FURTHER INFORMATION CONTACT** by 5 p.m. Eastern Standard Time on June 18, 2007. If a hearing is held, it will take place on June 27, 2007 at EPA headquarters in Washington DC. EPA will post a notice on our Web site (*http://www.epa.gov/ozone*) announcing further information on the hearing if it is requested.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2007–0297, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *A-and-R-docket@epa.gov*.
- Fax: 202–566–9744.
- Mail: Air Docket, Environmental Protection Agency, Mailcode 2822T,

1200 Pennsylvania Ave., NW., Washington, DC 20460.

• Hand Delivery or Courier. Deliver your comments to: EPA Air Docket, EPA West 1301 Constitution Avenue, NW., Room 3334, Mail Code 2822T, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2007–0297. EPA's policy is that all comments received by the docket will be included in the public docket without change and may be made available online at *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 through *www.regulations.gov* or e-mail that you consider to be CBI or otherwise protected. If you would like the Agency to consider comments that include CBI, EPA recommends that you submit the comments to the docket that exclude the CBI portion but that you provide a complete version of your comments, including the CBI, to the person listed under **ADDRESSES** above. The *www.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 *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public 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. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

Docket: All documents in the docket are listed in the *www.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 in *www.regulations.gov* or in hard copy at the Air Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility 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 Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Kirsten M. Cappel, by regular mail: U.S. Environmental Protection Agency, Stratospheric Protection Division (6205J), 1200 Pennsylvania Avenue, NW., Washington, DC, 20460; by courier service or overnight express: 1301 L Street, NW., Room 1047C, Washington DC, 20005; by telephone: (202) 343–9556; or by e-mail: *cappel.kirsten@epa.gov*.

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I. General Information

What should I consider when preparing my comments?

1. *Confidential Business Information.* Do not submit this information to EPA through *www.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 as 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:

• Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

• 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.

• Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

• Describe any assumptions and provide any technical information and/or data that you used.

• If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

• Provide specific examples to illustrate your concerns, and suggest alternatives.

• Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

• Make sure to submit your comments by the comment period deadline identified.

II. Basis for Allocating Essential Use Allowances

A. What are essential use allowances?

Essential use allowances are allowances to produce or import certain ODSs in the U.S. for purposes that have been deemed ''essential'' by the U.S. Government and by the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).

The Montreal Protocol is the international agreement aimed at reducing and eliminating the production and consumption [1] of ODSs. The elimination of production and consumption of Class I ODSs is accomplished through adherence to

[1] ''Consumption'' is defined as the amount of a substance produced in the United States, plus the amount imported into the United States, minus the amount exported to Parties to the Montreal Protocol (see Section 601(6) of the Clean Air Act).

phaseout schedules for specific Class I ODSs,[2] which include CFCs, halons, carbon tetrachloride, and methyl chloroform. As of January 1, 1996, production and import of most Class I ODSs were phased out in developed countries, including the United States.

However, the Montreal Protocol and the Clean Air Act (the Act) provide exemptions that allow for the continued import and/or production of Class I ODSs for specific uses. Under the Montreal Protocol, exemptions may be granted for uses that are determined by the Parties to be ''essential.'' Decision IV/25, taken by the Parties to the Protocol in 1992, established criteria for determining whether a specific use should be approved as essential, and set forth the international process for making determinations of essentiality. The criteria for an essential use, as set forth in paragraph 1 of Decision IV/25, are the following:

''(a) That a use of a controlled substance should qualify as 'essential' only if:

(i) It is necessary for the health, safety or is critical for the functioning of society (encompassing cultural and intellectual aspects); and

(ii) There are no available technically and economically feasible alternatives or substitutes that are acceptable from the standpoint of environment and health;

(b) That production and consumption, if any, of a controlled substance for essential uses should be permitted only if:

(i) All economically feasible steps have been taken to minimize the essential use and any associated emission of the controlled substance; and

(ii) The controlled substance is not available in sufficient quantity and quality from existing stocks of banked or recycled controlled substances, also bearing in mind the developing countries' need for controlled substances.''

B. Under what authority does EPA allocate essential use allowances?

Title VI of the Act implements the Montreal Protocol for the United States.[3] Section 604(d) of the Act authorizes EPA to allow the production of limited quantities of Class I ODSs after the phaseout date for the following essential uses:

(1) Methyl Chloroform, ''solely for use in essential applications (such as nondestructive testing for metal fatigue and corrosion of existing airplane engines and airplane parts susceptible to metal fatigue) for which no safe and effective substitute is available.'' Under section 604(d)(1) of the Act, this exemption was available only until January 1, 2005. Prior to that date, EPA issued methyl chloroform allowances to the U.S. Space Shuttle and Titan Rocket programs.

(2) Medical devices (as defined in section 601(8) of the Act), ''if such authorization is determined by the Commissioner [of the Food and Drug Administration], in consultation with the Administrator [of EPA] to be necessary for use in medical devices.'' EPA issues allowances to manufacturers of MDIs that use CFCs as propellant for the treatment of asthma and chronic obstructive pulmonary disease.

(3) Aviation safety, for which limited quantities of halon-1211, halon-1301, and halon-2402 may be produced ''if the Administrator of the Federal Aviation Administration, in consultation with the Administrator [of EPA] determines that no safe and effective substitute has been developed and that such authorization is necessary for aviation safety purposes.'' Neither EPA nor the Parties have ever granted a request for essential use allowances for halon, because alternatives are available or because existing quantities of this substance are large enough to provide for any needs for which alternatives have not yet been developed.

An additional essential use exemption under the Montreal Protocol, as agreed in Decision X/19, is the general exemption for laboratory and analytical uses. This exemption is reflected in EPA's regulations at 40 CFR part 82, subpart A. While the Act does not specifically provide for this exemption, EPA has determined that an exemption for essential laboratory and analytical uses is allowable under the Act as a *de minimis* exemption. The *de minimis* exemption is addressed in EPA's final rule of March 13, 2001 (66 FR 14760–14770). The Parties to the Protocol subsequently agreed (Decision XI/15) that the general exemption does not apply to the following uses: Testing of oil and grease, and total petroleum hydrocarbons in water; testing of tar in road-paving materials; and forensic finger-printing. EPA incorporated this exemption at Appendix G to Subpart A of 40 CFR part 82 on February 11, 2002 (67 FR 6352). In a December 29, 2005 final rule, EPA extended the general exemption for laboratory and analytical uses through December 31, 2007 (70 FR 77048), in accordance with Decision XV/8 of the Parties to the Protocol. EPA plans to update this exemption in accordance with future Decisions from the Parties and its own regulations.

C. What is the process for allocating essential use allowances?

The procedure set out by Decision IV/25 calls for individual Parties to nominate essential uses and the total amount of ODSs needed for those essential uses on an annual basis. The Protocol's Technology and Economic Assessment Panel (TEAP) evaluates the nominated essential uses and makes recommendations to the Parties. The Parties make the final decisions on whether to approve a Party's essential use nomination at their annual meeting. This nomination process occurs approximately two years before the year in which the allowances would be in effect. The allowances proposed for allocation for 2008 were first nominated by the United States in January 2006.

For MDIs, EPA requests information from manufacturers about the number and type of MDIs they plan to produce, as well as the amount of CFCs necessary for production. EPA then forwards the information to the Food and Drug Administration (FDA), which determines the amount of CFCs necessary for MDIs in the coming calendar year. Based on FDA's determination, EPA proposes allocations to each eligible entity. Under the Act and the Montreal Protocol, EPA may allocate essential use allowances in quantities that together are below or equal to the total amount approved by the Parties. EPA will not allocate essential use allowances in amounts higher than the total approved by the Parties. For 2008, the Parties authorized the United States to allocate up to 385 MT of CFCs for essential uses. In the 2008 nomination for essential use allowances, the United States did not request CFCs for use in MDIs where the sole active ingredient is albuterol.

III. Essential Use Allowances for Medical Devices

The following is a step-by-step list of actions EPA and FDA have taken thus far to implement the exemption for medical devices found at section 604(d)(2) of the Act for the 2008 calendar year.

1. On January 17, 2007, EPA sent letters to MDI manufacturers requesting the following information under section 114 of the Act (''114 letters''):

a. The MDI product where CFCs will be used.

b. The number of units of each MDI product produced from 1/1/06 to 12/31/06.

[2] Class I ozone depleting substances are listed at 40 CFR part 82, subpart A, appendix A.

[3] *See* Section 614(b) of the Act. EPA's regulations implementing the essential use provisions of the Act and the Protocol are located in 40 CFR part 82.

c. The number of units anticipated to be produced in 2007.

d. The number of units anticipated to be produced in 2008.

e. The gross target fill weight per unit (grams).

f. Total amount of CFCs to be contained in the MDI product for 2008.

g. The additional amount of CFCs necessary for production.

h. The total CFC request per MDI product for 2008.

The 114 letters are available for review in the Air Docket ID No. EPA–HQ–OAR–2007–0297. The companies requested that their responses be treated as confidential business information; for this reason, EPA has placed the responses in the confidential portion of the docket.

2. At the end of January 2007, as required by 40 CFR 82.13(u), EPA received information from MDI manufacturers that included such data as the type and quantity of CFCs held at the end of the year (i.e. stocks of pre-1996 and post-1996 CFCs). The data submitted in reports from each MDI manufacturer is available for review in the Air Docket ID No. EPA–HQ–OAR–2007–0297. The companies requested that their responses be treated as confidential business information; for this reason, EPA has placed the individual responses in the confidential portion of the docket.

3. On February 28, 2007, EPA sent FDA the information MDI manufacturers provided in response to the 114 letters and information required by 40 CFR 82.13(u) with a letter requesting that FDA make a determination regarding the amount of CFCs necessary for MDIs for calendar year 2008. This letter is available for review in Air Docket ID No. EPA–HQ–OAR–2007–0297.

4. On May 1, 2007 FDA sent a letter to EPA stating the amount of CFCs determined by the Commissioner to be necessary for each MDI company in 2008. This letter is available for review in the Air Docket ID No. EPA–HQ–OAR–2007–0297. FDA's letter informed EPA that it had determined that 27.0 MT of CFCs were medically necessary for use in MDIs in 2008. The letter stated: ''Our determination for the allocation of CFCs is lower than the total amount requested by sponsors. In reaching this estimate, we took into account the sponsors' production of MDIs that used CFCs as propellant in 2006, their estimated production in 2007, their estimated production in 2008, their anticipated essential-use allocations in 2007, and their current (as of December 31, 2006) stockpile levels. Our determination took into account any transferred CFCs as well as pre-1996 CFC amounts. We also considered the different types and blends of CFCs necessary to produce specific MDIs. Finally, we based our determination for 2008 on an estimate of the quantity of CFCs that would allow manufacturers to have a 12-month stockpile at the end of 2008 in accordance with paragraph 3 of Decision XVI/12 and paragraph 2 of Decision XVII/5.''

The letter stated that in making its determination, FDA made the following assumptions:

- All manufacturers will receive the full essential-use allocation proposed by EPA for calendar year 2007 (71 FR 64668, November 3, 2006);
- All manufacturers will procure the full quantity of CFCs allocated to them for calendar year 2007;
- The number of albuterol CFC MDIs produced in 2008 will be no more than half of the number produced in 2007, with albuterol HFA MDIs making up the remainder; and
- No bulk CFC currently held by, or allocated to, any manufacturer will be exported from the United States.

FDA's determination specified that the essential use allowances allocated for 2008 should only be used to acquire CFC–114 for the production of epinephrine MDIs. FDA's letter stated: ''In recent years, we aggregated the amounts for CFC–11, –12, and –114 and provided recommendations on the total amounts necessary to protect the public health. This year, as sponsors transition to non-CFC alternative and require smaller amounts of CFCs to produce CFC MDIs, we considered individual amounts of CFCs necessary to protect the public health and recommend an allocation of 27.0 tonnes of CFC–114 to Armstrong for the manufacture of epinephrine CFC MDIs.'' Consistent with FDA's determination letter, EPA is proposing to allocate 27.0 MT of CFC–114 to Armstrong for the production of epinephrine MDIs for 2008.

EPA has confirmed with FDA that this determination is consistent with Decision XVII/5, including language on stocks that states that Parties ''shall take into account pre- and post-1996 stocks of controlled substances as described in paragraph 1(b) of Decision IV/25, such that no more than a one-year operational supply is maintained by that manufacturer.'' In its analysis of a one-year operational supply of CFCs for the production of CFC-albuterol MDIs, FDA informed EPA that it calculates volumes to allow the manufacturer to end the calendar year with the appropriate stock of CFCs for essential uses. Allowing manufacturers to maintain up to a one-year operational supply accounts for unexpected variability in the demand for MDI products or other unexpected occurrences in the market and therefore ensures that MDI manufacturers are able to produce their essential use MDIs.

In accordance with the FDA determination, today's action proposes to allocate essential use allowances to Armstrong for a total of 27.0 MT of CFC–114 for the production of epinephrine MDIs only for calendar year 2008.

The amounts listed in this proposal are subject to additional review, and revision, by EPA and FDA if information demonstrates that the proposed allocations are either too high or too low. We specifically request comment on the extent to which the proposed allocation of CFCs is sufficient to protect public health and ensure the manufacture and continuous availability of CFCs necessary to meet the expected demand. We also request comment on whether the proposed allocation, when considered along with current stocks, will best protect consumers by providing a smooth transition to non-CFC alternatives. Commenters requesting increases or decreases of essential use allowances should provide detailed information supporting a claim for additional or fewer CFCs. Any company that needs less than the full amount listed in this proposal should notify EPA of the actual amount needed.

IV. Proposed Allocation of Essential Use Allowances for Calendar Year 2008

TABLE I.—ESSENTIAL USE ALLOWANCES FOR CALENDAR YEAR 2008

Company	Chemical	2008 Quantity (metric tons)
(i) Metered Dose Inhalers (for oral inhalation) for Treatment of Asthma and Chronic Obstructive Pulmonary Disease		
Armstrong Pharmaceuticals	CFC–114 (production of epinephrine MDIs only)	27.0

EPA proposes to allocate essential use allowances for calendar year 2008 to the entity listed in Table I. These allowances are for the production or import of the specified quantity of Class I controlled substances solely for the specified essential use.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

EPA prepared an analysis of the potential costs and benefits related to this action. This analysis is contained in the Agency's Regulatory Impact Analysis (RIA) for the entire Title VI phaseout program (U.S. Environmental Protection Agency, ''Regulatory Impact Analysis: Compliance with Section 604 of the Clean Air Act for the Phaseout of Ozone Depleting Chemicals,'' July 1992). A copy of the analysis is available in the docket for this action and the analysis is briefly summarized here. The RIA examined the projected economic costs of a complete phaseout of consumption of ozone-depleting substances, as well as the projected benefits of phased reductions in total emissions of CFCs and other ozone-depleting substances, including essential use CFCs used for MDIs.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The recordkeeping and reporting requirements included in this action are already included in an existing information collection burden and this action does not propose any changes that would affect the burden. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR 82.8(a) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0170, EPA ICR number 1432.25. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

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

For purposes of assessing the impact of today's proposed rule on small entities, small entity is defined as: (1) Pharmaceutical preparations manufacturing businesses (NAICS code 325412) that have less than 750 employees; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

This action, once finalized, will provide an otherwise unavailable benefit to those companies that are receiving essential use allowances by creating an exemption to the regulatory phaseout of chlorofluorocarbons. We have therefore concluded that today's proposed rule will relieve regulatory burden for all small entities. We continue to be interested in the potential impact of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year.

Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative, if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed a small government agency plan under section 203 of the UMRA. The plan must provide for notifying potentially affected small governments, enabling officials of

affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's proposed rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or the private sector, since it merely provides exemptions from the 1996 phaseout of Class I ODSs. Similarly, EPA has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments, because this rule merely allocates essential use exemptions to entities as an exemption to the ban on production and import of Class I ODSs.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. Today's proposed rule affects only the companies that requested essential use allowances. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such as the analysis required under section 5–501 of the Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it implements Section 604(d)(2) of the Clean Air Act which states that the Agency shall authorize essential use exemptions should the Food and Drug Administration determine that such exemptions are necessary.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The rule affects only the pharmaceutical companies that requested essential use allowances.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This proposed rule does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (February 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because any change in the level of environmental protection for any affected populations will not have any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. Any impacts of this proposed rule will be equally distributed among all populations.

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Imports, Ozone, Reporting and recordkeeping requirements.

Dated: June 6, 2007.

Stephen L. Johnson,

Administrator.

40 CFR part 82 is proposed to be amended as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601,7671–7671q.

Subpart A—Production and Consumption Controls

2. Section 82.8 is amended by revising the table in paragraph (a) to read as follows:

§ 82.8 Grant of essential use allowances and critical use allowances.

(a) * * *

TABLE I.—ESSENTIAL USE ALLOWANCES FOR CALENDAR YEAR 2008

Company	Chemical	2008 Quantity (metric tons)
(i) Metered Dose Inhalers (for oral inhalation) for Treatment of Asthma and Chronic Obstructive Pulmonary Disease		
Armstrong Pharmaceuticals	CFC–114 (production of epinephrine MDIs only)	27.0

* * * * *

[FR Doc. E7–11299 Filed 6–11–07; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 72, No. 112

Tuesday, June 12, 2007

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

Forest Service

[FSM 2350]

Northern, Rocky Mountain, Southwestern, and Intermountain Regions Continental Divide National Scenic Trail

AGENCY: Forest Service, USDA

ACTION: Notice—Proposed directives; request for comment.

SUMMARY: The Northern, Rocky Mountain, Southwestern, and Intermountain Regions of the USDA Forest Service are considering issuing directives, and are requesting comments, for the planning, development, and management of the Continental Divide National Scenic Trail (CDNST). After considering comments, the USDA Forest Service proposes to issue a supplemental directive for each Region. The directives would also amend the CDNST Comprehensive Plan of 1985.

Policy direction is needed to clarify the nature and purposes of the CDNST and to align the CDNST planning with USDA Forest Service land management planning processes.

DATES: Comments are requested and must be submitted on or before August 13, 2007.

FOR FURTHER INFORMATION CONTACT: Greg Warren, CDNST Administrator, (303) 275–5054.

Written comments concerning this proposal are to be sent to USDA Forest Service, Attn: CDNST, P.O. Box 25127, Lakewood, CO 80225–0127; delivered to 740 Simms, Golden, CO 80401; or via e-mail to *cdnst@fs.fed.us.*

All comments, including names and addresses, when provided, will be placed in the record and will be available for public inspection and copying. The public may inspect comments received in the office of the Director of Recreation, Heritage, and Wilderness Resources, USDA Forest Service, Rocky Mountain Regional Office, 740 Simms, Golden, CO 80401, on business days between the hours of 8:30 a.m. and 4 p.m. Those wishing to inspect comments are encouraged to call ahead at (303) 275–5200 to facilitate entry into the building.

SUPPLEMENTARY INFORMATION:

Background

The USDA Forest Service provides internal direction to field units through its Directives System, consisting of the USDA Forest Service Manuals (FSM) and USDA Forest Service Handbooks (FSH). Directives provide guidance to field units in implementing programs established by statute and regulation. USDA Forest Service directives establish agency policies for delegations of authority, consistent definitions of terms, clear and consistent interpretation of regulatory language, and standard processes.

The USDA Forest Service is requesting comment on policy that promotes the nature and purposes of the CDNST as depicted in the CDNST Study Report and Final Environment Statement. In addition, the directives recommend land management planning integration and management direction for the CDNST, and amends the CDNST Comprehensive Plan of 1985.

The Continental Divide National Scenic Trail is administered by the Secretary of Agriculture in consultation with the Secretary of the Interior. The Regional Forester of the Rocky Mountain Region is the lead Forest Service official for coordinating matters concerning the study, planning, and operation of the CDT.

The issuance of timely direction for the planning and management of the CDNST is important due to the extensive nature of ongoing land management planning and project planning assessments along the trail corridor throughout these four Regions of the USDA Forest Service. These assessments need to provide for the integrated management of the CDNST designated area. Additional information regarding this proposed directive can be found on the Internet at *http://www.fs.fed.us/r2/projects/cdnst_directive/.*

Because the agency plans to propose additional revisions to USDA Forest Service Manual 2300, chapter 50, proposed directives are issued for comments at this time. The current Forest Service Manual can be found on the Internet at: *http://www.fs.fed.us/im/directives/fsm/.*

Digest

2353.42(4)(5)—Adds policy direction for the Continental Divide National Scenic Trail.

2353.43(1–11) Planning and Development of the Continental Divide National Scenic Trail (CDNST)—Adds planning and development direction for the CDNST.

2353.44(1–8) Management of the Continental Divide National Scenic Trail (CDNST)—Adds management direction for the CDNST.

2353.4—Administration of National Scenic and National Historic Trails

2353.42—Policy

4. The nature and purposes of the Continental Divide National Scenic Trail are to provide for high quality, scenic, primitive hiking and horseback-riding, non-motorized recreational experiences and to conserve natural, historic, and cultural resources along the Continental Divide.

5. The policy, development, and management direction in this directive amends and supersedes the purpose depiction, management policy, and direction contained in the ''Continental Divide National Scenic Trail Comprehensive Plan'' of 1985.

2353.43—National Scenic and Historic Trail System Development

Planning and Development of the Continental Divide National Scenic Trail (CDNST)

1. Land Management Planning (FSM 1921) is to provide for the nature and purposes of the CDNST congressionally designated area, and address the Comprehensive Plan programmatic requirements of the National Trails System Act, as amended (Title 16, United States Code, section 1244(f) (16 U.S.C. 1244(f)):

a. Identify CDNST desired conditions;

b. Establish CDNST objectives,

c. Establish CDNST management guidelines,

d. Establish monitoring programs to evaluate the condition of the CDNST in the land management planning area, and

e. Where the CDNST travel route is outside of congressionally established wilderness delineate a special area or management area for the trail corridor.

2. For each land management plan area that encompasses the CDNST, a management plan should be completed to address the site-specific requirements of the National Trails System Act, as amended (16 U.S.C. 1244(f)):

a. Identify and display the located CDNST travel route,

b. Identify the significant natural, historical, and cultural resources to be preserved along the CDNST corridor,

c. Identify the carrying capacity for the trail that reflects the nature and purposes of the CDNST,

d. Provide for CDNST development, signing, and maintenance programs,

e. Establish monitoring programs to evaluate the condition of each CDNST segment as related to the nature and purposes of the CDNST, and

f. Where applicable, protect high potential segments until such time that the CDNST is located and delineated as a special area of management area (FSM 2353.43, Planning and Development of the CDNST (1)(e)).

3. The Scenery Management System (FSM 2382) should be followed when developing land management plans. The foreground zone from the CDNST travel route should be a primary consideration in delineating a CDNST special area or management area.

4. Use the Recreation Opportunity Spectrum (ROS) system to delineate, define, and integrate CDNST recreational opportunities in land management planning (FSM 2311.1). The CDNST should be located in Primitive and Semi-Primitive Non-Motorized ROS settings where available in the land management planning area, while recognizing that the CDNST will intermittently traverse through more developed areas, and across designated motor vehicle use routes (Subpart B—Designation of Roads, Trails, and Areas for Motor Vehicle Use, Part 212 Travel Management, of Title 36 Code of the Code of Federal Regulations (36 CFR 212 subpart B)), in order to provide for a continuous travel route between Canada and Mexico along the Continental Divide.

5. A new segment of the CDNST travel route should only be constructed if current National Forest System trails cannot be managed, maintained, and reconstructed to provide for the nature and purposes of the CDNST.

6. A CDNST trail segment (16 U.S.C. 1246(c)) is not to be designated for motor vehicle use (36 CFR 212 subpart B) by the general public, unless such use is consistent with FSM 2353.44, Management of the CDNST (5).

7. A CDNST segment may only be located on a road (16 U.S.C. 1244(5)) where the following conditions are met:

a. The road is primitive in nature and offers a recreation experience not materially different in quality than that extended by a bona fide hiking and equestrian trail,

b. An affirmative determination has been made that motor vehicle use would not substantially interfere with the nature and purposes of the CDNST, and

c. Motor vehicle use does not constitute a safety hazard to hikers-pedestrians and equestrians.

8. Locating the CDNST in wilderness on a National Forest System trail, and marking the travel route at trail junctions with the CDNST marker brand, is consistent with the Wilderness Act (Title 16, United States Code, 1131(a) and 1133(b)).

9. The CDNST should be located on a permanent easement where the trail crosses private land (FSM 5460.3).

10. The CDNST should be designed following the Pack-and-Saddle Trail Class 2 or 3 design parameters when constructed or reconstructed (FSH 2309.18). However, a CDNST segment may be designed following the Hiker-Pedestrian Trail Class 1, 2, or 3 design parameters where there exists a substantial safety or resource concern, or the overall management direction for the land management plan area only provides for Hiker-Pedestrain use.

2353.44—Management of National Scenic and National Historic Trails

Management of the Continental Divide National Scenic Trail (CDNST)

1. Scenery should be managed following the Scenery Management System (FSM 2380)). The CDNST is a concern level 1 travel route, and scenic integrity objective is to be high or very high.

2. Use the Recreation Opportunity Spectrum (ROS) system (FSM 2311.1) in the management of the CDNST corridor. The CDNST is to be managed primarily for Primitive and Semi-Primitive Non-Motorized ROS conditions and experiences.

3. The CDNST should be managed for both Pack-and-Saddle and Hiker-Pedestrian uses (FSH 2309.18). However, where the trail design parameters reflect only Hiker-Pedestrian use, the management use should be only Hiker-Pedestrian.

4. Motor vehicle use may be allowed on a trail segment of the CDNST (Title 16 United States Code, section 1246(c) (16 U.S.C. 1246(c)).

a. If necessary to meet emergencies,

b. To enable adjacent landowners or land users to have reasonable access to their lands or where there are existing valid rights, and

c. On a designated motor vehicle use route (36 CFR 212 subpart B) that crosses the CDNST where an affirmative determination has been made that such use would not substantially interfere with the nature and purposes of the CDNST.

d. In addition to one of the above three situations being met, motor vehicle use must also be allowed by the overall management direction for the land management plan area.

e. Motor vehicle use is also allowed on a trail segment if such use is consistent with FSM 2353.44, Management of the CDNST (5).

5. Motor vehicle use shall be allowed on a trail segment of the CDNST where the following conditions are met (16 U.S.C. 1246(c)):

a. An affirmative determination has been made that motor vehicle use would not substantially interfere with the nature and purposes of the CDNST, and

b. Motor vehicle use was allowed by administrative regulations on a National Forest System travel route that was developed prior to November 10, 1978, which is the time of designation of the CDNST by Public Law 95–625.

c. In addition to both of the above two situations being met, motor vehicle use must also be allowed by the overall management direction for the land management plan area.

d. Motor vehicle use may also be allowed on a trail segment if such use is consistent with FSM 2353.44, Management of the CDNST (4).

6. Where motor vehicle use is allowed on a road segment (16 U.S.C. 1244(5)) or trail segment (16 U.S.C. 1246(c)) of the CDNST, consider establishing motor vehicle use prohibitions and restrictions (Part 261—Prohibitions, of Title 36 Code of Federal Regulations (36 CFR part 261)) to mitigate the effects of such use on the nature and purposes of the CDNST. Management practices and actions that would promote or result in increased motor vehicle use on the CDNST should not occur.

7. Bicycle (mountain bike) use may only be allowed on a trail segment of the CDNST where the following conditions are met (16 U.S.C. 1246(c)):

a. An affirmative determination has been made that bicycle use would not substantially interfere with the nature and purposes of the CDNST, and

b. Bicycles must also be allowed by the overall management direction for the land management plan area.

8. Where bicycle (mountain bike) use is allowed on the CDNST, consider establishing bicycle use prohibitions and restrictions (36 CFR part 261) to mitigate the effects of such use on the nature and purposes of the CDNST. Management practices and actions that would promote or result in increased bicycle use on the CDNST should not occur.

Regulatory Certifications

Environmental Impact

The directives would provide policy and procedural guidance to agency officials implementing the National Trails System Act. CDNST management decisions implementing the directives would include appropriate site-specific environmental analysis and public involvement. The directives would have no effect on the ground until site-specific planning decisions are completed, with opportunity for public involvement. Section 31b of USDA Forest Service Handbook 1909.15 (57 FR 43180, September 18, 1992) excludes from documentation in an environmental assessment or environmental impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.'' The agency's conclusion is that the directives fall within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.

Regulatory Impact

The directives have been reviewed under USDA procedures and Executive Order (E.O.) 12866 on regulatory planning and review. The directives would not have an annual effect of $100 million or more on the economy, nor would it adversely affect productivity, competition, jobs, the environment, public health and safety, or State and local governments. The directives would not interfere with any action taken or planned by another agency, nor would they raise new legal or policy issues. Finally, the directives would not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of beneficiaries of such programs. Accordingly, the directives are not subject to OMB review under E.O. 12866.

Regulatory Flexibility Act Analysis

The directives have been considered in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). The directives would not have any effect on small entities as defined by the Regulatory Flexibility Act. The directives would not directly affect small businesses, small organizations, and small governmental jurisdictions. Therefore, the agency has determined that the directives would not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act because the directives would not impose record-keeping requirements on them; the directives would not affect their competitive position in relation to large entities; and it would not affect their cash flow, liquidity, or ability to remain in the market.

No Takings Implications

The directives have been analyzed in accordance with the principles and criteria contained in E.O. 12630. It has been determined that the directives would not pose the risk of a taking of private property.

Federalism and Consultation and Coordination With Indian Tribal Governments

The agency has considered the directives under the requirements of E.O. 13132 on federalism, and has determined that the directives conform with the federalism principles set out in this E.O.; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the agency has determined that no further assessment of federalism implications is necessary.

Moreover, the directives would not have Tribal implications as defined by E.O. 13175, Consultation and Coordination With Indian Tribal Governments, and therefore advance consultation with Tribes is not required.

Energy Effects

The directives have been reviewed under E.O. 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect the Energy Supply. It has been determined that the directives would not constitute a significant energy action as defined in the E.O.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the agency has assessed the effects of the directives on State, local, and Tribal governments and the private sector. The directives would not compel the expenditure of $100 million or more by any State, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Controlling Paperwork Burdens on the Public

These directives do not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

Dated: June 1, 2007.

Richard Stem,

Deputy Regional Forester.

[FR Doc. 07–2840 Filed 6–11–07; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 21–2007]

Foreign–Trade Zone 65 – Panama City, FL, Application for Subzone Status, Eastern Shipbuilding Group, Inc., (Shipbuilding)

An application has been submitted to the Foreign–Trade Zones Board (the Board) by the Port of Panama City, Florida, grantee of FTZ 65, requesting special–purpose subzone status for the shipbuilding facilities of Eastern Shipbuilding Group (ESG), in Panama City, Florida. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on June 5, 2007.

The proposed subzone would comprise ESG's facilities at two sites in Bay County, Florida: *Site 1* ''Nelson Street Shipyard'' (27.2 acres/4 parcels/ 82,500 sq.ft.) – 2200 Nelson Street, Panama City, Florida; and, *Site 2* ''Allanton Shipyard'' (142.5 acres, 67,300 sq.ft.) – 13300 Allanton Road, Panama City, located 15 miles southeast of Site 1. The ESG facilities (580 employees) are used for the construction, fabrication, and repair of commercial and military oceangoing vessels for domestic and international customers. Foreign components that

may be used at the ESG facilities (representing 25 – 40% of material value) may include plastic tubes/pipes/hoses/fittings/floor coverings/seals/gaskets/o–rings, rubber mats/gaskets/o–rings/seals/knobs/dampeners, carpeting (will be admitted under privileged foreign (PF) status (19 CFR § 146.41)), articles of plaster, tableware, steel and iron pipe/tube/profiles/casings/fittings, stainless steel pipe/tube/flanges, doors, windows, structures, tanks, drums, LNG containers, anchors, articles of copper, couplings (of nickel, aluminum, lead, zinc, tin), articles of chromium, flexible tubing, marine steam turbines, engines (diesel and spark ignition) and parts, turbojets, propellers, gas turbines and parts, pumps, compressors, fans, air conditioners, furnaces and parts, heat exchange units, chillers, water heaters and parts, centrifuges, filters and filtering equipment, cranes, trash compactors, valves, bearings (items subject to AD/CVD orders will be admitted under PF status), gears, flywheels, clutches, parts of transmissions, generators and sets, starters, radio transceivers and remote controllers, radar equipment, parts of signaling equipment, electric switchgear and control panels, ignition wiring sets, compasses, instruments and meters, navigational instruments, thermostats, marine chronometers, furniture, and lamps (duty rate range: free – 9.0%; 25¢/ea.+3.9%, *ad valorem*; 84¢/bbl).

FTZ procedures would exempt ESG from customs duty payments on the foreign components used in export activity. On its domestic sales, the company would not be required to pay applicable customs duties on the foreign components, or it would be able to elect the duty rate that applies to finished oceangoing vessels (duty free) for the foreign components when the vessels are processed for customs entry. The manufacturing activity conducted under FTZ procedures would be subject to the ''standard shipyard restriction'' applicable to foreign–origin steel mill products (e.g., angles, pipe, plate), which requires that full customs duties be paid on such items. The application indicates that the savings from FTZ procedures would help improve the facilities' international competitiveness.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is August 13, 2007. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to August 27, 2007.

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations: Office of the Area Port Director, U.S. Customs and Border Protection, 2831 Talleyrand Avenue, Jacksonville, FL 32206; and, the Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, DC 20230–0002.

For further information, contact Pierre Duy, examiner, at *pierre__duy@ita.doc.gov, or* (202) 482–1378.

Dated: June 5, 2007.

Pierre V. Duy,

Acting Executive Secretary.

[FR Doc. E7–11320 Filed 6–11–07; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Action Affecting Export Privileges; Cirrus Electronics LLC et al.

In the Matter of: Cirrus Electronics LLC, 201 Huddersville Drive, Simpsonville, South Carolina 29681–3703; and 22 Redglobe Court, Simpsonville, South Carolina 29681–3615; Cirrus Electronics Pte Ltd., Level 3, ECON Building, No. 2, Ang Mo Kio Street 64, Ang Mo Kio Industrial Park 3, Singapore; Cirrus Electronics Marketing (P) Ltd., ı303 Suraj Ganga Arcade, 332/7, 15th Cross 2nd Block, Jayanagar, Bangalore, India; Parthasarathy Sudarshan, Managing Director, CEO, President, and Group Head of Cirrus, 201 Huddersville Drive, Simpsonsville, South Carolina 29681–3703; and 22 Redglobe Court, Simpsonville, South Carolina 29681–3615; Mythili Gopal, International Manager of Cirrus, 201 Huddersville Drive, Simpsonville, South Carolina 29681–3703; and 22 Redglobe Court, Simpsonville, South Carolina 29681–3615; Akn Prasad, CEO of India Operations of Cirrus, #303 Suraj Ganga Arcade, 332/7, 15th Cross 2nd Block, Jayanagar, Bangalore, India; Sampath Sundar, Director of Operations of Cirrus, Cirrus Electronics Pte Ltd., Level 3, ECON Building, No. 2, Ang Mo Kio Street 64, Ang Mo Kio Industrial Park 3, Singapore, Respondents.

Order Temporarily Denying Export Privileges

Pursuant to Section 766.24 of the Export Administration Regulations (''EAR''),[1] the Bureau of Industry and Security (''BIS''), U.S. Department of Commerce, through its Office of Export Enforcement (''OEE''), has requested that I issue an Order temporarily denying the export privileges under the EAR of:

(1) Cirrus Electronics, doing business as Cirrus Electronics LLC, 201 Huddersville Drive, Simpsonville, South Carolina 29681–3703 and 22 Redglobe Court, Simpsonville, South Carolina 29681–3615 (''Cirrus U.S.A.'').

(2) Cirrus Electronics Pte Ltd., Level 3, ECON Building, No. 2, Ang Mo Kio Street 64, Ang Mo Kio Industrial Park 3, Singapore (''Cirrus Singapore'').

(3) Cirrus Electronics Marketing (P) Ltd., #303 Suraj Ganga Arcade, 332/7, 15th Cross 2nd Block, Jayanagar, Bangalore, India (''Cirrus India'').

(4) Parthasarathy Sudarshan, Managing Director, CEO, President, and Group Head of Cirrus, 201 Huddersville Drive, Simpsonville, South Carolina 29681–3703 and 22 Redglobe Court, Simpsonville, South Carolina 29681–3615.

(5) Mythili Gopal, International Manager of Cirrus, 201 Huddersville Drive, Simpsonville, South Carolina 29681–3703 and 22 Redglobe Court, Simpsonville, South Carolina 29681–3615.

(6) Akn Prasad, CEO of India Operations of Cirrus, #303 Suraj Ganga Arcade, 332/7, 15th Cross 2nd Block, Jayanagar, Bangalore, India.

(7) Sampath Sundar, Director of Operations of Cirrus, Cirrus Electronics Pte Ltd., Level 3, ECON Building, No. 2, Ang Mo Kio Street 64, Ang Mo Kio Industrial Park 3, Singapore.

(hereinafter collectively referred to as the ''Respondents'') for 180 days.

In its request, BIS has presented evidence that shows that the Respondents knowingly engaged in conduct prohibited by the EAR and took actions to evade the EAR by shipping items through Singapore and concealing the true identity of the end-users. The Respondents participated in the export of items subject to the EAR to two end-users on the Entity List set forth in Supp. 4 to Part 744 of the EAR without the export licenses required by Section 744.1 of the EAR.

Specifically, the evidence shows that on at least five occasions between on or about September 30, 2005 and on or about April 17, 2006, the Respondents exported items subject to the EAR from the United States to the Vikram Sarabhai Space Centre (''VSSC'') and Bharat Dynamics Ltd. (''BDL'') in India without the license required by Section 744.1 of the EAR. VSSC and BDL are

[1] The EAR are currently codified at 15 CFR Parts 730–774 (2007). The EAR are issued under the Export Administration Act of 1979, as amended (50 U.S.C. app. 2401–2420 (2000)) (''EAA''). Since August 21, 2001, the EAA has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), as extended by the Notice of August 3, 2006 (71 FR 44551 (August 7, 2006)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)) (''IEEPA'').

organizations set forth on the Entity List set forth in Supplement No. 4 to Part 744 of the EAR. On two occasions on or about March 24, 2006 and on or about April 17, 2006, the Respondents exported Static Random Access Memory computer chips, items subject to the EAR and classified under Export Control Classification Number 3A001.a.2.c., to VSSC. These items are controlled for national security reasons and required a license for export to Singapore, India, and VSSC. On three occasions on or about September 30, 2005, November 5, 2005, and January 14, 2006, the Respondents exported semiconductors and capacitors, items subject to the EAR (''EAR99'') to BDL. These items have applications in missile guidance and firing systems and required a license for export to BDL. In each instance, the items were shipped from the United States to Singapore for subsequent shipment to VSSC and BDL. The Respondents were aware of the Entity List licensing requirements and on at least one occasion provided an end-user statement to a U.S. vendor that falsely represented the end-user in order to conceal the intended actual end user, VSSC, of the vendor's items.

I find that the evidence presented by BIS demonstrates that the Respondents have knowingly violated the EAR, that such violations have been deliberate and covert, and that there is a likelihood of future violations, particularly given the nature of the transactions. As such, a Temporary Denial Order (''TDO'') is needed to give notice to persons and companies in the United States and abroad that they should cease dealing with the Respondents in export transactions involving items subject to the EAR. Such a TDO is consistent with the public interest to preclude future violations of the EAR.

Accordingly, I find that a TDO naming Cirrus USA, its two offices in Singapore and India, Cirrus Singapore and Cirrus India, respectively, and its four officers, Parthasarathy Sudarshan, Mythili Gopal, Akn Prasad, and Sampath Sundar, as Respondents is necessary, in the public interest, to prevent an imminent violation of the EAR. This Order is issued on an *ex parte* basis without a hearing based upon BIS's showing of an imminent violation.

It is therefore ordered:

First, that the Respondents, CIRRUS ELECTRONICS LLC, 201 Huddersville Drive, Simpsonville, South Carolina, 29681–3703 and 22 Redglobe Court, Simpsonville, South Carolina, 29681–3615, and Cirrus Electronics Pte Ltd., Level 3, ECON Building, No. 2, Ang Mo Kio Street 64, Ang Mo Kio Industrial Park 3, Singapore, and Cirrus Electronics Marketing (P) Ltd., #303 Suraj Ganga Arcade, 332/7, 15th Cross 2nd Block, Jayanagar, Banglalore, India, and Parthsarsathy Sudarshan, Managing Director, CEO, President, and Group Head of Cirrus, 201 Huddersville Drive, Simpsonville, South Carolina, 29681–3703, and 22 Redglobe Court, Simpsonville, South Carolina, 29681–3615, and Mythili Gopal, International Manager of Cirrus, 201 Huddersville Drive, Simpsonville, South Carolina, 29681–3703 and 22 Redglobe Court, Simpsonville, South Carolina, 29681–3615, and Akn Prasad, CEO of India Operations of Cirrus, #303 Suraj Ganga Arcade, 332/7, 15th Cross 2nd Block, Jayanagar, Bangalore, India, and Sampath Sundar, Director of Operations of Cirrus, Cirrus Electronics Pte Ltd., Level 3, ECON Building, No. 2, Ang Mo Kio Street 64, Ang Mo Kio Industrial Park 3, Singapore (collectively the ''Denied Persons''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Export Administration Regulations (''EAR''), or in any other activity subject to the EAR, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR; or

C. Benefiting in any way from any transaction involving any item expected or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR.

Second, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Persons any item subject to the EAR;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Persons of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Persons acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Persons of any item subject to the EAR that has been exported from the United States;

D. Obtain from the Denied Persons in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Persons, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Persons if such service involves the use of any item subject to the EAR that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to any of the Denied Persons by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

Fourth, that this Order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved that are subject to the EAR are the foreign-produced direct product of U.S.-origin technology.

In accordance with the provisions of Section 766.24(e) of the EAR, the Respondents may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.

In accordance with the provisions of Section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request with the Assistant Secretary not later than 20 days before the expiration date and serving the request on the Respondents. The Respondents may oppose a request to renew this Order by filing a written submission with the Assistant Secretary of Commerce for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be served on the Respondents and shall be published in the **Federal Register**.

This Order is effective upon date of publication in the **Federal Register** and shall remain in effect for 180 days.

Entered this 1st day of June, 2007.

Darryl W. Jackson,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 07–2899 Filed 6–11–07; 8:45 am]

BILLING CODE 3510–DT–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Wooden Bedroom Furniture from the People's Republic of China: Extension of Time Limits for the Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews

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

EFFECTIVE DATE: June 12, 2007.

FOR FURTHER INFORMATION CONTACT: Gene Degnan, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0414.

SUPPLEMENTARY INFORMATION:

Background

The Department of Commerce (''the Department'') published an antidumping duty order on wooden bedroom furniture (''WBF'') from the People's Republic of China (''PRC'') on January 4, 2005. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 FR 329 (January 4, 2005). On March 7, 2006, the Department published in the **Federal Register** a notice of the initiation of the antidumping duty administrative review of WBF from the PRC and new shipper reviews for the period June 24, 2004, through December 31, 2005. *See Initiation of Administrative Review of Antidumping Duty Order on Wooden Bedroom Furniture from the People's Republic of China*, 71 FR 11394 (March 7, 2006) and *Wooden Bedroom Furniture from the People's Republic of China: Initiation of New Shipper Reviews*, 71 FR 11404 (March 7, 2006) (''*Initiation of Second Annual New Shipper Reviews*''). On August 24, 2006, the Department aligned the deadlines and the time limits of the new shipper reviews of WBF with the 2004–2005 administrative review of WBF. *See* Memorandum to the File from Lilit Astvatsatrian, Case Analyst, through Wendy Frankel, Office Director, dated August 24, 2006. On February 9, 2007, the Department published in the **Federal Register** the preliminary results of the first administrative review and the new shipper reviews. *See Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Reviews and Notice of Partial Rescission*, 72 FR 6201 (February 9, 2007). The final results of review are currently due no later than June 9, 2007.

Extension of Time Limit of Final Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to issue final results within 120 days after the date on which the preliminary results are published. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the time period to a maximum of 180 days. Completion of the final results of the administrative review within the 120-day period is not practicable because the Department conducted verification in the administrative review after publication of the preliminary results, and, therefore, needs additional time to complete post–preliminary results verification reports, invite and analyze comments by interested parties on the preliminary results and verification reports, and analyze information gathered at verification.

Because it is not practicable to complete this review within the time specified under the Act, we are extending the time period for issuing the final results of the administrative and new shipper reviews to 180 days, until August 8, 2007, in accordance with section 751(a)(3)(A) of the Act. This notice is published pursuant to sections 751(a) and 777(i) of the Act.

Dated: June 5, 2007.

Stephen J. Claeys,

Deputy Assistant Secretaryfor Import Administration.

[FR Doc. E7–11318 Filed 6–11–07; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 070413089–7091–01]

Announcing Draft Federal Information Processing Standard (FIPS) Publication 198–1, the Keyed-Hash Message Authentication Code, and Request for Comments

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice and request for comments.

SUMMARY: This notice announces the Draft Federal Information Processing Standard (FIPS) 198–1, the Keyed-Hash Message Authentication Code (HMAC), for public review and comment. The draft standard, designated ''Draft FIPS 198–1,'' is proposed to supersede FIPS 198, the Keyed-Hash Message Authentication Code, issued March 2002. FIPS 198–1 specifies a keyed-hash message authentication code (HMAC), a mechanism for message authentication using cryptographic hash functions and shared secret keys. The proposed standard is available at *http://csrc.nist.gov/publications/drafts.html.*

Prior to the submission of this proposed standard to the Secretary of Commerce for review and approval, it is essential that consideration be given to the needs and views of the public, users, the information technology industry, and Federal, State, and local government organizations. The purpose of this notice is to solicit such views.

DATES: Comments must be received by September 10, 2007.

ADDRESSES: Written comments may be sent to: Chief, Computer Security Division, Information Technology Laboratory, Attention: Comments on Draft FIPS 198–1, 100 Bureau Drive—Stop 8930, National Institute of Standards and Technology, Gaithersburg, MD 20899–8930. Electronic comments may be sent to *proposed198–1@nist.gov.* with a subject line of Keyed-Hash Message Authentication Code. The current FIPS 198 and its proposed replacement, Draft FIPS 198–1, are available electronically at *http://csrc.nist.gov/publications/index.html.*

Comments received in response to this notice will be published electronically at *http://csrc.nist.gov/CryptoToolkit/tkhash.html.*

FOR FURTHER INFORMATION CONTACT: For general information, contact: Elaine Barker, National Institute of Standards and Technology, Stop 8930,

Gaithersburg, MD 20899–8930, telephone: 301–975–2911 or via fax at 301–975–8670, e-mail: *elaine.barker@nist.gov.* or Quynh Dang, telephone: 301–975–3610, e-mail: *quynh.dang@nist.gov.*

SUPPLEMENTARY INFORMATION: The changes between FIPS 198 and FIPS 198–1 are minor and are motivated by a desire to put informative information that may change in a separate, less formal publication that can be readily updated as necessary. FIPS 198 contained statements about the security provided by the HMAC algorithm and specified a truncation technique for the HMAC output. Since the security provided by the HMAC algorithm and its applications might be altered by future cryptanalysis, the security statements were not included in FIPS 198–1. The security of HMAC will be addressed in NIST Special Publications (SP) 800–57, Recommendation for Key Management, and 800–107, Recommendation for Using Approved Hash Algorithms. Draft FIPS 198–1 also does not include the truncation technique; the truncation technique of HMAC will be specified in the NIST Special Publication 800–107. Draft NIST Special Publications and NIST Special Publications are available at *http://csrc.nist.gov/publications/index.html.* Examples of the implementation of the HMAC algorithm can be found at *http://www.nist.gov/CryptoToolkitExamples.* NIST will continue to review these examples and to update them as needed.

Authority: NIST activities to develop computer security standards to protect Federal sensitive (unclassified) systems are undertaken pursuant to specific responsibilities assigned to NIST to section 20 of the National Institute of Standards and Technology Act (15 U.S.C. 278g–3) as amended by section 303 of the Federal Information Security Management Act of 2002 (Pub. L. 107–347). This notice has been determined not to be significant for the purposes of Executive Order 12866.

Dated: June 5, 2007.

James M. Turner,

Deputy Director, NIST.

[FR Doc. E7–11309 Filed 6–11–07; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 070413090–7092–01]

Announcing Draft Federal Information Processing Standard (FIPS) Publication 180–3, the Secure Hash Standard, and Request for Comments

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice and request for comments.

SUMMARY: This notice announces the Draft Federal Information Processing Standard (FIPS) 180–3, Secure Hash Standard (SHS), for public review and comment. The draft standard, designated ''Draft FIPS 180–3,'' is proposed to supersede FIPS 180–2. FIPS 180–2, Secure Hash Standard (SHS), August 2002, specifies secure hash algorithms (SHA) called SHA–1, SHA–256, SHA–384 and SHA–512. These algorithms produce 160, 256, 384, and 512-bit outputs, respectively, which are called message digests. An additional secure hash algorithm, called SHA–224, that produces a 224-bit output, is specified in Change Notice 1 to FIPS 180–2, which was issued in 2004. Draft FIPS 180–3 specifies five secure hash algorithms: SHA–1, SHA–224, SHA–256, SHA–384, and SHA–512. The proposed standard is available at *http://csrc.nist.gov/publications/drafts.html*.

Prior to the submission of this proposed standard to the Secretary of Commerce for review and approval, it is essential that consideration be given to the needs and views of the public, users, the information technology industry, and Federal, State, and local government organizations. The purpose of this notice is to solicit such views.

DATES: Comments must be received by September 10, 2007.

ADDRESSES: Written comments may be sent to: Chief, Computer Security Division, Information Technology Laboratory, Attention: Comments on Draft FIPS 180–3, 100 Bureau Drive—Stop 8930, National Institute of Standards and Technology, Gaithersburg, MD 20899–8930. Electronic comments may be sent to: *Proposed180–3@nist.gov*. The current FIPS 180–2 and its proposed replacement, Draft FIPS 180–3, are available electronically at *http://csrc.nist.gov/publications/index.html*.

Comments received in response to this notice will be published electronically at *http://csrc.nist.gov/CryptoToolkit/tkhash.html*.

FOR FURTHER INFORMATION CONTACT: For general information, contact: Elaine Barker, National Institute of Standards and Technology, Stop 8930, Gaithersburg, MD 20899–8930, telephone: 301–975–2911, e-mail: *elaine.barker@nist.gov*. or via fax at 301–975–8670, or Quynh Dang, telephone: 301–975–3610, e-mail: *quynh.dang@nist.gov*.

SUPPLEMENTARY INFORMATION: The changes between FIPS 180–2 and FIPS 180–3 are minor and are motivated by a desire to put informative information that is subject to change in a less formal publication that can be readily updated as necessary. FIPS 180–2 contained statements about the security strengths of the hash algorithms. However, the security strengths of the hashing algorithms, SHA–1, SHA–224, SHA–256, SHA–384 and SHA–512, might change due to future cryptanalysis; consequently, Draft FIPS 180–3 does not describe their security strengths. Instead, the security strengths will be specified in NIST Special Publications (SP) 800–57, Recommendation for Key Management, and discussed in NIST SP 800–107, Recommendation for Using Approved Hash Algorithms. These Special Publications will be periodically reviewed and updated if warranted by advances in the cryptanalysis of these hash algorithms. Examples of the implementation of these hash algorithms can be found at *http://www.nist.gov/CryptoToolkitExamples*. NIST Special Publications are available at: *http://csrc.nist.gov/publications/index.html*.

Authority: NIST activities to develop computer security standards to protect Federal sensitive (unclassified) systems are undertaken pursuant to specific responsibilities assigned to NIST by section 20 of the National Institute of Standards and Technology Act (5 U.S.C. 278g–3) as amended by section 303 of the Federal Information Security Management Act of 2002 (Pub. L. 107–347). Executive Order 12866: This notice has been determined not to be significant for the purpose of Executive Order 12866.

Dated: June 5, 2007.

James M. Turner,

Deputy Director, NIST.

[FR Doc. E7–11326 Filed 6–11–07; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Monterey Bay National Marine Sanctuary Advisory Council

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration, Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The Monterey Bay National Marine Sanctuary (MBNMS or Sanctuary) is seeking applicants for the following seats on its Sanctuary Advisory Council: Business/Industry, Commercial Fishing (alternate) and Recreational Fishing (alternate). Applicants chosen for these seats should expect to serve until February 2010. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the Sanctuary.

DATES: Applications are due by July 6, 2007.

ADDRESSES: Application kits may be obtained from Nicole Capps at the Monterey Bay National Marine Sanctuary, 299 Foam Street, Monterey, California 93940. Completed applications should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: Nicole Capps at (831) 647–4206, or *Nicole.Capps@noaa.gov.*

SUPPLEMENTARY INFORMATION: The MBNMS Advisory Council was established in March 1994 to assure continued public participation in the management of the Sanctuary. Since its establishment, the Advisory Council has played a vital role in decisions affecting the Sanctuary along the central California coast.

The Advisory Council's twenty voting members represent a variety of local user groups, as well as the general public, plus seven local, state and federal governmental jurisdictions. In addition, the respective managers or superintendents for the four California National Marine Sanctuaries (Channel Islands National Marine Sanctuary, Cordell Bank National Marine Sanctuary, Gulf of the Farallones National Marine Sanctuary and the Monterey Bay National Marine Sanctuary) and the Elkhorn Slough National Estuarine Research Reserve sit as non-voting members.

Four working groups support the Advisory Council: The Research Activity Panel (''RAP'') chaired by the Research Representative, the Sanctuary Education Panel (''SEP'') chaired by the Education Representative, the Conservation Working Group (''CWG'') chaired by the Conservation Representative, and the Business and Tourism Activity Panel (''BTAP'') chaired by the Business/Industry Representative, each dealing with matters concerning research, education, conservation and human use. The working groups are composed of experts from the appropriate fields of interest and meet monthly, or bi-monthly, serving as invaluable advisors to the Advisory Council and the Sanctuary Superintendent.

The Advisory Council represents the coordination link between the Sanctuary and the state and federal management agencies, user groups, researchers, educators, policy makers, and other various groups that help to focus efforts and attention on the central California coastal and marine ecosystems.

The Advisory Council functions in an advisory capacity to the Sanctuary Superintendent and is instrumental in helping develop policies, program goals, and identify education, outreach, research, long-term monitoring, resource protection, and revenue enhancement priorities. The Advisory Council works in concert with the Sanctuary Superintendent by keeping him or her informed about issues of concern throughout the Sanctuary, offering recommendations on specific issues, and aiding the Superintendent in achieving the goals of the Sanctuary program within the context of California's marine programs and policies.

Authority: 16 U.S.C. Sections 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: June 4, 2007.

Daniel J. Basta,

Director, National Marine Sanctuary Program, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 07–2888 Filed 6–11–07; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 050107J]

Incidental Takes of Marine Mammals During Specified Activities; Maintenance Dredging Around Pier 39, San Francisco, California

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

ACTION: Notice; issuance of incidental harassment authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) and its implementing regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the Bay Marina Management Incorporated (BMMI) to take small numbers of marine mammals, by Level B Harassment only, incidental to dredging on the west side of the Pier 39 Marina on the San Francisco, CA waterfront.

DATES: Effective from June 1, 2007, through May 31, 2008.

ADDRESSES: A copy of the IHA and the application are available by writing to 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 the contact listed here. A copy of the application containing a list of references used in this document may be obtained by writing to this address, by telephoning the contact listed here (**FOR FURTHER INFORMATION CONTACT**) or online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Jolie Harrison, Office of Protected Resources, NMFS, (301) 713–2289, ext 166.

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 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.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and that 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 September 14, 2006, NMFS received a request from BMMI to re-issue an IHA for the take, by harassment, of small numbers of California sea lions (*Zalophus californianus*) and Pacific harbor seals (*Phoca vitulina*) incidental to the maintenance dredging the I, J, and K Docks on the west side of Pier 39 Marina on the San Francisco waterfront, California. NMFS issued an IHA for these activities in October, 2005 (70 FR 69955); however, BMMI was unable to complete the work by the time the 2005 IHA expired on October 16, 2006. Therefore BMMI has asked for a new IHA to cover the completion of the previously analyzed and authorized action.

Description of the Activity

BMMI will complete the maintenance dredging begun before the previous IHA expired using a small, self-contained clamshell-style crane barge between docks I, J, and K at the Pier 39 west marina. These maintenance measures are necessary to maintain safe navigation depths at the marina, which currently has reduced water depths attributed to the accretion of bay sediment. The dredging at Pier 39 will remove sediment to create water depths in the project area of 9 ft (-2.7 m) Mean Lower Low Water (MLLW), plus an additional two-foot overdredge allowance. Dredging design area limits (footprints) include the faces, approaches, and entrance channels to each berthing area up to the limit of the adjacent pier. Dredging will occur between June 1 and November 30 to avoid impacts to steelhead trout and chinook salmon.

The dredging operations at the Pier 39 west marina will occur in the summer of 2007. The complete project, none of which was conducted under the previous IHA, is expected to take approximately one to two weeks to complete. No work will be conducted that was not already analyzed in the previous IHA. Dredge machinery will operate from 8 a.m. to 3:30 p.m. daily. Approximately 13,000 yd^3 (9,939 m^3) of material will be removed. Dredged material will be tested for pollutants and toxins by the Dredge Material Management Office prior to approval to begin dredging, and dredged materials will be deposited in accordance with local, state and Federal regulations. Once removed, the dredged material will be transferred to Piers 96/98, which are owned and operated by the Port of San Francisco, and from there it will be disposed of at an approved upland disposal site.

The proposed dredging of the Pier 39 west berthing area will focus on the channels and slips of I and J docks and half of the channel between J and K docks. The original K dock was destroyed by the combined weight of hundreds of California sea lions that frequently use the area as a haul-out. Pier 39 replaced the damaged dock with a number of ten by twelve-foot floats for the sea lions to use. Since there are no actual berthing sites at K dock, no dredging will be necessary in the area immediately surrounding or under K dock. The crane barge will be situated at the furthest distance possible from K dock during each dredging episode. The closest that the barge will be to the K dock haul-out is when dredging the channel between J and K docks. When the barge is dredging this channel it will be moored to the bayside of J dock and extend the clamshell dredge arm out into the channel, towards K dock. Since the distance between J and K docks is 100 ft (30 m) and the barge is 30 ft (9 m) wide, it will never be positioned closer than 50 ft (15 m) to K dock at any time during the dredging project.

Description of Habitat and Marine Mammals Affected by the Activity

The marine mammal species known to be present at the Pier 39 Marina area are the California sea lion (*Zalophus californianus*) and the Pacific harbor seal (*Phoca vitulina*). Since 1993, a single adult male Steller sea lion (*Eumetopias jubatus*) has been observed hauled out on K dock intermittently during the months of July and August, and occasionally in September (30 sightings in the last 10 years). However, this project will not affect the Steller sea lion because dredging activities will be halted if a Steller sea lion is observed.

Additional information on these species can be found in Marine Mammal Stock Assessment Reports, which are available online at: *http://www.nmfs.noaa.gov/prot__res/PR2/Stock__Assessment__Program/sars.html*.

California Sea Lions

California sea lions range from southern Mexico to southwestern Canada. In the United States, they breed during July after pupping in late May to June, primarily in the Channel Islands of California. Most individuals breed on the Channel Islands off southern California and off Baja and mainland Mexico, although a few pups have been born on Ano Nuevo Island and this year a pup was born on the docks at Monterey and subsequently transferred to Ano Nuevo Island with its mother. Following the breeding season on the Channel Islands, most adult and sub-adult males migrate northward to central and northern California and to the Pacific Northwest, while most females and young animals either remain on or near the breeding grounds throughout the year or move southward or northward, as far as Monterey Bay.

Since nearing extinction in the early 1900's, the California sea lion population has increased and is now growing at a rate of 5.4 to 6.1 percent per year (based on pup counts) with an estimated minimum population of 138,881 animals. Actual population numbers may be as high as 237,000 to 244,000 animals. The population is not listed as ''endangered'' or ''threatened'' under the Endangered Species Act (ESA), nor is this species listed as

''depleted'' or as a ''strategic stock'' under the MMPA.

California sea lions first appeared at Pier 39 in September 1989. Numbers of hauled-out sea lions were relatively low the first year and K Dock was only used as a haul out from late summer through the winter. Within a few years, larger numbers of sea lions were observed at K Dock and they began using the haul-out throughout the year. The Marine Mammal Center (MMC) began monitoring California sea lions at Pier 39 in the late 1990's and counts indicate peak usage of K dock at Pier 39 in May and early June, just prior to the breeding season. Although numbers decrease during mid-summer (when most adults relocate to the rookeries for pupping and breeding) some sea lions of all age classes remain in the area and continue to haul out at Pier 39. Within the dredging work window (June 1 to November 30) the largest numbers of California sea lions are found at K Dock in the late summer and fall. The highest number of individuals ever observed at once between June 1 and November 30 at Pier 39 to date was 1244, in August of 2003. If the number of individuals observed at one count is averaged by month, from June to November, since 2000, the averages range from 169 for July to 709 in September. Since monitoring began in 1991, only 10 California sea lion pups have been observed at Pier 39, in 1997 and 1998. These pups, which were all weaned, most likely hauled out at K Dock due to el Niño, and pups are not expected at the project site in ''normal'' years.

Pacific Harbor Seals

Although not commonly observed at Pier 39, Pacific harbor seals have been documented as visitors to K dock numerous times in the past decade. Harbor seals range from Baja California in Mexico northward to the Aleutian Islands of Alaska. The population estimate for the California stock is 34,233 individuals (Caretta *et al.*, 2005) and is relatively stable.

Harbor seals inhabit coastal waters within their range and prefer sheltered bays and inlets to the exposed coastline. Daily haul-out behavior of harbor seals is typically dependent on the tides, weather and time of day. Harbor seals exhibit seasonal variation in reproductive timing depending on geography. The pupping season for California populations is in the spring, with populations in the San Francisco Bay typically bearing young from March 15 through May 31 (Green *et al.*, 2001). There are two active pupping sites in the San Francisco Bay, Mowry Slough in the South Bay and Castro Rocks in the North Bay. Pups have been observed at Yerba Buena Island and Corte Madera Marsh in the San Francisco Bay. No births have been witnessed at these locations, but Yerba Buena is thought to be a potential pupping site. No harbor seal pups have ever been seen at Pier 39.

Annual counts of harbor seals at Pier 39 range from 0 seals observed in 1999 and 2004, to a high of nine observations in 2000 for a total of 28 observations between 1997–2004. No more than two harbor seals have been observed hauled out simultaneously at any given time at K Dock. No harbor seals have been observed hauling out at Pier 39 July through September. No pups have been observed at Pier 39. Observations by MMC volunteers indicate that observed harbor seals at Pier 39 tend to distance themselves from the California sea lions hauling out in the vicinity.

Potential Effects of Activities on Marine Mammals

The applicant is authorized to take small numbers of California sea lions and Pacific harbor seals, by Level B harassment only, incidental to the dredging activities described previously. Level B harassment may occur if hauled animals flush the haulout and/or move to increase their distance from dredging-related activities, such as noise associated with dredging, presence of a crane barge, the presence of workers, or unfamiliar activity in proximity to the haulout site. This disturbance from acoustic and visual stimuli is the principal means of marine mammal taking associated with these activities.

Sudden brief noises have been shown to elicit startle reactions in some pinnipeds. Novel looming visual stimuli may induce similar startle reactions in pinnipeds. Daily engine starts and movements of the dredge bucket and vessel may induce startled and/or flight behavior in marine mammals using K dock as a haul out. However, this area has become a tourist spot for viewing sea lions, and the current population of animals utilizing K dock is accustomed to human activities and regular noise levels from people, traffic, use of nearby boat slips, and other marine operations. If animals do flush into the water, they may return to the haul-out site immediately, stay in the water for a length of time and then return to the haul-out, or temporarily haul-out at another site. Many factors contribute to the degree of behavioral modification, if any, including seasonality, group composition of the pinnipeds, type of activity they are engaged in and what noises they may be accustomed to experiencing. Short-term reactions such as startle or alert reactions are unlikely to disrupt behavior patterns such as migrating, breeding, feeding and sheltering, nor would they be likely to result in serious injury to marine mammals.

The small, self-contained, clamshell dredge used for this activity may produce noise of a sufficient level to behaviorally harass marine mammals at K dock. Measured sound exposure levels (SELs) of similar equipment ranged between 75–88 dBA (re 20 microPa) measured at 50 feet (the closest distance that the dredge unit will be to K dock) (Boeing, 2005). Results of an ongoing study at Vandenberg Air Force Base of the effects of rocket launches on pinnipeds indicate that the percentage of Pacific harbor seals leaving the haul-out increases with noise level up to an SEL of approximately 100 dBA, after which almost all seals leave, although recent data have shown that an increasing percentage of seals have remained on shore during the noise, and those that remain are adults. Though harbor seals are more sensitive to audio stimuli than sea lions, these results indicate that animals are flushed at an SEL less than 100 dBA, and it is possible that marine mammals at K Dock may modify their behavior as a result of the lesser dredge noise.

If startle reactions were accompanied by large-scale movements of marine mammals, such as stampedes into the water, the disruption could escalate into Level A harassment and could result in injury of individuals, especially if pups were present. However, due to the uniqueness of this particular haul-out area, the unlikely presence of pups, and the required shut-down procedures should pups be sighted, NMFS believes there is a very low likelihood of such injury occurring at the Pier 39 site. Specifically, the haul-out consists of many separate floating platforms that can hold up to about 25 marine mammals each. If disrupted to the point of flushing off the platforms, pinnipeds can quickly leap or roll into the water in any direction off the relatively small platforms, avoiding a dangerous stampede-like situation that may occur at normal haul-out locations such as exposed rocks. Additionally, marine mammal pups use this haul-out very infrequently (approximately 10 pups have been sighted at K Dock, in 1997 and 1998, during el Niño), further reducing potential harm to the species.

Over the last 13 years, BMMI has observed that sea lions either ignore various unfamiliar intrusions and remain hauled out, or adapt to them and eventually become habituated and return to their normal behavior.

Disturbance from these dredging activities is expected to have a only a short-term negligible impact to a small number of California sea lions relative to their population size and a few Pacific harbor seals. At a maximum, short-term impacts are expected to result in a temporary reduction in utilization of K dock as a haulout site while work is in progress or until seals habituate to the disturbance. The project is not expected to result in any permanent reduction in the number of animals at Pier 39. NMFS agrees with BMMI that effects will be limited to short-term and localized behavioral changes falling within the MMPA definition of Level B harassment.

Comments and Responses

On October 17, 2006, NMFS published in the **Federal Register** a notice of a proposed IHA for BMMI's request to take marine mammals incidental to maintenance dredging at Pier 39, and requested comments regarding this request (71 FR 61207). During the 30-day public comment period, NMFS received one comment from the Marine Mammal Commission (Commission), which recommended that NMFS issue the authorization as proposed.

Mitigation

To minimize disturbance of marine mammals from visual and acoustic stimuli associated with the dredging activities, BMMI will use a small (relative to the range of sizes of equipment that could accomplish the task) clamshell dredge that can easily target the specific areas to be dredged. The smaller equipment will also minimize the amount of turbidity resulting from the dredging activities. The dredge material will be immediately loaded onto a barge and transported to a nearby terrestrial disposal site at Piers 96 and 98, which will allow for a shorter project duration.

When not in use, the clamshell dredge and dredge barge will be parked as far as feasible from the K Dock. After starting engines in morning, the clamshell dredge will be moved as slowly as possible to the area to be dredged and the dredge head lowered slowly and carefully into the water.

As mentioned previously, if a Steller sea lion of any age or a marine mammal pup of any species is spotted at any time during dredging operations, operations will cease until the animal has left the area.

Monitoring

The K dock haulout will be monitored periodically during dredging activities by two NMFS-approved observers according to the following schedule:

(1) During the week prior to the commencement of dredging activities, morning counts will be taken every morning at the same time. One afternoon count will be taken at approximately the same time the dredging is scheduled to stop in the following days.

(2) During the dredging operations:

- One count will be taken every morning before dredging work begins and every afternoon once operations cease.

- On the first day of dredging and on one other day near the end of dredging operations, monitors will be present all day (starting one hour before operations begin and remaining until 2 hours after operations cease) and they will document specific behaviors as they relate to specific aspects of the dredging operations and other activities. An additional count will be conducted 2 hours after dredging operations cease. Rates of departure and arrival of animals from/to the haulout will be noted.

(3) Following completion of the dredging:

- Morning counts (taken at approximately same time as those taken previously (See (1)) will be made every day for a week.

- An afternoon count will be conducted the day after dredging ceases and on the last day of the post-dredging monitoring.

(4) During all monitoring periods the following data will be recorded: date, time, observer, tidal height, species present, maximum number of animals hauled out, number of adults and sub-adults, number of males and females (if possible), any observed behavioral disturbances to the animals, and the number of animals disturbed (for example, if animals flushed, reports should include the number of animals that returned to the water, and those that remained hauled out). During periods of dredging a description of dredging activities will also occur (including location of dredge, i.e., between J and K Docks, or between I and J Docks).

Reporting

A draft report will be submitted to the NMFS Southwest Assistant Regional Administrator for Protected Resources and to the NMFS Division of Permits, Conservation, and Education, Office of Protected Resources, within 90 days after project completion. A final report will be submitted within 30 days of receiving NMFS' comments, if any, on the draft report. The Report will contain, analyze, and summarize the information required under Monitoring, above. BMMI will share data collected as a result of these monitoring activities with other interested parties, such as the Marine Mammal Center and other boat marinas.

Numbers of Marine Mammals Expected to be Harassed

The effects of the authorized dredging activities are expected to be limited to short-term startle responses and localized behavioral changes. NMFS anticipates that small numbers of California sea lions and Pacific harbor seals will effected.

The highest number of California sea lions ever counted at one time on the K Dock between June 1 and November 30 was 1244 individuals in August 2003. The average number of individuals counted at one time within the work window since 2000 is lowest in July (169) and highest in September (709). Based on an average of 169 to 709 animals over the maximum of 14 days, NMFS estimates that California sea lions could be exposed to audio or visual stimulus likely to cause harassment between 2360 and 9930 times. However, based on review of the Pier 39 observer logs maintained over the last 14 years, which indicate that sea lions may remain in the area and haul out for several days in a row at the K dock, NMFS estimates that between 1180 to 4965 individual California sea lions (approximately 0.5 to 2 percent of the population) will be harassed. These are small numbers relative to the size of the affected species or stock.

The highest total number of harbor seals ever seen in one month between June 1 and November 30 was 3 in November of 1997. NMFS anticipates that no more than 3 Pacific harbor seals will be harassed by this activity (less than 0.01 percent of the population). These are small numbers relative to the size of the affected species or stocks.

Potential Effects of the Authorized Activities on Marine Mammal Habitat

NMFS anticipates that the proposed action will result in minor and short-term effects on marine mammal habitat, including a temporary increase in the turbidity in the area of the dredging and a temporary decrease in the quality of K dock as a haul-out site as a result of increased visual and audio stimuli.

Potential Effects of Proposed Activities on Subsistence Needs

There are no subsistence uses for California sea lions or Pacific harbor seals in California waters, and thus, there are no anticipated effects on their availability for subsistence uses.

Endangered Species Act (ESA)

The only ESA-listed species that could potentially be affected by this activity (if not for the required mitigation) are steelhead trout, Chinook salmon, and Steller sea lions.

Though a single Steller sea lion has infrequently been sighted at the K Dock, BMMI plans to cease dredging operations immediately if one is seen, and not begin dredging again until the animal has left the area of its own volition. NMFS does not anticipate any impacts to Steller sea lions to result from the issuance of the IHA.In the 1998 programmatic Biological Opinion addressing dredging in San Francisco Bay, NMFS established a June 1 to November 30 work window for dredging activities in the San Francisco Bay to avoid impacts to steelhead trout and Chinook salmon. BMMI proposes to dredge between June 1 and November 30, and therefore NMFS does not anticipate any impacts to ESA-listed species.

National Environmental Policy Act (NEPA)

NMFS prepared an Environmental Assessment (EA) on the Issuance of an IHA for the Dredging at Pier 39 and issued a Finding of No Significant Impact on October 13, 2005. A copy of the EA and FONSI are available upon request (see **ADDRESSES**).

Conclusions

Based on the preceding information, NMFS has determined that the completion of the dredging activities described in this document and authorized in the 2007 IHA may result in short-term and localized changes in behavior by small numbers of California sea lions and Pacific harbor seals. In addition, no take by injury or death is anticipated, and take by harassment will be at the lowest level practicable due to incorporation of the mitigation measures mentioned previously in this document. While behavioral modifications may be made by the pinnipeds, including temporarily vacating the K Dock haulout, NMFS has determined that these takings will have a negligible impact on California sea lions and Pacific harbor seals.

Authorization

NMFS has issued an IHA to BMMI for the take, by Level B harassment only, of small numbers of California sea lions and Pacific harbor seals incidental to the completion of the previously authorized maintenance dredging around I, J, and K Docks at Pier 39 in San Francisco, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: May 30, 2007.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E7–11313 Filed 6–11–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Publication of North American Datum of 1983 State Plane Coordinates in Feet in Minnesota

AGENCY: National Geodetic Survey (NGS), National Oceanic Service (NOS), National Oceanic and Atmospheric Administration.

ACTION: Notice.

SUMMARY: The National Geodetic Survey (NGS) will publish North American Datum of 1983 (NAD 83) State Plane Coordinate (SPC) grid values in both meters and U.S. Survey Feet (1 ft = 1200/3937 m) in Minnesota, for all well defined geodetic survey control monuments maintained by NGS in the National Spatial References System (NSRS) and computed from various geodetic positioning utilities. The adoption of this standard is implemented in accordance with NGS policy and a request from the Minnesota Department of Transportation, the Minnesota Society of Professional Surveyors, the Minnesota GIS/LIS Consortium, the Minnesota Association of County Surveyors and the Minnesota Governor's Council on Geographic Information.

DATES: Individuals or organizations wishing to submit comments on the Publication of North American Datum of 1983 State Plane Coordinates in feet in Minnesota, should do so by July 12, 2007.

ADDRESSES: Written comments should be sent to the attention of David Doyle, Chief Geodetic Surveyor, Office of the National Geodetic Survey, National Oceanic Service (N/NGS2), 1315 East-West Highway, Silver Spring, Maryland, 20910, fax 301–713–4324, or via e-mail *Dave.Doyle@noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to David Doyle, Chief Geodetic Surveyor, National Geodetic Survey (N/NGS2), 1315 East-West Highway, Silver Spring, MD 20910; Phone: (301) 713–3178.

SUPPLEMENTARY INFORMATION:

Abstract

In 1991, NGS adopted a policy that defines the conditions under which NAD 83 State Plane Coordinates (SPCs) would be published in feet in addition to meters. As outlined in that policy, each state or territory must adopt NAD 83 legislation (typically referenced as Codes, Laws or Statutes), which specifically defines a conversion to either U.S. Survey or International Feet as defined by the U.S. Bureau of Standards in Federal Register Notice 59–5442. To date, 48 states have adopted the NAD 83 legislation however, for various reasons, only 33 included a specific definition of the relationship between meters and feet. This lack of uniformity has led to confusion and misuse of SPCs as provided in various NGS products, services and tools, and created errors in mapping, charting and surveying programs in numerous states due to inconsistent coordinate conversions.

Dated: May 30, 2007.

David B. Zilkoski,

Director, Office of National Geodetic Survey, National Ocean Service.

[FR Doc. 07–2887 Filed 6–11–07; 8:45 am]

BILLING CODE 3510–JE–M

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before July 12, 2007.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name, *e.g.*, ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of

1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: June 6, 2007.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: New.

Title: An Investigation of the Impact of a Traits-Based Writing Model on Student Achievement.

Frequency: Semi-annually; 3x per year.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs; individuals or household.

Reporting and Recordkeeping Hour Burden:

Responses: 3,392.

Burden Hours: 7,072.

Abstract: This study is designed to test the effectiveness of an analytical trait-based model for teaching and assessing student writing, called 6+1 Trait Writing, by examining its impact on the writing achievement of 5th graders. The model is designed to improve student writing through an integrated approach to teaching and assessing writing skills, and it incorporates ten instructional strategies to develop the specific traits of writing.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 3299. When you access the information collection, click on ''Download Attachments '' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E7–11255 Filed 6–11–07; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before August 13, 2007.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: June 5, 2007.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Office of Postsecondary Education

Type of Review: New.

Title: Title VI Undergraduate International Studies and Foreign Language Program.

Frequency: Annually.

Affected Public: Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 100.

Burden Hours: 10,000.

Abstract: This is an application to participate in the Title VI Undergraduate International Studies and Foreign Language Program which provides grants to institutions of higher education, partnerships between nonprofit educational organizations and institutions of higher education, and public and private nonprofit organizations, to implement programs to strengthen and improve undergraduate instruction in international studies and foreign languages. Three years ago this specific program was part of a package that included seven postsecondary programs. To ease public participation, OPE has decided to separate these individual programs this year.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 3378. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to

ICDocketMgr@ed.gov or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E7–11256 Filed 6–11–07; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before July 12, 2007.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name, e.g., ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: June 5, 2007.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: New.

Title: A Study of Differential Effects of ELL Training and Materials.

Frequency: On occasion; semi-annually; annually.

Affected Public: Individuals or household; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 896.

Burden Hours: 311.

Abstract: This study seeks to examine the impact on student achievement of a combination of a comprehensive English Language Learner (ELL) student program, On Our Way to English [OWE], and a professional development course, Responsive Instruction for Success in English [RISE]. Schools identified as having a high percentage of Spanish-speaking ELL students will be randomly assigned to either the treatment condition or a control group. All grade 1–5 classrooms at each school will participate in the condition assigned to the school. This study begins in 2007. OWE and RISE will be implemented in treatment schools during the 2007–2008 and 2008–2009 school years. Data on classroom practices, student activities, and student language and literacy will be collected each of these years. Intermediate and cumulative effects of the interventions will be analyzed using year-end data and data collected over the course of the study. Other analyses may explore education mechanisms that contribute to variation in the impact in achievement.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3303. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E7–11258 Filed 6–11–07; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2004–0015; FRL–8325–4]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; State Operating Permit Regulations (Renewal); EPA ICR No. 1587.07, OMB Control No. 2060–0243

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA)(44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before July 12, 2007.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2004–0015, to (1) EPA online using www.regulations.gov (our preferred method), by email to *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket and Information Center, Mail Code 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725

17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Jeff Herring, Air Quality Policy Division (C504–05), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–3195; fax number: (919) 541–5509; e-mail address: *herring.jeff@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On February 9, 2007 (72 FR 6233), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments during the comment period. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2004–0015, which is available for online viewing at www.regulations.gov, or in person viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air and Radiation Docket is 202–566–1742.

Use EPA's electronic docket and comment system at www.regulations.gov to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at www.regulations.gov as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: State Operating Permit Regulations (Renewal).

ICR numbers: EPA ICR No. 1587.07, OMB Control No. 2060–0243.

ICR Status: This ICR was originally scheduled to expire on March 31, 2007, but an emergency extension granted by OMB on March 13, 2007 extended the expiration date to June 30, 2007. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Title V of the Clean Air Act (Act) requires States to develop and implement a program for issuing operating permits to all sources that fall under any Act definition of ''major'' and certain other non-major sources that are subject to Federal air quality regulations. The Act further requires EPA to develop regulations that establish the minimum requirements for those State operating permits programs, to oversee implementation of the State programs, and to operate a Federal operating permits program in areas not subject to an approved State program.

The EPA regulations setting forth requirements for the State operating permits programs are at part 70, title 40, chapter I of the Code of Federal Regulations. These are referred to as the ''Part 70 Operating Permit Regulations,'' which are the subject of the ICR addressed in this notice.

In implementing title V of the Act and EPA's part 70 operating permits regulations, State and local permitting agencies must develop programs and submit them to EPA for approval (section 502(d)), and sources subject to the program must develop operating permit applications and submit them to the permitting authority within 1 year after program approval (section 503). Permitting authorities will then issue permits (section 503(c)) and thereafter enforce, revise, and renew those permits at no more than 5-year intervals (section 502(d)). Permit applications and proposed permits will be provided to, and are subject to review by, EPA (section 505(a)). All information submitted by a source and the issued permit shall also be available for public review except for confidential information which will be protected from disclosure (section 503(e)). Sources will semi-annually submit compliance monitoring reports to the permitting authorities (section 504(a)). The EPA has the responsibility to oversee implementation of the program and to administer a Federal operating permits program in the event a program is not approved for a State (section 502(d)(3)) or if EPA determines the permitting authority is not adequately administering its approved program (section 502(i)(4)). The activities to carry out these tasks are considered mandatory and necessary for implementation of title V and the proper operation of the operating permits program. This notice provides updated burden estimates from a previously approved ICR.

Burden Statement: The annual public reporting and recordkeeping burden for the part 70 collection of information is estimated to average 248 hours per permitted source, and the annual burden for permitting authorities to administer a part 70 program is estimated to average 12,050 hours (about 80 hours per permitted source). Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Respondents to this information collection come from two groups: (1) Sources required to obtain an operating permit and (2) permitting authorities.

Estimated Number of Respondents: 16,818 sources and 112 permitting authorities.

Frequency of Response: Initially, annually, and every five years.

Estimated Total Annual Hour Burden: 5,525,639 hours.

Estimated Total Annual Cost: $220,996,244, includes $0 annualized capital or O&M costs.

Changes in the Estimates: There is an increase of 416,091 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This increase in burden for sources and permitting authorities is due to expected changes in the existing information collection activities to be

performed by sources, primarily an increase in permit renewal activity.

Dated: June 5, 2007.

Sara Hisel-McCoy,

Acting Director, Collection Strategies Division.

[FR Doc. E7–11303 Filed 6–11–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2006–0750; FRL–8325–3]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Gasoline Distribution Facilities (Renewal), EPA ICR Number 1659.06, OMB Control Number 2060–0325

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before July 12, 2007.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2006–0750, to (1) EPA online using *www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 2201T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: María Malavé, Compliance Assessment and Media Programs Division (Mail Code 2223A), Office of Compliance, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: (202) 564–7027; fax number: (202) 564–0050; e-mail address: *malave.maria@epa.gov*.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On October 5, 2006 (71 FR 58853), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–OECA–2006–0750, which is available for public viewing online at *http://www.regulations.gov,* or in person viewing at the Enforcement and Compliance Docket and Information Center in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, 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 Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket and Information Center is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov,* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: NESHAP for Gasoline Distribution Facilities (Renewal).

ICR Numbers: EPA ICR Number 1659.06, OMB Control Number 2060–0325.

ICR Status: This ICR is scheduled to expire on June 30, 2007. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP), for the regulations published at 40 CFR part 63, subpart R, were promulgated on December 14, 1994 (59 FR 64318). The standards were revised on June 26, 1995 (60 FR 32913), to correct errors in the printing of the emission screening equation in the final standards, and amended on February 29, 1996 (61 FR 7723), to extend the initial compliance date for the equipment leak standard. The standards were amended again June 12, 1996 (61 FR 29875), to clarify the coverage of gasoline loading racks at refineries with through-puts greater than 75,700 liters/day. Updated direct final standards were promulgated on February 28, 1997 (62 FR 9092), to implement a proposed settlement with the American Petroleum Institute. These regulations apply to facilities that are new or existing pipeline breakout stations or bulk gasoline terminals with through-puts greater than 75,700 liters/day, commencing construction, modification or reconstruction after the date of proposal.

In general, all NESHAP standards require initial notifications, performance tests, and periodic reports. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all sources subject to NESHAP. Specifically, data is being collected on performance of the continuous monitoring systems for gasoline vapor and related hazardous air pollutants (HAPs), any excess emissions, and any operating parameter exceedances.

Any owner or operator subject to the provisions of this part shall maintain a file of these measurements, and retain the file for at least five years following the date of such measurements, maintenance reports, and records. All reports are sent to the delegated State or local authority. In the event that there is no such delegated authority, the reports are sent directly to the United States Environmental Protection Agency (EPA) regional office.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 29 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Owners or operators of facilities that are new or existing pipeline breakout stations or bulk gasoline terminals.

Estimated Number of Respondents: 447.

Frequency of Response: Initially, semiannually and annually.

Estimated Total Annual Hour Burden: 15,756 hours.

Estimated Total Annual Cost: $1,755,864, which includes $0 annualized Capital Startup costs, $357,000 annualized Operating and Maintenance Costs (O&M), and $1,398,864 annualized Labor Costs.

Changes in the Estimates: There are two categories of burden in this ICR, major sources and area sources. There is a net decrease in burden hours from the most recently approved ICR due to a decrease in the number of major sources subject to the standard. The decrease occurred because major sources reduced their emissions or otherwise demonstrated that their emissions were below the threshold level for applicability in the standard. However, it should be noted that the previous ICR did not include the burden hours for area sources.

After the calculations were updated to include managerial and clerical hours for major sources, and we added the burden associated with area sources, the sum total of the increases did not offset burden hours associated with the decrease in the number of major sources required to comply with the standard. Hence, there is a net overall decrease in the burden hours to comply with this standard.

Dated: June 4, 2007.

Sara Hisel-McCoy,

Acting Director, Collection Strategies Division.

[FR Doc. E7–11310 Filed 6–11–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2007–0468; FRL–8325–6]

Agency Information Collection Activities; Proposed Collection; Comment Request; Environmental Impact Assessment of Nongovernmental Activities in Antarctica (Renewal); EPA ICR No. 1808.05, OMB Control No. 2020–0007

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on October 31, 2007. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before August 13, 2007.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OECA–2007–0468, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: hessert.aimee@epa.gov*.
- *Fax:* 202–564–0072.
- *Mail:* Enforcement and Compliance Docket; Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* EPA Headquarters West Building, Room 3334, located at 1301 Constitution Ave., NW., Washington DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OECA–2007–0468. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *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 *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site 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 *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public 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. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

FOR FURTHER INFORMATION CONTACT: Aimee Hessert, Office of Federal Activities, Mail Code 2252A, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–0993; fax number: (202) 564–0072; e-mail address: *hessert.aimee@epa.gov*.

SUPPLEMENTARY INFORMATION:

How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OECA–2007–0468, which is available for online viewing at *www.regulations.gov*, or in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Enforcement and Compliance Docket is 202–566–1752.

Use *www.regulations.gov* to obtain a copy of the draft collection of

information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) 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.

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Offer alternative ways to improve the collection activity.

6. Make sure to submit your comments by the deadline identified under DATES.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What Information Collection Activity or ICR Does This Apply to?

Affected entities: Entities potentially affected by this action are all nongovernmental operators with activities in Antarctica, including tour operators, for which the United States is required to give advance notice under paragraph 5 of Article VII of the Antarctic Treaty of 1959; this includes all nongovernmental expeditions to and within Antarctica organized in or proceeding from the territory of the United States.

Title: Agency Information Collection Activities: Proposed Collection; Comment Request; Environmental Impact Assessment of Nongovernmental Activities in Antarctica (Renewal).

ICR numbers: EPA ICR No. 1808.05, OMB Control No. 2020–0007.

ICR status: This ICR is currently scheduled to expire on December 31, 2007. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The Environmental Protection Agency's (EPA's) regulations at 40 CFR part 8, Environmental Impact Assessment of Nongovernmental Activities in Antarctica (Final Rule), were promulgated pursuant to the Antarctic Science, Tourism, and Conservation Act of 1996 (Act), 16 U.S.C. 2401 *et seq.*, as amended, 16 U.S.C. 2403a, which implements the Protocol on Environmental Protection (Protocol) to the Antarctic Treaty of 1959 (Treaty). The Final Rule provides for assessment of the environmental impacts of nongovernmental activities in Antarctica, including tourism, for which the United States is required to give advance notice under Paragraph 5 of Article VII of the Treaty, and for coordination of the review of information regarding environmental impact assessments received from other Parties under the Protocol. The requirements of the Final Rule apply to operators of nongovernmental expeditions organized or proceeding from the territory of the United States to Antarctica and include commercial and noncommercial expeditions. Expeditions may include ship-based tours; yacht, skiing or mountaineering expeditions; privately funded research expeditions; and other nongovernmental activities. The Final Rule does not apply to individual U.S. citizens or groups of citizens planning travel to Antarctica on an expedition for which they are not acting as an operator. (Operators, for example, typically acquire use of vessels or aircraft, hire expedition staff, plan itineraries, and undertake other organizational responsibilities.) The Final rule provides nongovernmental operators with the specific requirements they need to meet in order to comply with the requirements of Article 8 and Annex I to the Protocol. The provisions of the Final Rule are intended to ensure that potential environmental effects of nongovernmental activities undertaken in Antarctica are appropriately identified and considered by the operator during the planning process and that to the extent practicable appropriate environmental safeguards which would mitigate or prevent adverse impacts on the Antarctic environment are identified by the operator.

Environmental Documentation. Persons subject to the Final Rule must prepare environmental documentation to support the operator's determination regarding the level of environmental impact of the proposed expedition. Environmental documentation includes a Preliminary Environmental Review Memorandum (PERM), an Initial Environmental Evaluation (IEE), or a Comprehensive Environmental Evaluation (CEE). The environmental document is submitted to the Office of Federal Activities (OFA). If the operator determines that an expedition may have: (1) Less than a minor or transitory impact, a PERM needs to be submitted no later than 180 days before the proposed departure to Antarctica; (2) no more than minor or transitory impacts, an IEE needs to be submitted no later than 90 days before the proposed departure; or (3) more than minor or transitory impacts, a CEE needs to be submitted. Operators who anticipate such activities are encouraged to consult with EPA as soon as possible regarding the date for submittal of the CEE. (Article 3(4), of Annex I of the Protocol requires that draft CEEs be distributed to all Parties and the Committee for Environmental Protection 120 days in advance of the next Antarctic Treaty Consultative Meeting (ATCM) at which the CEE may be addressed.)

The Protocol and the Final Rule also require an operator to employ

procedures to assess and provide a regular and verifiable record of the actual impacts of an activity which proceeds on the basis of an IEE or CEE. The record developed through these measures needs to be designed to: (a) Enable assessments to be made of the extent to which environmental impacts of nongovernmental expeditions are consistent with the Protocol; and (b) provide information useful for minimizing and mitigating those impacts and, where appropriate, on the need for suspension, cancellation, or modification of the activity. Moreover, an operator needs to monitor key environmental indicators for an activity proceeding on the basis of a CEE. An operator may also need to carry out monitoring in order to assess and verify the impact of an activity for which an IEE would be prepared. For activities that require an IEE, an operator should be able to use procedures currently being voluntarily utilized by operators to provide the required information. Should an activity require a CEE, the operator should consult with EPA to: (a) Identify the monitoring regime appropriate to that activity, and (b) determine whether and how the operator might utilize relevant monitoring data collected by the U.S. Antarctic Program. OFA would consult with the National Science Foundation and other interested Federal agencies regarding the monitoring regime.

In cases of emergency related to the safety of human life or of ships, aircraft, equipment and facilities of high value, or the protection of the environment which would require an activity to be undertaken without completion of the documentation procedures set out in the Final Rule, the operator would need to notify the Department of State within 15 days of any activities which would have otherwise required preparation of a CEE, and provide a full explanation of the activities carried out within 45 days of those activities. (During the time the Interim Final and Final Rules have been in effect, there were no emergencies requiring notification by U.S. operators. An Interim Final Rule was in effect from April 30, 1997, until replaced on December 6, 2001, by the Final Rule).

Environmental documents (*e.g.*, PERM, IEE, CEE) are submitted to OFA. Environmental documents are reviewed by OFA, in consultation with the National Science Foundation and other interested Federal agencies, and also made available to other Parties and the public as required under the Protocol or otherwise requested. OFA notifies the public of document availability via the World Wide Web at: *http://www.epa.gov/compliance/nepa/international/antarctica/index.html.* The types of nongovernmental activities currently being carried out (*e.g.*, ship-based tours, land-based tours, flights, and privately funded research expeditions) are typically unlikely to have impacts that are more than minor or transitory, thus an IEE is the typical level of environmental documentation submitted. For the 1997–1998 through 2003–2004 austral summer seasons during the time the Interim Final Rule and Final Rule have been in effect, all respondents submitted IEEs with the exception of one PERM. Paperwork reduction provisions in the Final Rule that are used by the operators include: (a) Incorporation of material in the environmental document by referring to it in the IEE, (b) inclusion of all proposed expeditions by one operator within one IEE; (c) use of one IEE to address expeditions being carried out by more than one operator; and (d) use of multi-year environmental documentation to address proposed expeditions for a period of up to five consecutive austral summer seasons.

Coordination of Review of Information Received from Other Parties to the Treaty. The Final Rule also provides for the coordination of review of information received from other Parties and the public availability of that information including: (1) A description of national procedures for considering the environmental impacts of proposed activities; (2) an annual list of any IEEs and any decisions taken in consequence thereof; (3) significant information obtained and any action taken in consequence thereof with regard to monitoring from IEEs to CEEs; and (4) information in a final CEE. This provision fulfills the United States' obligation to meet the requirements of Article 6 of Annex I to the Protocol. The Department of State is responsible for coordination of these reviews of drafts with interested Federal agencies, and for public availability of documents and information. This portion of the Final Rule does not impose paperwork requirements on any nongovernmental person subject to U.S. regulation.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9 and are identified on the form and/or instrument, if applicable.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1663 hours annually, or 72 hours per response. This hourly burden reflects annual submission of different levels of environmental documentation by an anticipated 23 respondents (*e.g.*, U.S.-based nongovernmental operators). Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 23.

Frequency of response: Annually.

Estimated total average number of responses for each respondent: 1.

Estimated total annual burden hours: 1663 hours.

Estimated total annual costs: $133,916. This includes an estimated burden cost of $129,697 and an estimated maintenance and operational cost of $4,219.

Are There Changes in the Estimates From the Last Approval?

There is an increase of 115 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. This increase is the result of an increase in the number of respondents anticipated during the 3-year ICR renewal period and the level of environmental documentation EPA anticipates the respondents will submit.

What Is the Next Step in the Process for This ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the

approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: June 1, 2007.

Anne N. Miller,

Director, Office of Federal Activities.

[FR Doc. E7–11323 Filed 6–11–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R09–OAR–2007–0393; FRL–8326–5]

Adequacy Status of Motor Vehicle Budgets in Submitted Yuma PM_{10} Maintenance Plan for Transportation Conformity Purposes; Arizona

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of adequacy.

SUMMARY: In this notice, EPA is notifying the public that the Agency has found that the motor vehicle emissions budgets for PM_{10} in the Yuma PM_{10} Maintenance Plan are adequate for transportation conformity purposes. The Yuma PM_{10} Maintenance Plan was submitted to EPA on August 17, 2006 by the Arizona Department of Environmental Quality as a revision to the Arizona state implementation plan (SIP). As a result of our finding, the Yuma Metropolitan Planning Organization and the Federal Highway Administration must use the motor vehicle emissions budgets from the submitted Yuma PM_{10} Maintenance Plan for future conformity determinations.

DATES: This finding is effective June 27, 2007.

FOR FURTHER INFORMATION CONTACT: Rebecca Rosen, U.S. EPA, Region IX, Air Division AIR–2, 75 Hawthorne Street, San Francisco, CA 94105–3901; (415) 947–4152 or *rosen.rebecca@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Today's notice is simply an announcement of a finding that we have already made. EPA Region IX sent a letter to Arizona Department of Environmental Quality on June 1, 2007 stating that the motor vehicle emissions budgets in the submitted Yuma PM_{10} Maintenance Plan for 1999, 2005 and 2016 are adequate. The finding is available at EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm*. The adequate motor vehicle emissions budgets are provided in the following table:

ADEQUATE MOTOR VEHICLE EMISSIONS BUDGETS

Budget year	PM_{10}—tons per year (tpy)
1999	12,914
2005	12,169
2016	10,803

Transportation conformity is required by Clean Air Act section 176(c). EPA's conformity rule requires that transportation plans, transportation improvement programs, and projects conform to state air quality implementation plans (SIPs) and establishes the criteria and procedures for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards.

The criteria by which we determine whether a SIP's motor vehicle emission budgets are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4). We have described our process for determining the adequacy of submitted SIP budgets in our July 1, 2004 preamble starting at 69 FR 40038 and we used the information in these resources in making our adequacy determination. Please note that an adequacy review is separate from EPA's completeness review, and should not be used to prejudge EPA's ultimate approval action for the SIP. Even if we find a budget adequate, the SIP could later be disapproved.

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

Dated: May 30, 2007.

Wayne Nastri,

Regional Administrator, Region IX.

[FR Doc. E7–11331 Filed 6–11–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8326–7]

Notice of Meeting of the EPA's Children's Health Protection Advisory Committee (CHPAC)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that a meeting via conference call of the Children's Health Protection Advisory Committee (CHPAC) will be held June 29th, 2007 at 3 p.m. EDT. The CHPAC was created to advise the Environmental Protection Agency on science, regulations, and other issues relating to children's environmental health.

DATES: Conference call will take place on June 29th, 2007 at 3 p.m. EDT.

FOR FURTHER INFORMATION CONTACT: Carolyn Hubbard, Office of Children's Health Protection and Environmental Education, USEPA, MC 1107A, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 564–2189, *hubbard.carolyn@epa.gov*.

SUPPLEMENTARY INFORMATION: The meetings of the CHPAC are open to the public. EPA's Office of Research and Development and OCHPEE are supporting a joint Board of Scientific Counselors (BOSC) and Children's Health Protection Advisory Committee (CHPAC) work group to review the EPA/NIEHS Research Centers for Children's Environmental Health and Disease Prevention.

The Children's Environmental Health Research Centers (CEHRC) Work Group is gathering information and will develop a report.

During the conference call, the CHPAC will review that information to inform writing a letter for the full CHPAC to discuss and take action on at the July meeting.

Draft Call agenda:

3–3:15—Overview of CEHRC Work Group activities

3:15–3:30—Question/Answer (Full CHPAC)

3:30–3:50—Possible ideas for a recommendation letter

3:50–4—Wrap up and next steps

Call time: Friday June 29, 3–4 p.m. EDT.

Call-in number: 1–866–299–3188.

Conference call code: 202 564 2189.

Access and Accommodations: For information on access or services for individuals with disabilities, please contact Carolyn Hubbard at 202–564–2189 or *hubbard.carolyn@epa.gov*. To request accommodation of a disability, please contact Carolyn Hubbard preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: June 7, 2007.

Carolyn Hubbard,

Designated Federal Official.

[FR Doc. E7–11298 Filed 6–11–07; 8:45 am]

BILLING CODE 6560–50–P

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 June 27, 2007.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) 411 Locust Street, St. Louis, Missouri 63166-2034:

1. Gaylon M. Lawrence, Jr., Franklin, Tennessee; to acquire control of Farmers Bancorp, Inc., and thereby indirectly acquire control of Farmers Bank and Trust Company, both of Blytheville, Arkansas.

Board of Governors of the Federal Reserve System, June 7, 2007.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E7–11296 Filed 6–12–07; 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 July 6, 2007.

A. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105-1579:

1. Granite Bancshares, Inc., to become a bank holding company by acquiring 100 percent of the voting shares of Granite Community Bank, N.A., both of Granite Bay, California.

Board of Governors of the Federal Reserve System, June 6, 2007.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E7–11190 Filed 6–11–07; 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 July 6, 2007.

A. Federal Reserve Bank of Atlanta (David Tatum, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. Pro Financial Holdings, Inc.; to become a bank holding company by acquiring 100 percent of the voting shares of Pro Bank (in organization), both of Tallahassee, Florida.

B. Federal Reserve Bank of Chicago (Burl Thornton, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Gerber Bancshares, Inc.; to become a bank holding company by acquiring 100 percent of the voting shares of The Gerber State Bank, both of Argenta, Illinois.

Board of Governors of the Federal Reserve System, June 7, 2007.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E7–11297 Filed 6–11–07; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated.

The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. 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 the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 26, 2007.

A. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. Square 1 Financial, Inc.; to engage *de novo* through its subsidiaries, Square 1 Venture Management 1, L.P.; Square 1 Ventures, LLC; and Square 1 Venture 1, L.P., all of Durham, North Carolina, in private placement and investment advisory activities, pursuant to sections 225.28(b)(6)(i); (b)(6)(ii); (b)(6)(iii); (b)(6)(iv); and (b)(7)(iii), of Regulation Y.

Board of Governors of the Federal Reserve System, June 6, 2007.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc.E7–11191 Filed 6–11–07; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act; Notice of Meeting

TIME AND DATE: 9 a.m. (Eastern Time), June 19, 2007.

PLACE: 4th Floor Conference Room, 1250 H Street, NW., Washington, DC 20005.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Approval of the minutes of the May 22, 2007 Board member meeting.
2. Thrift Savings Plan activity report by the Executive Director.
   a. Monthly Participant Activity Report.
   b. Monthly Investment Performance Report.
   c. Legislative Report.
3. Investment consultant report on the impact of legislative proposals that would impose investment restrictions on the I Fund.
4. Analysis and recommendations on automatic enrollment, changing the default fund, and establishing a Roth feature.

CONTACT PERSON FOR MORE INFORMATION: Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: June 7, 2007.

Thomas K. Emswiler,

Secretary to the Board, Federal Retirement Thrift Investment Board.

[FR Doc. 07–2913 Filed 6–7–07; 4:36 pm]

BILLING CODE 6760–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–07–05BL]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Worksheet for Identifying Medical Conditions among Refugees and Immigrants—New—National Center for Preparedness, Detection, and Control of Infectious Diseases (NCPDCID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC is requesting OMB approval of a worksheet to be used by state and local health coordinators to identify and monitor specific medical conditions of public health importance in newly arrived refugees and immigrants. CDC requests notification of specific medical conditions listed on the Worksheet, including Class A and B health conditions not recognized overseas, as well as any discrepancies in the overseas and U.S.-based medical evaluations. Completion of the Worksheet and furnishing the requested information are essential to preventing the spread of disease.

Respondents are State and local health officials who will complete the Worksheet and return it to CDC. The Worksheet will be completed whenever a medical condition is identified in a newly arrived immigrant or refugee. The information collected in the Worksheet will be used by CDC to identify and rectify deficiencies in the overseas medical evaluation process, and evaluate and optimize overseas screening procedures and guidelines in the future.

The only cost to respondents is their time to complete the Worksheet. The total estimated annualized burden hours are 4,250.

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
State and local health agencies	300	170	5/60

Dated: June 5, 2007.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E7–11279 Filed 6–11–07; 8:45 am]

<FNP>

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–07–06AC]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–6974. Written comments should be received within 30 days of this notice.

Proposed Project

Low Back Exposure Assessment Tool for Mining—NEW—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Federal Mine Safety & Health Act of 1977, Section 501, enables CDC/NIOSH to carry out research relevant to the health and safety of workers in the mining industry. Mining has one of the highest incidence rates for back pain of any industry, and back injuries are consistently the leading cause of lost work days in the industry. The objective of this project is to develop a self-administered, paper and pencil risk assessment tool for the development of low back disorders specifically directed towards use in the mining industry. Many current methods of assessing the risk of low back disorders do not address stressors that are relatively unique to the mining environment, including the restricted vertical spaces in many coal mines that require workers to adopt stooping or kneeling postures for extended periods of their workday.

The low back exposure assessment tool for mining will assess various occupational exposures associated with development of back disorders in the literature (postural demands, lifting, whole body vibration exposure, individual and psychosocial issues), as well as specific mining stressors and will develop a score that will be used to assess the degree of risk for the job and the individual. The tool will be useful in both prioritizing jobs that need interventions to reduce low back disorder risk, and in evaluating the effectiveness of interventions through tool administration before and after the implementation of an intervention. There will be no cost to respondents other than their time. The total estimated annualized burden hours are 80.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Surface and Underground Miners	320 miners	1	15/60

Dated: June 5, 2007.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E7–11285 Filed 6–11–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel: CDC Health Protection Research Initiative: Evaluation of Workplace Health Promotion Research Projects, Request for Applications (RFA) CD07–004

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces a meeting of the aforementioned Special Emphasis Panel.

Time and Date: 9 a.m.–5 p.m., July 17, 2007 (Closed).

Place: Doubletree Buckhead Hotel, 3342 Peachtree Road, NE., Atlanta, GA 30326

Status: The meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of the scientific merit of research applications in response to RFA CD07–004, ''CDC Health Protection Research Initiative: Evaluation of Workplace Health Promotion Research Projects.''

Contact Person for More Information: Christine J. Morrison, Ph.D., Designated Federal Official, 1600 Clifton Road, NE., Mailstop D72, Atlanta, GA 30333, telephone (404) 639–3098.

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 the Agency for Toxic Substances and Disease Registry.

Dated: June 6, 2007.

Elaine L. Baker,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E7–11277 Filed 6–11–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel: Division of Global AIDS (DGA) International Laboratory Branch Review Panel, and Extramural Review of Intramural Operational Research

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces a meeting of the aforementioned Special Emphasis Panel.

Time And Date: 8:30 a.m.–5 p.m., July 11, 2007 (Closed).

Place: CDC Roybal Campus, 1600 Clifton Road, Bldg. 19, Conference Room 232, Auditorium B2, Atlanta, GA 30333, Telephone (404) 639–8838.

Status: The meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of the ''DGA International Laboratory Branch Review Panel, and the Extramural Review of Intramural Operational Research.''

Contact Person for More Information: Deborah Birx, Global AIDS Program, Director, CDC, Corporate Square, Bldg. 1, Room 1506, Mail Stop E–04, Atlanta, GA 30329, Telephone (404) 639–6137.

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 the Agency for Toxic Substances and Disease Registry.

Dated: June 6, 2007.

Elaine L. Baker,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E7–11280 Filed 6–11–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel; Occupational Safety and Health Research, Program Announcement (PA) 07–318, and Exploratory Developmental Grants, PA PAR–06–552

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting of the aforementioned committee:

Time and Date: 9 a.m.–5 p.m., July 11, 2007 (Closed).

Place: Marriott Waterfront, 700 Aliceanna Street, Baltimore, MD 21202.

Status: The meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of research grant applications in response to PA 07–318, ''Occupational Safety and Health Research,'' and PAR 06–552, ''Exploratory Developmental Grants.''

Contact Person for More Information: Stephen Olenchock, Ph.D., Scientific Review Administrator, 1095 Willowdale Road, Morgantown, WV 26506, telephone 304.285.6271.

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 the Agency for Toxic Substances and Disease Registry.

Dated: June 6, 2007.

Elaine L. Baker,

Acting Director, Management Analysis and Services, Office Centers for Disease Control and Prevention

[FR Doc. E7–11288 Filed 6–11–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

National Institute for Occupational Safety and Health (NIOSH), Safety and Occupational Health Study Section (SOHSS)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting of the aforementioned committee:

Times and Dates:

8 a.m.–5 p.m., June 28, 2007 (Closed).

8 a.m.–5 p.m., June 29, 2007 (Closed).

Place: Embassy Suites Hotel, 1900 Diagonal Road, Alexandria, Virginia 22314, telephone 703–684–5900, fax 703–684–1403.

Purpose: The Safety and Occupational Health Study Section will review, discuss, and evaluate grant application(s) received in response to the Institute's standard grants review and funding cycles pertaining to research issues in occupational safety and health, and allied areas.

It is the intent of NIOSH to support broad-based research endeavors in keeping with the Institute's program goals. This will lead to improved understanding and appreciation for the magnitude of the aggregate health burden associated with occupational injuries and illnesses, as well as to support more focused research projects, which will lead to improvements in the delivery of occupational safety and health services, and the prevention of work-related injury and illness. It is anticipated that research funded will promote these program goals.

Matters To Be Discussed: The meeting will convene to address matters related to the conduct of Study Section business and for the study section to consider safety and occupational health-related grant applications. These portions of the meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, Centers for Disease Control and Prevention, pursuant to Section 10(d) Public Law 92–463.

Agenda items are subject to change as priorities dictate.

Contact Person for More Information: Price Connor, PhD, NIOSH Health Scientist, 1600 Clifton Road, NE., Mailstop E–20, Atlanta, Georgia 30333, telephone 404–498–2511, fax 404–498–2571.

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 the Agency for Toxic Substances and Disease Registry.

Dated: June 5, 2007.

Elaine L. Baker,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E7–11281 Filed 6–11–07; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2006D–0020]

Guidance for Industry and Food and Drug Administration Staff; Class II Special Controls Guidance Document: Intervertebral Body Fusion Device; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance document entitled ''Class II Special Controls Guidance Document: Intervertebral Body Fusion Device.'' It was developed as a special control to support the reclassification of intervertebral body fusion devices that contain bone grafting material from class III (premarket approval) into class II (special controls). The guidance document describes a means by which these intervertebral body fusion devices may comply with the requirement of special controls for class II devices. Elsewhere in this issue of the **Federal Register**, FDA is publishing a final rule to reclassify the intervertebral body fusion device that contain bone grafting material from class III into class II (special controls) and retain those that contain any therapeutic biologic (e.g., bone morphogenic protein) in class III.

DATES: Submit written or electronic comments on this guidance at any time.

General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the guidance document entitled ''Class II Special Controls Guidance Document: Intervertebral Body Fusion Device'' to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health, Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 240–276–3151. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Jodi N. Anderson, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 240–276–3680.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of February 9, 2006 (71 FR 6778), FDA announced the availability of the draft guidance document entitled ''Class II Special Controls Guidance Document: Class II Special Controls Guidance Document: Intervertebral Body Fusion Device.'' Interested persons were invited to comment on the draft guidance document by May 10, 2006.

In the same **Federal Register** (71 FR 6710), FDA published a proposed rule to reclassify the intervertebral body fusion devices that contain bone grafting material, from class III (premarket approval) into class II (special controls), and retain those that contain any therapeutic biologic (e.g., bone morphogenic protein) in class III. FDA received twelve comments on the proposed rule and draft guidance. Ten comments were on the proposed rule and are addressed in the final rule published elsewhere in this issue of the **Federal Register**. The two comments on the draft guidance suggested that FDA clarify its discussion of device sterilization and mechanical testing. FDA has updated the guidance to clarify its recommendations about these two topics.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on intervertebral body fusion devices. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the draft guidance may do so by using the Internet. To receive ''Class II Special Controls Guidance Document: Class II Special Controls Guidance Document: Intervertebral Body Fusion Device'' you may either send an e-mail request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 240–276–3151 to receive a hard copy. Please use the document number 1540 to identify the guidance you are requesting.

CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of approved applications and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH Web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available on the Division of Dockets Management Internet site at *http://www.fda.gov/ohrms/dockets*.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 807, subpart E have been approved under OMB control number 0910–0120; and the collections of information in 21 CFR part 801 have been approved under OMB control number 0910–0485.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: May 31, 2007.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. E7–11235 Filed 6–11–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2007–27657]

Cooperative Research and Development Agreement: Command Center Decision Support Tools and Concept of Operations

AGENCY: Coast Guard, DHS.

ACTION: Notice of intent; request for public comments.

SUMMARY: The Coast Guard announces its intent to enter into a Cooperative Research and Development Agreement (CRADA) with Raytheon Corporation's Mission Innovation Group, to identify and investigate, via currently available modeling and simulation techniques, the potential of conceptual Next Generation, Command Center Decision Support Tools and Concept of Operations (CONOPS) for enhancing maritime security. The Coast Guard invites public comment on the proposed CRADA and also invites other non-Federal participants, who have the interest and capability to bring similar in-kind contributions to this type of research, to be considered for entry into similar CRADAs.

DATES: Comments and related material on the proposed CRADA, and preliminary inquiries about participation in CRADAs, must reach the Docket Management Facility on or before July 12, 2007. Proposals from other potential, non-Federal CRADA participants must reach the Docket Management Facility on or before December 10, 2007.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2007–27657 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Web Site: http://dms.dot.gov.*

(2) *Mail:* Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(3) *Fax:* 202–493–2251.

(4) *Delivery:* Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

Potential, non-Federal CRADA participants may submit inquiries and CRADA proposals to James W. Gynther, U.S. Coast Guard Research and Development Center, 1082 Shennecossett Road, Groton, CT 06340–6048 (e-mail: *James.W.Gynther@uscg.mil*).

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, contact James W. Gynther, U.S. Coast Guard Research and Development Center, 1082 Shennecossett Road, Groton, CT 06340–6048, telephone 860–441–2858, e-mail: *James.W.Gynther@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–493–0402.

SUPPLEMENTARY INFORMATION:

Request for Comments

All comments received will be posted, without change, to *http://dms.dot.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's ''Privacy Act'' paragraph below.

Submitting comments: If you submit a comment, please include your name and address, identify the docket number for this notice (USCG–2007–27657) and give the reason for each comment. You may submit your comments by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8 by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Docket Management Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments received during the comment period.

Viewing comments and documents: To view comments, go to *http://dms.dot.gov* at any time, click on ''Simple Search,'' enter the last five digits of the docket number for this notice, and click on ''Search.'' You may also visit the Docket Management Facility, West Building Ground Floor W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, 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 into any of our 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 Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov.*

Cooperative Research and Development Agreements

Cooperative Research and Development Agreements, or CRADAs, are authorized by the Federal Technology Transfer Act of 1986 (Pub. L. 99–502, codified at 15 U.S.C. 3710a). A CRADA promotes the transfer of technology to the private sector for commercial use as well as specified research or development efforts that are consistent with the mission of the Federal parties to the CRADA. The Federal party or parties agree with one or more non-Federal parties to share research resources (but the Federal party does not contribute funding). The Department of Homeland Security (DHS), as an executive agency under 5 U.S.C. 105, is a Federal agency for purposes of 15 U.S.C. 3710a and may enter into a CRADA. DHS delegated its authority to the Commandant of the Coast Guard (see DHS Delegation No. 0160.1, para. 2.B(34)) and the Commandant has delegated his authority to the Coast Guard Research and Development Center.

CRADAs are not procurement contracts. Care is taken to ensure that CRADAs are not used to circumvent the contracting process. This typically includes advertisement in the **Federal Register** to give all potential CRADA partners opportunity to participate, remove any appearance of favoritism, and limit the risk of future litigation by non-CRADA partners. CRADAs have a specific purpose and should not be confused with other types of agreements such as procurement contracts, grants, and cooperative agreements.

Goal of Proposed CRADA

Under the proposed agreement, the Coast Guard's Research and Development Center (USCG R&DC) would collaborate with non-Federal participants. Together, the R&DC and its CRADA participants would identify and investigate, via currently available modeling and simulation techniques, the potential of conceptual Next Generation, Command Center Decision Support Tools and CONOPS to enhance maritime security. This joint research would also provide additional understanding of the processes and support tools within USCG and other command centers, which have the responsibility to detect, assess, and interdict maritime threats within the coastal waters of a sovereign state.

The R&DC, with its CRADA participants, will create and employ a structured and collaborative test environment to evaluate concepts and technologies for Next Generation Command Center Decision Support Tools.

Party Contributions

We anticipate that the Coast Guard's contributions under the proposed CRADA will include the following:

(1) Provide candidate Command Center Decision Support Tool Concepts;

(2) Provide Command Center personnel to serve as (a) Subject Matter Experts during simulation environment and conceptual support tool development and (b) Test Subjects during the concept evaluation exercises; and

(3) Review of the CRADA partner's Draft Results Report after each concept evaluation exercise.

We anticipate that the non-Federal participants' contributions under the proposed CRADA will include the following:

(1) The provision of appropriate modeling and simulation environment(s) for evaluating conceptual Next Generation, Command Center Decision Support Tools;

(2) Development and execution of a modeling and simulation test plan(s);

(3) Analysis of modeling and simulation results;

(4) Development of a Draft CRADA Results Report after each concept evaluation exercise; and

(5) The provision to the U.S. Coast Guard Research and Development Center of all Final CRADA Results

Reports in electronic format suitable for distribution to other interested, qualified parties upon request.

Selection Criteria

The Coast Guard reserves the right to select for CRADA participants all, some, or none of the proposals in response to this notice. The Coast Guard will provide no funding for reimbursement of proposal development costs. Proposals (or any other material) submitted in response to this notice will not be returned. Proposals submitted are expected to be unclassified and have no more than four single-sided pages (excluding cover page and resumes). The Coast Guard will select proposals at its sole discretion on the basis of:

(1) How well they communicate an understanding of, and ability to meet, the proposed CRADA's goal; and

(2) How well they address the following criteria:

(a) Technical capability to support the non-Federal party contributions described; and

(b) Resources available for supporting the non-Federal party contributions described.

This is a technology transfer/development effort. Presently, the Coast Guard has no plan to procure the Next Generation, Command Center Decision Support technology being investigated under this CRADA. Since the goal of this CRADA is ''to identify and investigate the potential of conceptual Next Generation, Command Center Decision Support Tools,'' and not to set future CG acquisition requirements for same, non-Federal CRADA partners will not be excluded from any future CG procurements based solely on their participation within this CRADA.

Special consideration will be given to small business firms/consortia, and preference will be given to business units located in the U.S.

Dated: May 29, 2007.

T.W. Jones,

CAPT, USCG, Commanding Officer, R&D Center.

[FR Doc. E7–11257 Filed 6–11–07; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Generic Clearance of Customer Service Surveys; OMB Control No. 1615–0077.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on March 27, 2007, at 72 FR 14288. The notice allowed for a 60-day public comment period. No comments were received on this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until July 12, 2007. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0077 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate 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;

(2) Evaluate the accuracy of the agencies estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of existing information collection.

(2) *Title of the Form/Collection:* Generic Clearance of Customer Service Surveys.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No Agency Form Number; File OMB–9. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Individuals complete the customer service survey so that USCIS can determine the kind and quality of services customers want and expect, their level of satisfaction with existing services, and the type of services which they project may be required within a 3 to 5 year time frame.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 34,200 responses at 30 minutes (.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 17,100 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please contact Richard A. Sloan, Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., 3rd Floor, Suite 3008, Washington, DC 20529; 202–272–8377.

Dated: June 6, 2007.

Richard Sloan,

Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. E7–11269 Filed 6–11–07; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection under Review: Memorandum of Understanding to Participate in the Basic Pilot Employment Eligibility Program; Verify Employment Eligibility Status; OMB Control No. 1615–0092.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on April 5, 2007, at 72 FR 16807 allowing for a 60-day public comment period. One comment was received on this information collection. USCIS responded to the comment, but will not be making changes at this time.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until July 12, 2007. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov*, and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0092 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(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, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Memorandum of Understanding to Participate in the Basic Pilot Employment Eligibility Program; Verify Employment Eligibility Status.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No Agency Form Number; File OMB–18. U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for profit. The Basic Pilot Program allows employers to electronically verify the employment eligibility status of newly hired employees.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 40,000 MOU's at 2.333 (2 hours and 20 minutes) per response; 40,000 employers registering to participate in the program at .166 (10 minutes) per response; 4,000,000 initial queries at .05 (3 minutes) per response; 40,000 secondary queries at .333 (20 minutes) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 313,279 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please contact Richard A. Sloan, Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529; Telephone 202–272–8377.

Dated: June 6, 2007.

Richard Sloan,

Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E7–11270 Filed 6–11–07; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form I–526, Immigrant Petition by Alien Entrepreneur, OMB Control No. 1615–0026.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on March 23, 2007, at 72 FR 13818. The notice allowed for a 60-day public comment period. No comments were received on this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until July 12, 2007. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0026 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate 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;

(2) Evaluate the accuracy of the agencies estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Immigrant Petition by Alien Entrepreneur.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–526; U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or Households. This form is used by qualified immigrants seeking to enter the United States under section 203(b)(5) of the Immigration and Nationality Act for the purpose of engaging in a commercial enterprise.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1,368 responses at 1 hour and 15 minutes (1.25 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 17,100 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please contact Richard A. Sloan, Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., 3rd Floor, Suite 3008, Washington, DC 20529; 202–272–8377.

Dated: June 6, 2007.

Richard Sloan,

Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. E7–11271 Filed 6–11–07; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Revision of an Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form I–817, Application for Family Unity Benefits; OMB Control Number 1615–0005.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on April 6, 2007, at 72 FR 17176. The notice allowed for a 60-day public comment period. No comments were received on this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until July 12, 2007. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0005 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate 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;

(2) Evaluate the accuracy of the agencies estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Revision of existing information collection.

(2) *Title of the Form/Collection:* Application for Family Unity Benefits.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–817; U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The information collected will be used to determine whether the applicant meets the eligibility requirements for benefits under 8 CFR part 245A, Subpart C.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 6,000 responses as 2 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 12,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please contact Richard A. Sloan, Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., 3rd Floor, Suite 3008, Washington, DC 20529; 202–272–8377.

Dated: June 6, 2007.

Richard Sloan,

Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services.

[FR Doc. E7–11272 Filed 6–11–07; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Proposed Information Collection; OMB Control Number 1018-0135; Electronic Duck Stamp Pilot Program

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. We 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.

DATES: You must submit comments on or before August 13, 2007.

ADDRESSES: Send your comments on the IC to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); *hope_grey@fws.gov* (e-mail); or (703) 358–2269 (fax).

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Hope Grey by mail, fax, or e-mail (see ADDRESSES) or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Electronic Duck Stamp Act of 2005 (Act) (Pub.L. 109-266), passed in August 2006, requires that the Secretary of the Interior conduct a 3–year pilot program under which up to 15 States authorized by the Secretary may issue electronic Federal Duck Stamps. Eligible applicants are State fish and wildlife agencies that have an automated licensing system authorized under State law. There are currently 40 States that offer Internet, point of sale, or telephonic sales for their hunting and fishing licenses.

Under the Act, a State may not participate in the pilot program unless it submits an application and the Secretary approves it. OMB has granted emergency approval for the application for this program (FWS Form 3-2341) and assigned OMB Control No. 1018-0135, which expires October 31, 2007. To participate in the pilot program, eligible State fish and wildlife agencies must have submitted an application by June 8, 2007. The application process will lead to the selection of up to 15 participants for this pilot program.

The Act requires reports from States that participate in the pilot program We plan to ask OMB to approve the following reporting requirements for a 3–year term:

(1) Pilot Fulfillment Report. Each participating State must collect the following information and submit it to the fulfillment contractor on a weekly basis. We will use this information to issue an actual stamp to each purchaser.

(a) First and last name and complete mailing address for each individual who purchases an electronic stamp from the State.

(b) Face value amount of each electronic stamp sold by the State.

(c) Amount of the Federal portion of any fee required by the agreement for each stamp sold.

(2) At the end of the pilot program, the Act requires that we submit a report to Congress. We will evaluate the program to determine if it has provided a cost effective and convenient means for issuing Federal Duck Stamps. We will ask each State to provide information on whether or not the program:

(a) Increased the availability of the stamps.

(b) Assisted States in meeting customer service objectives.

(c) Maintained actual stamps as an effective and viable conservation tool.

(d) Maintained adequate retail availability of the actual stamp.

II. Data

OMB Control Number: 1018-0135.

Title: Electronic Duck Stamp Pilot Program.

Service Form Number(s): None.

Type of Request: Revision of currently approved collection.

Affected Public: State fish and wildlife agencies.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Weekly for fulfillment reports; one time for evaluation report.

Activity	Number of annual respondents	Number of annual responses	Completion time per response	Annual burden hours
Pilot Fulfillment Reports	15	780	1 hour	1,200
Pilot Evaluation Report	15	15	8 hours	120
Totals	30	795		1,320

III. Request for Comments

We invite comments concerning this IC on:

(1) whether or not the collection of information is necessary, including whether or not the information will have practical utility;

(2) the accuracy of our estimate of the burden for this collection of information;

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. We will include and/or summarize each comment in our request to OMB to approve this IC. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: April 30, 2007

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

FR Doc. E7–11286 Filed 6–11–07; 8:45 pm

Billing Code 4310–55–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Proposed Low Effect Habitat Conservation Plan for the Crown Enterprise Site, City of Rialto, County of San Bernardino, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: Crown Enterprises (applicant) has applied to the U.S. Fish and Wildlife Service (Service) for a 3-year incidental take permit for one covered species pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The application addresses the potential for ''take'' of the endangered Delhi Sands flower-loving

fly (*Rhaphiomidas terminatus abdominalis*) associated with the proposed commercial development on a 3.2-acre site in the City of Rialto, San Bernardino County, California. A conservation program to mitigate for the project activities would be implemented as described in the proposed 3.2-acre Crown Enterprise Site, City of Rialto, San Bernardino County, California Low Effect Habitat Conservation Plan (proposed HCP), which would be implemented by the applicant.

We are requesting comments on the permit application and on the preliminary determination that the proposed HCP qualifies as a ''Low-effect'' Habitat Conservation Plan, eligible for a categorical exclusion under the National Environmental Policy Act (NEPA) of 1969, as amended. The basis for this determination is discussed in the Environmental Action Statement (EAS) and the associated Low Effect Screening Form, which are also available for public review.

DATES: Written comments should be received on or before July 12, 2007.

ADDRESSES: Comments should be addressed to the Field Supervisor, Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, California 92011. Written comments may be sent by facsimile to (760) 918–0638.

FOR FURTHER INFORMATION CONTACT: Ms. Karen Goebel, Assistant Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES**); telephone: (760) 431–9440.

SUPPLEMENTARY INFORMATION:

Availability of Documents

Individuals wishing copies of the application, proposed HCP, and EAS should immediately contact the Service by telephone at (760) 431–9440 or by letter to the Carlsbad Fish and Wildlife Office. Copies of the proposed HCP and EAS also are available for public inspection during regular business hours at the Carlsbad Fish and Wildlife Office [see **ADDRESSES**].

Background

Section 9 of the Act and its implementing Federal regulations prohibit the take of animal species listed as endangered or threatened. Take is defined under the Act as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect listed animal species, or attempt to engage in such conduct (16 U.S.C. 1538). However, under section 10(a) of the Act, the Service may issue permits to authorize incidental take of listed species. ''Incidental take'' is defined by the Act as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Regulations governing incidental take permits for threatened and endangered species, respectively, are found in the Code of Federal Regulations at 50 CFR 17.22 and 50 CFR 17.32.

The applicant is seeking a permit for take of the Delhi Sands flower-loving fly during the life of the permit. This species is referred to as the ''DSF'' in the proposed HCP.

The applicant proposes to construct a commercial development on 3.2 acres of land located along the west side of Riverside Avenue between Santa Ana and Jurupa avenues in the City of Rialto, San Bernardino County, California. We anticipate that all DSF would be lost within the project site. The project site does not contain any other rare, threatened or endangered species or habitat. No critical habitat for any listed species occurs on the project site.

The applicant proposes to mitigate the effects to the DSF associated with the covered activities by fully implementing the HCP. The purpose of the proposed HCP's conservation program is to promote the biological conservation of the DSF. The applicant proposes to mitigate impacts to the DSF through purchase of 1 acre of credit within the Colton Dunes Conservation Bank in the City of Colton, San Bernardino County, California.

The Proposed Action consists of the issuance of an incidental take permit and implementation of the proposed HCP, which includes measures to mitigate impacts of the project on the DSF. One alternative to the taking of the listed species under the Proposed Action is considered in the proposed HCP. Under the No Action Alternative, no permit would be issued, and no construction would occur.

The Service has made a preliminary determination that approval of the proposed HCP qualifies as a categorical exclusion under NEPA, as provided by the Department of the Interior Manual (516 DM 2 Appendix 1 and 516 DM 6 Appendix 1) and as a ''low-effect'' plan as defined by the Habitat Conservation Planning Handbook (November 1996). Determination of Low-effect Habitat Conservation Plans is based on the following three criteria: (1) Implementation of the proposed HCP would result in minor or negligible effects on federally listed, proposed, and candidate species and their habitats; (2) Implementation of the proposed HCP would result in minor or negligible effects on other environmental values or resources; and (3) Impacts of the proposed HCP, considered together with the impacts of other past, present and reasonably foreseeable similarly situated projects, would not result, over time, in cumulative effects to environmental values or resources which would be considered significant.

Based upon this preliminary determination, we do not intend to prepare further NEPA documentation. We will consider public comments in making the final determination on whether to prepare such additional documentation.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

This notice is provided pursuant to section 10(c) of the Act. We will evaluate the permit application, the proposed HCP, and comments submitted thereon to determine whether the application meets the requirements of section 10 (a) of the Act. If the requirements are met, we will issue a permit to the Crown Enterprises for the incidental take of the Delhi Sands flower-loving fly from the commercial development in the City of Rialto, San Bernardino County, California.

Dated: June 6, 2007.

Jim A. Bartel,

Field Supervisor, Carlsbad Fish and Wildlife Office, California/Nevada Operations, Carlsbad, California.

[FR Doc. E7–11314 Filed 6–11–07; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Trempealeau National Wildlife Refuge, Buffalo and Trempealeau Counties, WI

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of a draft comprehensive conservation plan and environmental impact statement; request for comments.

SUMMARY: The U.S. Fish and Wildlife Service (Service), announces that a Draft Comprehensive Conservation Plan (CCP) and associated Environmental Impact Statement are available for the Trempealeau National Wildlife Refuge (NWR). This notice is furnished in compliance with our CCP policy to

advise other agencies and the public of their opportunity to comment on the draft documents.

DATES: To ensure consideration, your written comments must be received by August 11, 2007. A public open house meeting will be held to accept comments in person; the date, time, and location of the meeting will be announced in local media.

ADDRESSES: Copies of the Draft CCP are available on compact disk or hard copy. You may access and download a copy via the planning Web site at *http://www.fws.gov/midwest/planning/Trempealeau* or you may obtain a copy by writing to the following address: U.S. Fish and Wildlife Service, Division of Conservation Planning, Bishop Henry Whipple Federal Building, 1 Federal Drive, Fort Snelling, Minnesota 55111.

Send your comments to Trempealeau National Wildlife Refuge, W28488 Refuge Road, Trempealeau, Wisconsin, 54661 or direct e-mail to *r3planning@fws.gov*. Comments may also be submitted through the Service's regional Web site at: *http://www.fws.gov/midwest/planning*.

FOR FURTHER INFORMATION CONTACT: Vickie Hirschboeck, 608–539–2311 extension 12.

SUPPLEMENTARY INFORMATION: With this notice, the Service announces the availability of the Draft CCP/EIS for the Trempealeau NWR with headquarters in Trempealeau, WI.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee), requires the Service to develop a comprehensive conservation plan for each national wildlife refuge. The purpose in developing a comprehensive conservation plan is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and Service policies. In addition to outlining broad management direction on conserving wildlife and their habitats, plans identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation.

Each unit of the National Wildlife Refuge System is established with specific purposes. The Service uses these purposes to develop and prioritize management goals and objectives within the National Wildlife Refuge System mission, and to guide which public uses will occur on these Refuges. The planning process is a way for us and the public to evaluate management goals and objectives for the best possible means to conserve the Refuge's important wildlife habitat, while providing for wildlife-dependent recreation opportunities that are compatible with the Refuges' establishing purposes and the mission of the National Wildlife Refuge System.

The environmental review of this project is being conducted in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*); NEPA Regulations (40 CFR parts 1500–1508); other appropriate Federal laws and regulations; and our policies and procedures for compliance with those regulations. All comments we receive from individuals on our environmental impact statements become part of the official public record. We will handle requests for such comments in accordance with the Freedom of Information Act, NEPA (40 CFR 1506.6(f)), and other Departmental and Service policies and procedures.

Trempealeau National Wildlife Refuge

The Refuge, established by an Executive Order in 1936 to provide a refuge and breeding ground for migratory birds and other wildlife, encompasses 6,226 acres. The Refuge is part of the Upper Mississippi River National Wildlife and Fish Refuge Complex. An estimated 70,000 visitors enjoy birding, hiking, biking, hunting, fishing, or photography at the Refuge. Over 2,000 young people learn about their environment each year through education programs. A dedicated force of volunteers contributes to the quality of the visitor experience, as well as successful habitat management.

In September 2002 and March 2003, public meetings were held and written comments were accepted to identify issues and concerns relevant to the Refuge. The issues were grouped into five topic areas: Landscape; wildlife and habitat; public use; neighboring landowners and communities; and administration and operations.

The focus of the CCP over the next 15 years will be on enhancing forest and wetland habitat; improving outreach, access, and wildlife-dependent recreation opportunities; and improving staffing and infrastructure capability.

Three alternatives were evaluated in the EIS: (1) No action or current direction; (2) wildlife and habitat focus; and (3) integrated public use and wildlife and habitat focus (preferred). The alternatives differ mainly in the level of effort and resources given to fish, wildlife, and habitat management and public use opportunities and programs. Under the preferred alternative all current recreational uses would continue, and regulations would be reviewed to ensure consistency with existing laws and policy.

Dated: February 15, 2007.

Charles M. Wooley,

Acting Regional Director, Region 3, U.S. Fish and Wildlife Service, Fort Snelling, Minnesota.

This document was received at the Office of the Federal Register on June 7, 2007.

[FR Doc. E7–11315 Filed 6–11–07; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14937–A, F–14937–A2; AK–964–1410–HY–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to St. Mary's Native Corporation. The lands are in the vicinity of St. Mary's, Alaska, and are located in:

Seward Meridian, Alaska

T. 24 N., R. 76 W., Secs. 1 to 14, inclusive; Secs. 17 to 20, inclusive; Secs. 29, 30, and 31.
Containing 13,197.42 acres.
T. 25 N., R. 76 W., Sec. 17; Secs. 20 to 29, inclusive; Secs. 32 to 36 inclusive.
Containing 10,000.00 acres.
Aggregating 23,197.42 acres.

The subsurface estate in these lands will be conveyed to Calista Corporation when the surface estate is conveyed to St. Mary's Native Corporation. Notice of the decision will also be published four times in the Tundra Drums.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until July 12, 2007 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30

days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov.* Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

Kara Marciniec,

Land Law Examiner, Branch of Adjudication II.

[FR Doc. E7–11283 Filed 6–11–07; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–922–07–1310-FI; COC63509]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement of oil and gas lease COC63509 from Beartooth Oil and Gas Company, for lands in Moffat County, Colorado. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Milada Krasilinec, Land Law Examiner, Branch of Fluid Minerals Adjudication, at 303–239–3767.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease COC63509 effective May 1, 2007, under the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Dated: June 6, 2007.

Milada Krasilinec,

Land Law Examiner.

[FR Doc. E7–11282 Filed 6–11–07; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM–952–07–1420–BJ]

Notice of Filing of Plats of Survey; New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey described below are scheduled to be officially filed in the New Mexico State Office, Bureau of Land Management, Santa Fe, New Mexico, (30) thirty calendar days from the date of this publication.

SUPPLEMENTARY INFORMATION:

New Mexico Principal Meridian, New Mexico

The plat representing the dependent resurvey and survey for Township 12 North, Range 12 East, accepted January 19, 2007, for Group 1047 New Mexico.

The plat representing the dependent resurvey and survey for Township 13 North, Range 14 East, accepted January 29, 2007, for Group 1059 New Mexico.

The plat representing the dependent resurvey for Township 7 North, Range 3 East, accepted March 12, 2007, for Group 1039 New Mexico.

The plat representing the dependent resurvey and survey for Township 17 North, Range 8 East, accepted March 14, 2007, for Group 1050 New Mexico.

The plat representing the dependent resurvey and survey for Township 17 North Range 9, East, accepted March 20, 2007, for Group 1058 New Mexico.

The plat representing the dependent resurvey and subdivision of sections for Township 24 North, Range 9 East, accepted March 26, 2007, for Group 998 New Mexico.

The plat in two sheets representing the dependent resurvey and subdivision of sections for Township 14 North, Range 18 West, accepted April 30, 2007, for Group 1038 New Mexico.

The plat in representing the dependent resurvey and subdivision of sections for Township 3 North, Range 6 West, accepted March 30, 2007, for Group 1056 New Mexico.

The plat representing the dependent resurvey for Township 16 North, Range 5 East, accepted May 14, 2007, for Group 1001 New Mexico.

The plat in four sheets, representing the dependent resurvey and survey for Township 15 North, Range 6 East, accepted May 14, 2007, for Group 1001 New Mexico.

The plat in five sheets, representing the dependent resurvey and survey for Township 15 North, Range 5 East, accepted May 14, 2007, for Group 1001 New Mexico.

Indian Meridian, Oklahoma

The plat representing the dependent resurvey and survey for Township 6 North, Range 5 West, accepted January 10, 2007, for Group 131 Oklahoma.

The plat representing the dependent resurvey and subdivisions of sections for Township 22 North, Range 1 East, accepted March 21, 2007 for Group 141 Oklahoma.

The plat representing the dependent resurvey for Township 6 North, Range 5 West, accepted January 10, 2007 for Group 131 Oklahoma.

The plat representing the dependent resurvey and subdivision of section 30 for Township 2 North, Range 14 West, accepted December 27, 2006, for Group 142 Oklahoma.

The plat representing the dependent resurvey and subdivision of sections for Township 8 North, Range 6 East, accepted February 8, 2007, for Group 108 Oklahoma.

The supplemental plat of section 3, Township 5 South, Range 14 West, accepted January 18, 2007, Oklahoma.

The supplemental plat of sections 4 and 9, Township 5 South, Range 14 West, accepted January 18, 2007, Oklahoma.

The plat representing the dependent resurvey for Township 21 North, Range 9 East, accepted September 26, 2006 for Group 129 Oklahoma.

The plat in two sheets, representing the dependent resurvey and survey for Township 21 North, Range 8 East, accepted September 28, 2006 for Group 129 Oklahoma.

If a protest against a survey, as shown on any of the above plats is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed.

A person or party who wishes to protest against any of these surveys must file a written protest with the New Mexico State Director, Bureau of Land Management, stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within thirty days after the protest is filed.

FOR FURTHER INFORMATION CONTACT: These plats will be available for inspection in the new Mexico State Office, Bureau of Land Management, and P.O. Box 27115, Santa Fe, New Mexico, 87502–0115. Copies may be obtained from this office upon payment of $1.10 per sheet.

Dated: May 31, 2007.

Robert A. Casias,

Chief Cadastral Surveyor, New Mexico.

[FR Doc. 07–2896 Filed 6–11–07; 8:45 am]

BILLING CODE 4310–FM–M

DEPARTMENT OF THE INTERIOR

National Park Service

Draft Environmental Impact Statement for the Marin Headlands-Fort Baker, Transportation Infrastructure and Management Plan, Golden Gate National Recreation Area, Marin County, CA; Notice of Availability

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (Pub. L. 91–190, 42 U.S.C. 4321–4347, January 1, 1970, as amended), and the Council on Environmental Quality Regulations (40 CFR parts 1500 through 1508), the National Park Service, Department of the Interior, has prepared a Draft Environmental Impact Statement for the Marin Headlands-Fort Baker Transportation Infrastructure and Management Plan. The project would provide greater access to and within the Marin Headlands and Fort Baker areas for a variety of users in a way that minimizes or avoids impacts to the rich natural diversity and cultural resources of these areas within Golden Gate National Recreation Area (GGNRA). Roadway infrastructure would be rehabilitated or reconstructed with non-character altering roadway widening, and parking facilities would be improved. Additional transit options would be provided to and within areas to improve access to visitor sites. Pedestrian and bicycle facilities would be improved through closure and rerouting of existing trails and construction of new trails. A successful project would meet the following goals: (1) Promote public transit, pedestrian, and bicycle travel to and within GGNRA to improve visitor experience and enhance environmental quality; (2) Rehabilitate the Marin Headlands-Fort Baker transportation road and trail infrastructure in a manner that protects resources and improves safety and circulation; (3) Reduce traffic congestion at key GGNRA locations and connecting roads.

Proposal and Alternatives: As noted, this Draft Environmental Impact Statement (EIS) describes and analyzes four alternatives. *Alternative 1*, the No Action Alternative, would not deviate from the existing management direction; it serves as an environmental baseline from which potential effects of the three ''action'' alternatives may be compared. *Alternative 2* would provide basic multi-modal access. Roadway infrastructure would be rehabilitated within the existing roadway width; parking facilities would be improved; transit service to the Marin Headlands would be expanded on weekends; and minor pedestrian and bicycle facility enhancements would be implemented to improve access to these GGNRA areas. *Alternative 4* would provide maximum multi-modal access. Roadway infrastructure would be reconstructed throughout the study area, and parking facilities would be improved. Transit options would include the addition of connections to regional transit centers outside of GGNRA. Extensive pedestrian and bicycle facility enhancements would be implemented, including closure and rerouting of existing trails, construction of new trails, and road widening to allow for bicycle lane construction on nearly all major roads.

Alternative 3 is the Agency Preferred alternative. *Alternative 3* would provide enhanced multi-modal access. Roadway infrastructure would be rehabilitated or reconstructed with non-character altering roadway widening, and parking facilities would be improved. Additional transit options would be provided to and within the Marin Headlands and Fort Baker (MH/FB) areas to improve access. Pedestrian and bicycle facilities would be improved through closure and rerouting of existing trails and construction of new trails. Key project elements include the following:

Roadways and Vehicular Circulation: At selected sites within the area of potential effect, roads and intersections will be modified to improve safety and operations. Modifications include widening the road widths from two to four feet to allow for the provision of Class 2 bicycle lanes or improved safety on Class 3 bike routes, and reconstructing intersections from a ''Y'' to a ''T'' configuration. In addition GGNRA would implement a wayfinding program and ''intelligent transportation system'' (ITS) technologies to improve visitor information and reduce traffic congestion at key locations.

Parking Management and Fees: In many MH/FB locations parking areas would be reconfigured, delineated, and formalized, in order to improve parking operations, reduce congestion, better match parking supply with demand, and reduce natural resource impacts. A parking fee program would be implemented to provide enhanced transit service operations.

Bicycle and Pedestrian Improvements: Class 1 bicycle path and Class 2 bicycle lanes would be added in several locations, and extensive improvements to pedestrian trails would be implemented. A new bicycle/pedestrian trail would be constructed to provide a separate facility connecting Fort Baker to the bike lanes at Barry-Baker tunnel and the Marin Headlands. Rodeo Valley Trail would be widened with a hardened surface between Capehart Housing and Bunker Road at Rodeo Lagoon to provide a Class 1 bicycle path and hiking trail. The Coastal Trail would be rerouted from its current interior Rodeo Valley alignment to a more coastal alignment with spectacular views.

Transit Services: Existing transit services in the MH/FB areas would be enhanced to improve access to and within these areas. The goal would be to provide transit access seven days a week by expanding MUNI and Golden Gate Transit service on existing routes, and by implementing additional park shuttle service.

Car-Free Days and Special Events: A program of car-free days would be established on selected days on a trial basis; after review of the demonstration program, GGNRA may adjust the number of car-free days or the scheduled times and operations. This program would allow visitors to experience these areas with minimal vehicular traffic and would encourage visitors to use alternative modes of transportation to access and travel within GGNRA.

Natural Resource Enhancements: Efforts to protect and enhance natural resources would include restoring the wetland community at the unpaved parking lot at Rodeo Beach; repairing gullies that have eroded due to past poor drainage along Conzelman roadway; and removing fill and restoring wetlands along Rodeo Lagoon/Lake on selected portions of Smith and Bunker Roads.

Scoping and Public Involvement: The Notice of Intent to prepare an EIS was published in the **Federal Register** on April 10, 2002. Early in the EIS scoping phase three public meetings were hosted in San Francisco, Marin City, and Oakland. The San Francisco meeting occurred on March 26, 2002 during a meeting of the GGNRA Advisory Committee (approximately ten members of the public attended the meeting). The Marin City meeting occurred on April 10, 2002 at the Manzanita Community Center in Marin City (approximately 20 members of the public attended). The Oakland meeting occurred on April 11, 2002 at the Metropolitan Transportation Commission Auditorium in Oakland.

Three members of the public attended, along with several agency staff members. In addition GGNRA hosted two Alternatives Refinement Workshops for the public in order to solicit early feedback on the four preliminary alternatives. The workshops were conducted on November 19, 2002 at Tamalpais High School in Mill Valley (approximately 11 community members attended) and on November 26, 2002 at GGNRA Headquarters in San Francisco (approximately 15 community members attended). GGNRA staff prepared and distributed announcements of the meetings to 2,000 individuals and organizations (and these were also distributed at Marin Headlands Visitor Center and posted widely on bulletin boards in Marin County). Summaries of oral comments received at each workshop and written comments from the public have been documented (''Summary of November 2002 Alternatives Refinements Workshops'', Nelson/Nygaard 2003). Comments from these workshops were used to further refine the alternatives and identify the main issues to be addressed in finalizing the Draft EIS. GGNRA also hosted a public forum March 14, 2003 to review initial findings of the Fort Baker Cultural Landscape Report and Marin Headlands-Fort Baker Historic Roads Characterization Study (two individuals attended). The most recent public outreach efforts included updates on project alternatives at the last four of GGNRA's quarterly public meetings beginning with a May 16, 2006 meeting at the Mill Valley Community Center. Regular posting of information updates occurs on GGNRA's Web site (*http://parkplanning.nps.gov/goga*).

Comments: Copies of the Draft EIS will be sent to affected Federal, Tribal, State and local government agencies, to all interested parties, and those requesting copies. Printed and digital copies (compact disc) of the Draft EIS will be available at GGNRA headquarters and at local libraries. The complete document will be posted on GGNRA's Web site (noted above). All written comments must be postmarked or transmitted no later than sixty days from the date of EPA's notice of filing published in the **Federal Register** (as soon as this occurs, the confirmed closing date for the comment period will be posted on GGNRA's Web site, and also publcized in all other GGNRA announcements). Written comments may be sent by letter addressed to: General Superintendent, GGNRA, Fort Mason, Bldg. 201, San Francisco, CA 94123 (Attn: MH–FB Transportation Plan). Comments will also be accepted via the Internet at *http://parkplanning.nps.gov/goga* (click on the project title and follow instructions) or e-mail at *goga_planning@nps.gov.*

All submissions from organizations or businesses, and from individuals identifying themselves as representatives of or officials of organizations or businesses, are maintained in the project administrative record and will be available for public inspection in their entirety. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire response—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

A public meeting will be scheduled to hear comments on the Draft EIS, approximately 30 days after publication of this notice in the **Federal Register**. Please visit GGNRA's Web site (noted above) to learn more about the project or the conservation planning/environmental impact analysis process, or to obtain information updates regarding the logistics of the public meeting. Questions regarding the Draft EIS may also be directed at any time to Mr. Steve Ortega at (415) 561–4841 (or *goga_planning@nps.gov.*

Decision Process: Following the careful analysis of all comments received concerning the Draft EIS, it is anticipated that the Final EIS for the proposed Transportation Infrastructure and Management Plan would be completed in fall 2007. Availability of the Final EIS will be announced in the **Federal Register**, and also publicized via local and regional press media, direct mailings, and Web site postings. Not sooner than thirty days after release of the Final EIS, a Record of Decision may be executed (at this time it is anticipated that a recommended decision would be developed during winter 2007–08). As a delegated EIS the approving official is the Regional Director, Pacific West Region. Subsequently, the official responsible for implementation of the approved plan will be the General Superintendent, Golden Gate National Recreation Area.

Dated: May 31, 2007.

Jonathan B. Jarvis,

Regional Director, Pacific West Region.

[FR Doc. 07–2880 Filed 6–11–07; 8:45 am]

BILLING CODE 4312–FN–M

DEPARTMENT OF THE INTERIOR

National Park Service

General Management Plan, Final Environmental Impact Statement, Great Sand Dunes National Park and Preserve, Colorado

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of Availability of the Final Environmental Impact Statement for the General Management Plan and Wilderness Study, Great Sand Dunes National Park and Preserve.

SUMMARY: Pursuant to National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service (NPS) announces the availability of a Final Environmental Impact Statement for the General Management Plan and Wilderness Study, Great Sand Dunes National Park and Preserve, Colorado. The NPS preferred alternative was developed with substantial public, interagency, and staff participation between 2002 and 2006. The NPS preferred option includes options for new trails to allow for dispersed hiking and horseback riding and educational opportunities on the expansion lands. Cooperative or joint facilities, such as future access routes and trailheads with the U.S. Forest Service, U.S. Fish and Wildlife Service, and private partners are emphasized. A large portion of the park expansion lands was studied and will be recommended for future wilderness designation. Additional wilderness in the Sand Dunes National Park was very popular with the public.

DATES: The National Park Service will execute a Record of Decision (ROD) no sooner than 30 days following publication by the Environmental Protection Agency of the Notice of Availability of the Final Environmental Impact Statement.

ADDRESSES: Information will be available for public inspection online at *http://parkplanning.nps.gov,* in the office of the Superintendent, Art Hutchinson, Great Sand Dunes National Monument and Preserve, 11500 Hwy. 150, Mosca, CO, 81146–9798; Tel: (719) 378–6300; and at the following locations: Southern Peaks Public Library, 423 4th Street, Alamosa, Colorado; West Custer County Library, 209 Main Street, Westcliffe, Colorado; Crestone/Baca Library, Crestone, Colorado; Great Sand Dunes National Park and Preserve Visitor Center.

FOR FURTHER INFORMATION CONTACT: Superintendent Art Hutchinson, Great Sand Dunes National Monument and

Preserve, 11500 Hwy. 150, Mosca, CO 81146–9798; Tel: (719) 378–6300; FAX: (719) 378–6311; e-mail: *art_hutchinson@nps.gov.*

Dated: May 29, 2007.

Anthony J. Schetzsle,

Deputy Director, Intermountain Region, National Park Service.

[FR Doc. 07–2895 Filed 6–11–07; 8:45 am]

BILLING CODE 4312–CL–M

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0041]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-Day Notice of Information Collection Under Review: Implementation of Public Law 103–322, The Violent Crime Control and Law Enforcement Act of 1994.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until August 13, 2007. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Thomas McDermott, Firearms Programs Division, Room 7400, 650 Massachusetts Avenue, NW., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Implementation of Public Law 103–322, The Violent Crime Control and Law Enforcement Act of 1994.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: Individual or households. The Act restricts the manufacture, transfer, and possession of certain semiautomatic assault weapons and large capacity ammunition feeding devices. The regulations provide that Federal firearms licensees may transfer these weapons to law enforcement agencies and law enforcement officers with proper documentation. This documentation is necessary for ATF to ensure compliance with the law and to prevent the introduction of semiautomatic assault weapons into commercial channels.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 61,529 respondents will provide the necessary documentation and maintain records for a total of 2 hours and 50 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 148,900 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: June 7, 2007.

Lynn Bryant,

Department Clearance Officer, PRA, Department of Justice.

[FR Doc. E7–11302 Filed 6–11–07; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0013]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day notice of information collection under review: application for tax-exempt transfer of firearm and registration to special (occupational) taxpayer.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until August 13, 2007. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Gary Schaible, National Firearms Act Branch, 244 Needy Road, Martinsburg, WV 25405.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information* Collection: Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Tax-Exempt Transfer of Firearm and Registration to Special (Occupational) Taxpayer.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF F 3 (5320.3). Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: None. The form is submitted and approved by ATF prior to the transfer of a National Firearms Act weapon from one Special Occupational Tax paying Federal firearms licensee to another special taxpaying licensee. The form is required whenever such a transfer is to be made.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 2,521 respondents will complete a 30 minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 11,850 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: June 7, 2007.

Lynn Bryant,

Department Clearance Officer, PRA, Department of Justice.

[FR Doc. E7–11304 Filed 6–11–07; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0040]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day notice of information collection under review: Application for an amended Federal firearms license.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until August 13, 2007. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Patricia Power, Chief, Federal Firearms Licensing Center, Suite 110, 2600 Century Parkway, NE., Atlanta, Georgia 30345.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for an Amended Federal Firearms License.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF F 5300.38. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: Individual or households. The form is used when a Federal firearms licensee makes application to change the location of the firearms business premises. The applicant must certify that the proposed new business premises will be in compliance with State and local law for that location.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 18,000 respondents will complete a 1 hour and 15 minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 22,500 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: June 7, 2007.

Lynn Bryant,

Department Clearance Officer, PRA, Department of Justice.

[FR Doc. E7–11306 Filed 6–11–07; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0033]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day notice of information collection under review: Request for disposition of offense.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be

submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until August 13, 2007. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Phillip Awe, Acting Chief, Firearms Enforcement Branch, Room 7400, 650 Massachusetts Avenue, NW., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Request for Disposition of Offense.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF F 5020.29. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: Business or other for-profit. The form is used if an applicant applies for a license or permit and has an arrest record charged with a violation of Federal or State law and there is no record present of the disposition of the case(s), ATF F 5020.29 is sent to the custodian of records to ascertain the disposition of the case.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 50 respondents will complete a 30 minute form.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 25 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: June 7, 2007.

Lynn Bryant,

Department Clearance Officer, Department of Justice.

[FR Doc. E7–11307 Filed 6–11–07; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0028]

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60–day notice of information collection under review: Inventories, licensed explosives importers, manufacturers, dealers, and permittees.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until August 13, 2007. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Gary Bangs, Chief, Explosives Industry Programs Branch, Room 5000, 650 Massachusetts Avenue, NW., Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—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;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Inventories, Licensed Explosives Importers, Manufacturers, Dealers, and Permittees.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* ATF REC 5400/1. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. Other: None. The records show the explosive material inventories of those persons engaged in various activities within the explosives industry and are used by the government as initial figures from which an audit trail can be developed during the course of a compliance inspection or criminal investigation. Licensees and permittees shall keep records on the business premises for five years from the date a transaction occurs or until discontinuance of business or operations by licensees or permittees.

(5) *An estimate of the total number of respondents and the amount of time*

estimated for an average respondent to respond: It is estimated that 13,106 respondents will take 2 hours to complete the records.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 26,212 annual total burden hours associated with this collection.

If additional information is required contact: Lynn Bryant, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: June 7, 2007.

Lynn Bryant,

Department Clearance Officer, PRA, Department of Justice.

[FR Doc. E7–11308 Filed 6–11–07; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Cemex, S.A.B. de C.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 proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States* v. *Cemex, S.A.B. de C.V.,* Civil Action No. 1:07–cv–00640. On April 4, 2007, the United States filed a Complaint to enjoin Cemex, S.A.B. de C.V. from acquiring Rinker Group Limited. On May 2, 2007, the United States filed an Amended Complaint naming Rinker as a defendant in the suit. The Amended Complaint alleges that Cemex's acquisition of Rinker would substantially lessen competition in the production and distribution of ready mix concrete in certain metropolitan areas of Florida and Arizona, of concrete block in certain metropolitan areas of Florida, and of aggregate in the metropolitan area of Tucson, Arizona, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18. The proposed Final Judgment requires Cemex, once it obtains control of Rinker, to divest (1) Ready mix concrete plants in the metropolitan areas of Fort Walton Beach/Panama City/Pensacola, Jacksonville, Orlando, Tampa/St. Petersburg, and Fort Myers/Naples, Florida and the metropolitan areas Flagstaff and Tucson, Arizona; (2) concrete block plants in metropolitan Tampa/St. Petersburg and Fort Myers/Naples, Florida; and (3) aggregate plants in metropolitan Tucson, Arizona.

Copies of the Amended Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 325 7th Street, NW., Room 215, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr*, and at the Office of the Clerk of the United States District Court for the District of Columbia, Washington, DC. Copies of these materials may be obtained from the Antitrust Division upon request and payment of a copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. 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, NW., Suite 3000, Washington, DC 20530 (telephone: 202–307–0924).

Patricia A. Brink,

Deputy Director of Operations.

United States District Court for the District of Columbia

United States of America, Department of Justice, Antitrust Division, 1401 H Street, NW., Suite 3000, Washington, DC 20530, Plaintiff, v. *Cemex, S.A.B. de C.V., Av. Ricardo Margàin Zozaya #325, Colonia del Valle Campestre, Garza García, Nuevo León, Mexico 66265, and Rinker Group Limited, Level 8, Tower B, 799 Pacific Highway, Chatsworth, NSW 2067, Australia*, Defendants.

Case No.: 1:07–cv–00640.
Judge: Hon. Royce C. Lamberth.
Deck Type: Antitrust.
Date Stamp: May 2, 2007.

Amended Complaint

Plaintiff United States of America (''United States''), acting under the direction of the Attorney General of the United States, brings this civil antitrust action to obtain equitable and other relief against defendants, Cemex, S.A.B. de C.V. (''Cemex'') and Rinker Group Limited (''Rinker'') to prevent Cemex's proposed acquisition of Rinker. Plaintiff complains and alleges as follows:

I. Nature of the Action

1. On October 27, 2006, Cemex Australia Pty Ltd., an entity controlled by Cemex, initiated a hostile cash tender offer to acquire all of the outstanding shares of Rinker. The total enterprise value of the transaction offer when made on October 27, 2007, including Rinker's debt, was approximately $12 billion. The offer was due to expire on March 30, 2007, but Cemex extended it until April 27, 2007.

2. On April 9, 2007, Cemex announced that it had signed an agreement with Rinker, pursuant to which Cemex increased its offer to make the total enterprise value of the transaction, including Rinker's debt, approximately $15 billion. This offer expired on May 18, 2007, and it is subject to the acquisition of 90 percent of Rinker's shares. As part of the agreement, Rinker's Board of Directors unanimously agreed to recommend to its shareholders that they accept Cemex's increased offer at the higher price, in the absence of a superior proposal.

3. Cemex and Rinker both produce and distribute building materials, including, among other things, ready mix concrete, aggregate, and concrete block, throughout the world.

4. The combination of Cemex and Rinker would create one of the world's largest building materials companies. Cemex's proposed acquisition of Rinker would reduce the number of significant suppliers of ready mix concrete in various metropolitan areas in Florida and Arizona, of concrete block in several metropolitan areas in Florida, and of aggregate in Tucson, Arizona.

5. The United States brings this action to prevent the proposed acquisition because it would substantially lessen competition in the production and distribution of ready mix concrete in the metropolitan areas of Fort Walton Beach/Panama City/Pensacola, Jacksonville, Orlando, Tampa/St. Petersburg, Fort Myers/Naples, Florida, and the metropolitan areas of Flagstaff and Tucson, Arizona. In addition, the acquisition would substantially lessen competition in the production and distribution of concrete block in metropolitan Tampa/St. Petersburg and Fort Myers/Naples, Florida. Finally, the acquisition would substantially lessen competition in the production and distribution of aggregate in metropolitan Tucson, Arizona.

II. Parties to the Proposed Transaction

6. Defendant Cemex is organized under the laws of the United Mexican States with its principal place of business in Nuevo León, Mexico. Cemex operates in the United States through its wholly owned subsidiary, Cemex, Inc., which has its principal place of business in Houston, Texas. In 2006,

Cemex reported total sales of approximately $24.6 billion.

7. Cemex produces and distributes cement, ready mix concrete, aggregate, concrete block, concrete pipe, and related building materials to customers in more than 50 countries. Approximately 25 percent of Cemex's revenues are earned in the United States. Cemex is the largest United States supplier of ready mix concrete and cement and the seventh largest United States supplier of aggregate.

8. Defendant Rinker is organized under the laws of Australia with its principal place of business in Chatswood, Australia. Rinker operates in the United States through its subsidiary, Rinker Materials Corporation. Rinker Materials Corporation has its principal place of business in West Palm Beach, Florida. In 2006, Rinker reported total sales of approximately $4 billion.

9. Rinker produces and distributes aggregate, ready mix concrete, cement, concrete block, asphalt, concrete pipe, and other construction materials through its operations in the United States and Australia. Approximately 80 percent of Rinker's revenues are earned in the United States. Rinker is the second largest United States supplier of ready mix concrete and the fifth largest United States supplier of aggregate.

III. Jurisdiction and Venue

10. Plaintiff United States brings this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain defendants from violating Section 7 of the Clayton Act, 15 U.S.C. 18.

11. Defendants produce and distribute ready mix concrete, concrete block, and aggregate in the flow of interstate commerce. Defendants' activities in producing and distributing these products substantially affect interstate commerce. This Court has subject matter jurisdiction over this action pursuant to Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1331, 1337(a), and 1345.

12. Venue is proper in this District pursuant to 28 U.S.C. 1391(d). Further, defendants have consented to venue and personal jurisdiction in this judicial district.

IV. Trade and Commerce

A. The Relevant Product Markets

1. Ready Mix Concrete

13. Ready mix concrete is a building material made up of a combination of cement, fine and coarse aggregate, small amounts of chemical additives, and water. The amount of cement added to a concrete mixture determines its strength, which is measured in pounds per square inch (''psi''). Concrete with higher psi ratings is typically used for large state department of transportation highway and bridge projects and high-rise buildings. Concrete with lower psi ratings is typically used for residential and curb-and-gutter construction projects.

14. Ready mix concrete is made at production facilities called batch plants. A batch plant measures the precise amount of dry input products needed to manufacture a given type of concrete. The mixture is then dumped into a rotating drum mounted on a heavy duty truck. Immediately before the truck departs the plant, a measured amount of water is added. Once the water hits the dry mixture, an irreversible chemical reaction is triggered causing the product to begin to set into a rigid building substance. The concrete components are mixed by the rotating drum while the truck is being driven to the job site. At the job site, the concrete is poured directly from the truck onto the project.

15. Ready mix concrete is unique because it is pliable when freshly mixed, can be molded into a variety of forms, and it is strong and permanent when hardened. For many building applications, customers will not substitute other building materials, such as steel, wood, or asphalt, for ready mix concrete. Steel is often not a substitute for ready mix concrete because it cannot be poured and formed into smooth, regular planes. Wood is often not a substitute because it does not have the structural strength to support heavy loads. Asphalt is often not a substitute because it cannot be used for the structural portions of bridges, cannot be used for buildings, and for certain applications cannot be used for highways.

16. Ready mix concrete is sold pursuant to bids, which are based on extensive specifications from the customer regarding, among other things, the amount of concrete, the various strengths of concrete, and the size and timing of the concrete pours. The needs of the customer can differ significantly by each project.

17. Not all suppliers of ready mix concrete can service every kind of project. For example, servicing certain types of ''large projects,'' such as large state department of transportation highway and bridge building projects and high-rise building projects, requires ready mix concrete suppliers to be able to provide: (a) A large number of cubic yards of concrete; (b) large daily pours of concrete, which require the concrete supplier to schedule trucks to arrive continuously at a project; (c) concrete having multiple psi specifications; and (d) testing to insure the concrete meets project engineering specifications.

18. If the concrete does not meet the project specifications or the concrete is not poured continuously, the customer may suffer substantial direct and consequential losses as a result of defective concrete. Contractors building large projects carefully select suppliers to minimize the chances of problems with the concrete. .

19. Purchasers of ready mix concrete for such large projects require that their suppliers have: (a) Multiple ready mix concrete plants in a geographic area; (b) the ability to produce large amounts of concrete with multiple specifications; (c) backup plants; (d) a large number of concrete trucks; (e) a sizeable and well-trained workforce; (f) the demonstrated ability to service such a large project; and (g) considerable financial backing to remedy any problems relating to defective concrete.

20. Each large project is bid separately and ready mix concrete suppliers can identify the specific market conditions that apply to each large project, including the number of competitors that potentially could service the project's requirements. Ready mix concrete suppliers can and do charge different prices to customers based on the particular project's requirements and the market conditions.

21. A small but significant post-acquisition increase in the price of ready mix concrete that meets the bid specifications would not cause the purchasers of ready mix concrete for large projects to substitute another building material in sufficient quantities, or to utilize a supplier of ready mix concrete without the characteristics described in paragraph 19 above with sufficient frequency so as to make such a price increase unprofitable.

22. Accordingly, the production, distribution, and sale of ready mix concrete for use in large projects is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

2. Concrete Block

23. Concrete block is a construction material used to build exterior and interior walls in residential and commercial structures. Concrete block comes in a variety of shapes and sizes. Standard concrete blocks measure 8 inches by 8 inches by 16 inches and are composed of two hollow squares joined to form a rectangle.

24. Concrete block is produced by pouring concrete into molds and

pressing the molded blocks onto a conveyor belt for transport to a kiln for curing. Concrete blocks are then delivered to storage yards for final hardening and storage.

25. In Florida, from Orlando south, the walls of residential structures are built almost exclusively with concrete block. Wood is not a viable substitute because of its susceptibility to termite and hurricane damage. Poured concrete walls (''tilt up'' walls) are at least 10 percent more expensive than concrete block, except where a large number of identical structures with regular shapes are built on contiguous lots using a single mold. In addition, block made of polyurethane is not an economically viable substitute because it is difficult to install and does not withstand hurricane winds as well as concrete block.

26. For nearly all residential construction applications in Florida, from Orlando south, a small but significant post-acquisition increase in the price of concrete block would not cause the purchasers of concrete block to substitute another product in sufficient quantities so as to make such a price increase unprofitable.

27. Accordingly, within the state of Florida, from Orlando south, the production and distribution of concrete block is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

3. Aggregate

28. Aggregate is rock mined from either quarries or pits. Aggregate is crushed, washed, and mixed with sand, cement, and water to produce ready mix concrete. It is also used to make asphalt concrete for use in building roads. Different sizes of rock are needed to meet different ready mix concrete and asphalt specifications.

29. There are no substitutes for aggregate because aggregate differs from other types of stone products in its physical composition, functional characteristics, customary uses, and pricing. It must meet the state departments of transportation or American Society of Testing Materials' specifications for the specific type of asphalt or ready mix concrete being produced.

30. A small but significant post-acquisition increase in the price of aggregate that meets state departments of transportation and American Society of Testing Materials' specifications for use in ready mix concrete and asphalt projects would not cause the purchasers of such aggregate to substitute another product in sufficient quantities so as to make such a price increase unprofitable.

31. Accordingly, the production and distribution of aggregate that meets state departments of transportation and American Society of Testing materials' specifications for use in ready mix concrete and asphalt projects is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

B. The Relevant Geographic Markets

1. Ready Mix Concrete

32. The ready mix concrete needed for large projects, such as highways, bridges, and high-rise buildings, is bid on a project-by-project basis. Ready mix concrete suppliers can identify the specific market conditions that apply to each project, including the number of competitors that potentially could service the location of the project. Ready mix concrete suppliers charge different prices to customers based on the particular location of a project.

33. The suppliers with the ability to bid on large projects are those with plants located within the metropolitan area in which the project is located. The cost of transporting ready mix concrete is high compared to the value of the product. As concrete is hauled greater distances, the transportation costs begin to diminish the profitability of a load of concrete. Therefore, suppliers attempt to stay close to their batch plants to minimize the cost of hauling concrete.

34. Further, because concrete begins to set while being driven to the job site, it is highly perishable. Therefore, contractors and state departments of transportation typically limit the time concrete can spend in a truck to 90 minutes or less. This time may be even shorter in hot weather conditions. This time period is measured from the moment the water hits the dry concrete inputs in the truck until the concrete is poured out of the truck. Because of this 90-minute window, contractors and state departments of transportation typically allow only a portion—often only 30 minutes—to be consumed by driving time. If the concrete is driven for a longer period of time, there may be insufficient time for the concrete to be completely poured onto the project within the 90-minute window.

35. Due to its perishability and the cost of hauling concrete, depending on the size of the city and the associated traffic, the distance concrete can reasonably be transported for large projects, such as highways, bridges, and high-rise buildings in a metropolitan area is limited to the metropolitan area and, in many cases, to only portions of that area.

36. The relevant geographic markets, within the meaning of Section 7 of the Clayton Act, consist of the locations within the metropolitan areas of Fort Walton Beach/Panama City/Pensacola, Jacksonville, Orlando, Tampa/St. Petersburg, Fort Myers/Naples, Florida, and the metropolitan areas of Flagstaff and Tucson, Arizona, to which Cemex and Rinker are among a small number of firms that compete to supply ready mix concrete for large projects.

2. Concrete Block

37. The cost of transporting concrete block is high compared to the value of the product. Manufacturers or third-party haulers deliver concrete block to customer job sites by truck. As delivery distance increases, the ratio of transportation costs to the price of concrete block increases. In urban areas, this most often confines the transport of concrete block to the metropolitan area.

38. A small but significant post-acquisition increase in the price of concrete block in metropolitan Tampa/St. Petersburg would not cause customers of concrete block to procure concrete block from outside this area in sufficient quantities so as to make such a price increase unprofitable.

39. Accordingly, metropolitan Tampa/St. Petersburg is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

40. Similarly, a small but significant post-acquisition increase in the price of concrete block in metropolitan Fort Myers/Naples would not cause customers of concrete block to procure concrete block from outside this area so as to make such a price increase unprofitable.

41. Accordingly, metropolitan Fort Myers/Naples is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

3. Aggregate

42. Aggregate is a bulky, heavy, and relatively low-cost product. The cost of transporting aggregate is high compared to the value of the product.

43. Suppliers cannot economically transport aggregate to the Tucson area from locations outside of metropolitan Tucson. First, transportation costs limit the distance aggregate can be economically transported from an aggregate pit to a ready mix concrete plant (for aggregate pits that are not co-located with ready mix concrete plants) or from an aggregate pit to the job site. Second, the location of other aggregate suppliers limits the distance that aggregate can economically travel. Finally, in metropolitan Tucson, the ready mix concrete plants are typically

co-located with the aggregate pits to minimize transportation costs.

44. A small but. significant post-acquisition increase in the price of aggregate in metropolitan Tucson would not cause customers of aggregate to procure aggregate in sufficient quantities from outside this area so as to make such a price increase unprofitable.

45. Accordingly, metropolitan Tucson is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

C. Anticompetitive Effects

1. The Proposed Transaction Will Harm Competition in the Markets for Ready Mix Concrete, Concrete Block, and Aggregate in the Specified Geographic Markets.

a. Ready Mix Concrete

46. Vigorous price competition between Cemex and Rinker in the production and sale of ready mix concrete has benefitted customers.

47. The competitors that could constrain Cemex and Rinker from raising prices for ready mix concrete to be used on large projects, such as highways, bridges, and high-rise buildings, are limited to those that meet the requirements imposed by purchasers for large ready mix concrete projects.

48. The proposed acquisition will eliminate the competition between Cemex and Rinker and reduce the number of suppliers of ready mix concrete that might bid on certain types of large projects, such as highways, bridges, and high-rise buildings, from three to two in metropolitan Tampa/St. Petersburg and metropolitan Fort Walton Beach/Panama City/Pensacola, Florida, and in metropolitan Tucson, Arizona. The proposed acquisition will eliminate the competition between Cemex and Rinker and reduce the number of suppliers of ready mix concrete that might bid on certain types of large projects, such as highways, bridges and high-rise buildings, from four to three generally, and in some areas or for some projects from three to two, in metropolitan Orlando, metropolitan Fort Myers/Naples, and metropolitan Jacksonville, Florida. Further, the proposed acquisition will substantially increase the likelihood that Cemex will unilaterally increase the price of ready mix concrete to a significant number of customers in these areas.

49. In metropolitan Flagstaff, Arizona, the proposed acquisition will eliminate the competition between Cemex and Rinker and reduce the number of suppliers of ready mix concrete that might bid on certain types of large projects, such as highways, bridges, and high-rise buildings, from two to one.

50. The response of other ready mix concrete producers in the relevant areas would not be sufficient to constrain a unilateral exercise of market power by Cemex after the acquisition.

51. In addition, a combined Cemex and Rinker would have the ability to increase prices for ready mix concrete to certain customers. Ready mix concrete producers know the locations of their competitors' batch plants and the distance from their own plants and their competitors' plants to a customer's job site. Generally, because of transportation costs, the farther a supplier's closest competitor is from a job site, the less price competition that supplier faces for that project. Post-acquisition, in instances where Cemex and Rinker plants were the 11 closest plants to a customer's project, the combined firm, using the knowledge of its competitors' plant locations, would be able to charge such customers higher prices in instances in which the next closest ready mix concrete supplier's plant is farther from the customer's project than were the Cemex and Rinker plants.

52. Without the competitive constraint of competition between Cemex and Rinker, post-acquisition Cemex will have a greater ability to exercise market power by raising prices to customers for whom Rinker and Cemex were their closest and second-closest sources of ready mix concrete.

53. Further, Cemex's elimination of Rinker as an independent competitor in the production and distribution of ready mix concrete is likely to facilitate anticompetitive coordination among the remaining producers that can bid on large projects in each relevant geographic market. Mixes of the same strength of concrete are relatively standard and homogeneous, and producers have access to information about competitors' output, capacity, and costs. Moreover, participants in ready mix concrete markets have successfully engaged in anticompetitive coordination in the past. Given these market conditions, eliminating one of the few ready mix concrete suppliers that can bid on large projects is likely to further increase the ability of the remaining competitors to successfully coordinate.

54. The transaction will therefore substantially lessen competition in the market for ready mix concrete in the affected areas, which is likely to lead to higher prices for the ultimate consumers of such products, in violation of Section 7 of the Clayton Act.

b. Concrete Block

55. Vigorous price competition between Cemex and Rinker in the production and sale of concrete block has benefitted customers.

56. In metropolitan Tampa/St. Petersburg, Florida, the proposed acquisition will eliminate the competition between Cemex and Rinker. The acquisition will give Cemex control of approximately 60 percent of the concrete block capacity in metropolitan Tampa/St. Petersburg. The proposed acquisition will substantially increase the likelihood that Cemex will unilaterally increase the price of concrete block to a significant number of customers in metropolitan Tampa/St. Petersburg.

57. In metropolitan Fort Myers/Naples, Florida, the proposed acquisition will eliminate the competition between Cemex and Rinker. The acquisition will give Cemex control of approximately 69 percent of the concrete block capacity in metropolitan Fort Myers/Naples. The proposed acquisition will substantially increase the likelihood that Cemex will unilaterally increase the price of concrete block to a significant number of customers in metropolitan Fort Myers/Naples.

58. In addition, in each of these markets, a combined Cemex and Rinker would have the ability to increase prices for concrete block to certain customers. As with ready mix concrete, concrete block manufacturers know the locations of their competitors' plants and the distance from their own plants and their competitors' plants to a customer's job site. Generally, because of transportation costs, the farther a supplier's closest competitor is from the job site, the less price competition that supplier faces for that project. Post-acquisition, in instances where Cemex and Rinker plants were the closest plants to a customer's project, the combined firm, using the knowledge of its competitors' plant locations, would be able to charge such customers higher prices in instances in which the next closest concrete block supplier's plant is farther from the customer's project than were the Cemex and Rinker plants.

59. Without the constraint of competition between Cemex and Rinker, post-acquisition Cemex will have a greater ability to exercise market power by raising prices to customers for whom Rinker and Cemex were their closest and second-closest sources of concrete block supply.

60. Further, Cemex's elimination of Rinker as an independent competitor in the production and distribution of

concrete block is likely to facilitate anti-competitive coordination among the remaining concrete block producers in each relevant geographic market. Concrete block is a homogeneous commodity and producers have access to information about competitors' output, capacity, and costs. Given these market conditions, eliminating one of the few concrete block competitors is likely to further increase the ability of the remaining competitors to successfully coordinate.

61. The response of other concrete block producers in the relevant areas would not be sufficient to constrain a unilateral exercise of market power by Cemex after the acquisition.

62. The transaction will therefore substantially lessen competition in the market for concrete block, which is likely to lead to higher prices for the ultimate consumers of such products, in violation of Section 7 of the Clayton Act.

c. Aggregate

63. Vigorous price competition between Cemex and Rinker in the production and sale of aggregate in metropolitan Tucson, Arizona has benefitted customers.

64. In metropolitan Tucson, the proposed acquisition will eliminate the competition between Cemex and Rinker. The proposed acquisition will also reduce the number of significant suppliers of aggregate from five to four in the Tucson market generally and, depending on the location of the aggregate pit and the transportation costs, the number of suppliers could be reduced to as few as three or two. Further, the proposed acquisition will substantially increase the likelihood that Cemex will unilaterally increase the price of aggregate to a significant number of customers.

65. Further, Cemex's elimination of Rinker as an independent competitor in the production and distribution of aggregate is likely to facilitate anti-competitive coordination among the remaining aggregate producers in Tucson. Aggregate is a homogeneous commodity and producers have access to information about competitors' output, capacity, and costs. Given these market conditions, eliminating one of the few aggregate competitors is likely to further increase the ability of the remaining competitors to successfully coordinate.

66. The transaction will therefore substantially lessen competition in the market for aggregate, which is likely to lead to higher prices for the ultimate consumers of such products, in violation of Section 7 of the Clayton Act.

2. Entry Is Not Likely To Deter the Exercise of Market Power

a. Ready Mix Concrete

67. Successful entry or expansion into the production and distribution of ready mix concrete for large projects is difficult, time-consuming, and costly. In order to be able to bid on large projects, such as highways, bridges, and high-rise buildings, it is not sufficient simply to be able to produce ready mix concrete. In order to bid on these large projects, a new entrant or an existing producer must have multiple ready mix concrete plants in a geographic area, the ability to produce large amounts of concrete with multiple specifications, backup plants, a large number of concrete trucks, a sizeable and well-trained workforce, the demonstrated ability and reputation to be able to service such a large project and considerable financial backing to remedy any problems relating to defective concrete.

68. In addition, opening a ready mix concrete batch plant in a metropolitan area is difficult because of the need to acquire the land for the site of such a batch plant. The location of a batch plant is very important because of the perishability of the ready mix concrete. In Florida, batch plants typically require approximately three to five acres of land to comply with environmental and land use regulations. Finding the appropriate site for such a plant close enough to the large projects is difficult, because in metropolitan areas such land is already utilized or does not have the appropriate zoning. Obtaining the land use permits or zoning variances is difficult, costly, and time-consuming, as well. Furthermore, in addition to building the new batch plant, an entrant would also have to secure sources of cement and aggregate, which are inputs into ready mix concrete.

69. Therefore, entry or expansion by any other firm so that it is able to bid on large ready mix concrete projects will not be timely, likely, or sufficient to defeat an anti-competitive price Increase.

b. Concrete Block

70. In metropolitan Tampa/St. Petersburg and metropolitan Fort Myers/Naples, successful entry or expansion into the production and distribution of concrete block is difficult, time consuming, and costly. Properly zoned parcels of land of the necessary size (at least eight acres) are scarce. Locating or securing proper zoning, development, building, air quality, and environmental permits and building a concrete block plant can take more than two years. Building a new concrete block plant costs approximately $8 to $12 million.

71. Therefore, entry or expansion by any other firm into the concrete block markets in metropolitan Tampa/St. Petersburg and metropolitan Fort Myers/Naples will not be timely, likely, or sufficient to defeat an anti-competitive price increase.

c. Aggregate

72. Successful entry or expansion into the production and distribution of aggregate is difficult, time-consuming, and costly. Successful entry or expansion into the production and distribution of aggregate in metropolitan Tucson, Arizona is difficult because there are very few new sites on which to locate aggregate pits. First, for aggregate used on transportation projects, the aggregate pits must be located in a river bed or wash. Second, aggregate is a finite resource in metropolitan Tucson, and several aggregate pits have been depleted in the past several years. Third, requests to open new aggregate pits often face fierce public opposition.

73. In addition, Arizona state and federal zoning, air quality, and other permitting process requirements must be met. Obtaining the necessary environmental and land-use permits for aggregate pits is difficult in Tucson.

74. Further, the Arizona Aggregate Mine Reclamation Act requires financial assurances and other requirements for companies seeking to open a new aggregate pit, continuing to operating an existing aggregate pit, or expanding an existing aggregate pit.

75. Therefore, entry or expansion by any other firm into the aggregate market in metropolitan Tucson would not be timely, likely, or sufficient to defeat an anti-competitive price Increase.

V. Violations Alleged

76. The proposed acquisition of Rinker by Cemex would substantially lessen competition and tend to create a monopoly in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

77. Unless restrained, the transaction will have the following anti-competitive effects, among others:

a. Actual and potential competition between Cemex and Rinker in the production and distribution of ready mix concrete, concrete block, and aggregate in the relevant geographic markets will be eliminated;

b. competition generally in the production and distribution of ready

mix concrete, concrete block, and aggregate in the relevant geographic markets. will be substantially lessened; and

c. Prices for ready mix concrete, concrete block, and aggregate in the relevant geographic markets will likely increase.

VI. Request for Relief

78. Plaintiff requests that:

a. Cemex's proposed acquisition of Rinker be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. Defendants and all persons acting on their behalf 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 Cemex with the operations of Rinker;

c. Plaintiff be awarded its costs for this action; and

d. Plaintiff receive such other and further relief as the Court deems just and proper.

Respectfully submitted,

For Plaintiff United States of America:

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Dated: May 2, 2007.

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Cemex, S.A.B. de C.Y. and Rinker Group Limited,* Defendants.

Case No.: 1:07-cv-00640.
Judge: Hon. Royce C. Lamberth.
Deck Type: Antitrust.
Date Stamped: May 2, 2007.

Final Judgment

Whereas, plaintiff, United States of America, filed its Amended Complaint on May 2, 2007, and plaintiff and defendants, Cemex, S.A.R de C.V. (''Cemex'') and Rinker Group Limited (''Rinker''), 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, Cemex 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 Cemex to assure that competition is not substantially lessened;

And whereas, plaintiff requires Cemex to make certain divestitures for the purpose of remedying the loss of competition alleged in the Amended Complaint;

And whereas, Cemex has represented to the United States that the divestitures required below can and will be made and that Cemex 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 Amended Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

II. Definitions

As used in this Final Judgment:

A. ''Acquirer'' or ''Acquirers'' means the entity or entities to whom Cemex divests some or all of the Divestiture Assets.

B. ''Aggregate'' means crushed stone and gravel produced at quarries, mines, or gravel pits used for, among other things, the production of ready mix concrete and concrete block. c.

C. ''Cemex'' means defendant Cemex, S.A.B. de C.V., a Mexican corporation with its headquarters in Nuevo Leon, Mexico, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. ''Concrete block'' means a building material used in the construction of residential and commercial structures that is produced at a plant by mixing cementitious material, aggregate, chemical additives, and water, and placing that mixture in molds of various sizes.

E. Divestiture Assets'' means:

1. the following Ready Mix Concrete plants:

a. Fort Walton Beach/Panama City/Pensacola, Florida Area

i. Rinker's Crestview plant, located at 5420 Fairchild Road, Crestview, FL 32539;

ii. Rinker's Fort Walton plant, located at 1787 FIM Boulevard, Fort Walton Beach, FL 32547;

iii. Rinker's Milton plant, located at 6250 Da Lisa Road, Milton, FL 32583;

iv. Rinker's Panama City plant, located at 1901–B East 15th Street, Panama City, FL 32405;

v. Rinker's Panama City Beach plant, located at 17750 Hutchinson Road, Panama City Beach, FL 32407;

vi. Rinker's Pensacola plant, located at 415 Hyatt Street, Pensacola, FL 32503;

vii. Rinker's Port St. Joe plant, located at 1145 Industrial Road, Port St. Joe, FL 32456;

viii. Rinker's Point Washington plant, located at the intersection of East Highway 98 and Old Ferry Road, Santa Rosa Beach, FL 32459;

b. Jacksonville, Florida Area

i. Cemex's Main Street plant, located at 9214 North Main Street, Jacksonville, FL 32218;

ii. Cemex's Southside Florida Mining Boulevard plant, located at 9715 East Florida Mining Boulevard, Jacksonville, FL 32223;

c. Orlando, Florida Area

i. Cemex's East Orlando plant, located at 7400 Narcoossee Road, Orlando, FL 32822;

ii. Cemex's Goldenrod plant, located at 4000 Forsyth Road, Winter Park, FL 32792;

iii. Cemex's Winter Garden plant, located at 201 Hennis Road, Winter Garden, FL 34787;

iv. Rinker's Kennedy plant, located at 1406 Atlanta Avenue, Orlando, FL 32806;

d. Tampa/St. Petersburg, Florida Area

i. Rinker's Clearwater plant, located at 3757 118th Avenue North, Clearwater, FL 33762;

ii. Rinker's Odessa plant, located at 12025 State Road 54, Odessa, FL 33556;

iii. Rinker's Odessa Keys plant, located at 11913 State Road 54, Odessa, FL 33556;

iv. Rinker's Riverview plant, located at 6723 South 78th Street, Riverview, FL 33569;

v. Rinker's Tampa plant, located at 6106 East Hanna Avenue, Tampa, FL 33610;

vi. Rinker's Tampa Keys plant, located at 1811 North 57th Street, Tampa, FL 33619;

e. Fort Myers/Naples, Florida Area

i. Rinker's Ave Maria plant, located at 4811 Ave Maria Boulevard, Immokalee, FL 34142;

ii. Rinker's Bonita Springs plant, located at 25061 Old U.S. Highway 41 South, Bonita Springs, FL 34135;

iii. Rinker's Canal Street plant, located at 4262 Canal Street, Fort Myers, FL 33916;

iv. Rinker's Cape Coral (Pine Island) plant, located at 2401 SW Pine Island Road, Cape Coral, FL 33991;

v. Rinker's Naples plant, located at 9210 Collier Boulevard, Naples, FL 34114;

vi. Rinker's South Fort Myers plant, located at 7270 Alico Road, Fort Myers, FL 33912;

f. Flagstaff, Arizona Area

Cemex's Brannen plant, located at 633 East Brannen Avenue, Flagstaff, AZ 86001;

g. Tucson, Arizona Area

i. Cemex's Ina plant, located at 5400 West Massingale Road, Tucson, AZ 85743;

ii. Rinker's Green Valley plant, located at 18701 South Old Nogales Highway, Sahuarita, AZ 85629;

iii. Rinker's Poorman Road plant, located at 6500 South Old Spanish Trail, Tucson, AZ 85747;

iv. Rinker's Valencia plant, located at 1011 West Valencia Road, Tucson, AZ 85706;

The following concrete block plants:

a. Tampa/St. Petersburg, Florida

i. Rinker's Odessa plant, located at 12025 State Road 54, Odessa, FL 33556;

ii. Rinker's Palmetto plant, located at 600 9th Street West, Palmetto, FL 34221;

iii. Rinker's Tampa plant, located at 6302 North 56th Street, Tampa, FL 33610;

b. Fort Myers/Naples, Florida Area

i. Rinker's Bonita Springs plant, located at 25091 Old U.S. Highway 41 South, Bonita Springs, FL 34135;

ii. Rinker's Coral Rock plant, located at 41451 Cook Brown Road, Punta Gorda, FL 33982;

iii. Rinker's South Fort Myers plant, located at 7270 Alico Road, Fort Myers, FL 33912;

3. The following Tucson, Arizona area aggregate plants:

a. Cemex's Ina plant, located at 5400 West Massingale Road, Tucson, AZ 85743;

b. Rinker's Green Valley plant, located at 18701 South Old Nogales Highway, Sahuarita, AZ 85629;

4. All tangible assets used in the plants listed in paragraphs II(E)(1)–(3), including all research and development activities, manufacturing equipment, tooling and fixed assets, real property (leased or owned), mining equipment, personal property, inventory, aggregate reserves, office furniture, materials, supplies, on- or off-site warehouses or storage facilities relating to the plants; all licenses, permits and authorizations issued by any governmental organization relating to the plants; all contracts, agreements, leases (including renewal rights), commitments, and understandings relating to the plants, including supply agreements; all customer lists, contracts, accounts, and credit records relating to the plants; all other records relating to the plants; and at the option of the Acquirer or Acquirers, a number of trucks and other vehicles usable at the plants listed in paragraphs II(E)(1)–(3) equal to, for each separate type of truck or other vehicle, the average number of trucks and other vehicles of that type used at each such plant per month during the months of operation of the plant between January 1, 2006 and December 31, 2006 (calculated by averaging the number of trucks and other vehicles of each type that were used at each plant at any time during each month that the plant was in operation), but such trucks and vehicles need not include any equipment related to Cemex's ''ReadySlump'' process, so long as the trucks and other vehicles are fully operable without such equipment; and

5. All intangible assets used in the development, production, servicing, and distribution of products by the facilities listed in paragraphs II(E)(1)–(3), including but not limited to all contractual rights, patents, licenses and sublicenses, intellectual property, technical information, computer software (including dispatch software and management information systems) 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, all manuals and technical information provided to the employees, customers, suppliers, agents or licensees, and all research data (including aggregate reserve testing information) concerning historic and current research and development efforts relating to the plants listed in paragraphs II(E)(1)–(3), including, but not limited to designs of experiments, and the results of successful and unsuccessful designs and experiments.

F. ''Ready mix concrete'' means a building material used in the construction of buildings, highways, bridges, tunnels, and other projects that is produced by mixing a cementitious material and aggregate with sufficient water to cause the cement to set and bind.

G. ''Rinker'' means defendant Rinker Group Limited, an Australian corporation with its headquarters in Chatswood, Australia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

H. ''Divestiture Trigger'' means the day on which Cemex elects a majority of the Board of Directors of Rinker or forty-five (45) days after Cemex obtains a number of shares of Rinker stock in excess of 50 percent of the outstanding shares of Rinker, whichever is sooner.

III. Applicability

A. This Final Judgment applies to Cemex, as defined above, and all other persons in active concert or participation with Cemex who receive actual notice of this Final Judgment by personal service or otherwise.

B. Cemex 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 include the Divestiture Assets, that the purchaser agrees to be bound by the provisions of this Final Judgment.

IV. Divestitures

A. Cemex is ordered and directed, within one hundred twenty (120) calendar days after the Divestiture Trigger, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer or Acquirers 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. Cemex agrees to use its best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In accomplishing the divestitures ordered by the Final Judgment, Cemex promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Cemex shall inform any person making inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Unless the United States otherwise consents in writing, Cemex shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets that customarily are provided in a due diligence process except such information or documents subject to the attorney-client or work-product privilege. Cemex shall make available such information to the United States at the same time that such information is made available to any other person.

C. Unless the United States otherwise consents in writing, Cemex shall provide the Acquirer or Acquirers and the United States information relating to personnel involved in production, operations, and sales at the Divestiture Assets to enable the Acquirer or Acquirers to make offers of employment. Cemex will not interfere with any negotiations by the Acquirer or Acquirers to employ any employee of the Divestiture Assets whose primary responsibility is production, operations, or sales at the Divestiture Assets.

D. Unless the United States otherwise consents in writing, Cemex shall permit prospective Acquirers of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of the Divestiture Assets; 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.

E. Cemex shall warrant to the Acquirer or Acquirers that those Divestiture Assets owned by Cemex prior to an acquisition of Rinker will be operational on the date of the divestiture. In addition, with respect to those Divestiture Assets owned by Rinker prior to an acquisition by Cemex, Cemex shall warrant to the Acquirer or Acquirers that those Divestiture Assets will be operational on the date of the divestiture, if they were operational on the date Cemex acquires a number of shares of Rinker stock in excess of 50 percent of the outstanding shares of Rinker.

F. Cemex shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

G. Cemex shall warrant to the Acquirer or Acquirers that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of those Divestiture Assets owned by Cemex prior to an acquisition of Rinker. In addition, with respect to those Divestiture Assets owned by Rinker prior to an acquisition by Cemex, Cemex shall warrant to the Acquirer or Acquirers that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of those Divestiture Assets, if there are no material defects in the environmental, zoning, or other permits pertaining to the operation of those Divestiture Assets on the date Cemex acquires a number of shares of Rinker stock in excess of 50 percent of the outstanding shares of Rinker. Cemex shall not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

H. If for any reason Cemex is unable within the time period required by paragraph IV(A) to divest any of the Divestiture Assets or make any of the Divestiture Assets available for sale by the trustee appointed pursuant to Section V, or if for any reason Cemex does not make the warranties in paragraphs IV(E) and (G) with respect to the assets owned by Rinker prior to an acquisition by Cemex, for each such asset, the United States, in its sole discretion, may select one or more alternative assets owned by Cemex that are located or used in the same geographic area (as identified in boldface type in section II(E)) to be divested in lieu of the Divestiture Asset that could not be divested. Unless the United States consents otherwise in writing, divestiture of an alternative Cemex asset shall include all tangible and intangible assets associated with that asset, as defined in paragraph II(E).

I. Unless the United States otherwise consents in writing, any divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer or Acquirers as viable, ongoing businesses engaged in producing and distributing ready mix concrete, concrete block, and/or aggregate, that the Divestiture Assets will remain viable, and that the divestiture of such assets will remedy the competitive harm alleged in the Amended Complaint. The sale of the Divestiture Assets may be made to one or more Acquirers, so long as: (1) All of the ready mix concrete plants in a geographic area (as identified in boldface type in section II(E)) are divested to a single Acquirer; (2) all of the concrete block plants in a geographic area are divested to a single Acquirer; (3) both aggregate plants listed in paragraph II(E)(3) are divested to the same Acquirer that acquires the ready mix concrete plants listed in paragraphs II(E)(l)(g)(i)–(iii); and (4) in each instance it is demonstrated in a manner acceptable to the United States in its sole discretion that the Divestiture Assets will remain viable and the divestiture of such Divestiture assets will remedy the competitive harm alleged in the Amended Complaint. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

1. Shall be made to an Acquirer or Acquirers 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 distribution of ready mix concrete, concrete block, and/or aggregate; 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 or Acquirers and Cemex gives Cemex the ability to unreasonably raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively in the production and distribution of ready mix concrete, concrete block, and/or aggregate.

J. If Cemex does not acquire a number of shares of Rinker stock in excess of 50 percent of the outstanding shares of Rinker, Cemex shall divest all its interest in Rinker within six months from the date this Final Judgment is signed by the Court. Pending such divestiture, Cemex shall not, directly or indirectly: (1) Exercise dominion or control over, or otherwise seek to influence, the management, direction, or supervision of the business of Rinker; (2) seek or obtain representation on the Board of Directors of Rinker; (3) exercise any voting rights attached to the shares; (4) seek or obtain access to any confidential or proprietary information of Rinker; or (5) take any action or omit to take any action that would have an

effect different than if Cemex's interest in Rinker were that of a purely passive investor.

V. Appointment of Trustee to Effect Divestitures

A. If Cemex has not divested the Divestiture Assets within the time period specified in paragraph IV(A), Cemex 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 Divestiture Assets.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. 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 paragraph V(D) of this Final Judgment, the trustee may hire at the cost and expense of Cemex 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. Cemex shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objection by Cemex 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 Cemex, on such terms and conditions as plaintiff approves, and shall account for all monies derived from the sale of the assets sold by the trustee and 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 Cemex 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 Divestiture Assets 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. Cemex 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 business to be divested, and Cemex shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secrets or other confidential research, development, or commercial information. Cemex 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 Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished such divestiture 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, Cemex 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 ofthis Final Judgment. If the trustee is responsible, it shall similarly notify Cemex. 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 Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Cemex, the proposed Acquirer or Acquirers, any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer or Acquirers, and any other potential Acquirer. Cemex 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 thirty (30) calendar days after receipt of the notice, or within twenty (20) calendar days after the United States has been provided the additional information requested from Cemex, the proposed Acquirer or Acquirers, any third party, or the trustee, whichever is later, the United States shall provide written notice to Cemex 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 Cemex's limited right to object to the sale under paragraph 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 Cemex under paragraph V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Cemex shall not finance all or any part of any purchase by an Acquirer of any Divestiture Asset pursuant to Section IV or V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, Cemex shall take all steps necessary to comply with the Amended Hold Separate Stipulation and Order entered by this Court. Cemex shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the Divestiture Trigger, and every thirty (30) calendar days thereafter until the divestitures have been completed under Section IV or V, Cemex 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 Judgment. 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 Divestiture Assets, 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 Cemex has taken to solicit buyers for the Divestiture Assets, 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 Cemex, 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 Amended Complaint in this matter, Cemex shall deliver to the United States an affidavit that describes in reasonable detail all actions Cemex has taken and all steps Cemex has implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Cemex shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Cemex's earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Cemex shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestitures have been completed.

X. Compliance Inspection

A. For the 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 Cemex, be permitted:

1. Access during Cemex's office hours to inspect and copy, or at plaintiff's option, to require Cemex to provide copies of, all books, ledgers, accounts, records and documents in the possession, custody, or control of Cemex, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, Cemex'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 Cemex.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Cemex shall submit written reports or responses to written interrogatories, 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 Cemex to the United States, Cemex 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 Cemex marks 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 Cemex ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. No Reacquisition

Cemex may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

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. *Cemex, S.A.B. de C.V. and Rinker Group Limited,* Defendants.

Case No.: 1:07–cv–00640.
Judge: Hon. Royce C. Lamberth.
Deck Type: Antitrust.
Date Stamped:

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 April 4, 2007, seeking to obtain equitable and other relief against defendant Cemex, S.A.B. de C.V. (''Cemex'') to prevent its proposed acquisition of defendant Rinker Group Limited (''Rinker'') by hostile cash tender offer. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially in the production and distribution of ready mix concrete in certain areas of Florida

and Arizona, of concrete block in certain areas of Florida, and of aggregate in Tucson, Arizona, in violation of Section 7 of the Clayton Act. This loss of competition would likely result in higher prices for these products in the affected areas. At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order and a proposed Final Judgment, which were designed to eliminate the anticompetitive effects of the acquisition.

Subsequently, on April 9, 2007, Cemex signed an agreement with Rinker, pursuant to which, among other things, Cemex agreed to increase its offer price for the shares of Rinker stock and the Rinker Board of Directors agreed to recommend to its shareholders that they accept Cemex's increased offer. Accordingly, on May 2, 2007, the United States filed an Amended Complaint adding Rinker as a defendant and an Amended Hold Separate Stipulation and Order that obligated Rinker to abide by the terms of that Stipulation and Order.[1] Finally, the United States filed an amended proposed Final Judgment (hereafter, the ''proposed Final Judgment''), reflecting the fact that Rinker is a defendant in this action.[2]

Under the proposed Final Judgment, which is explained more fully below, Cemex is required to divest 31 ready mix concrete plants in the metropolitan areas of Fort Walton Beach/Panama City/Pensacola, Jacksonville, Orlando, Tampa/St. Petersburg, and Fort Myers/Naples, Florida, and the metropolitan areas of Flagstaff and Tucson, Arizona. In addition, Cemex is required to divest six concrete block plants in the Tampa/St. Petersburg and Fort Myers/Naples, Florida metropolitan areas and two aggregate plants in the Tucson, Arizona metropolitan area. Under the terms of the Amended Hold Separate Stipulation and Order, Cemex and Rinker are required to: (1) Take certain steps to ensure that the plants discussed above (hereafter, the ''Divestiture Assets'') are operated as ongoing, economically viable competitive businesses; (2) maintain the management, sales, and operations of all assets owned by each entirely separate, distinct, and apart from the assets owned by the other; and (3) refrain from coordinating the production, marketing, or terms of sale of any of their products with those produced or distributed by any assets owned by the other defendant prior to the acquisition.

The United States, Cemex, and Rinker have stipulated that the proposed Final Judgment may be entered after compliance with the APP A. 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 Defendants and the Proposed Transaction

Cemex and Rinker both produce and distribute building materials, including, among other things, ready mix concrete, aggregate, and concrete block throughout the world. Cemex is organized under the laws of the United Mexican States with its principal place of business in Nuevo León, Mexico. In 2006, Cemex reported total sales of approximately $24.6 billion. Cemex is the largest United States supplier of ready mix concrete and cement and the seventh largest United States supplier of aggregate. Approximately 25 percent of Cemex's revenues are earned in the United States. Cemex operates in the United States through its wholly-owned subsidiary, Cemex, Inc., which has its principal place of business in Houston, Texas.

Rinker is organized under the laws of Australia with its principal place of business in Chatswood, Australia. In 2006, Rinker reported total sales of approximately $4 billion. Rinker is the second largest United States supplier of ready mix concrete and the fifth largest United States supplier of aggregate. Approximately 80 percent of Rinker's revenues are earned in the United States. Rinker operates in the United States through its subsidiary, Rinker Materials Corporation. Rinker Materials Corporation has its principal place of business in West Palm Beach, Florida.

On October 27, 2006, Cemex Australia Pty Ltd., an entity controlled by Cemex, initiated a hostile cash tender offer to acquire all of the outstanding shares of Rinker for $13 per share. The total enterprise value of the transaction when made on October 27, 2006, including Rinker's debt, was approximately $12 billion. This offer was due to expire on March 30, 2007, but Cemex extended it until April 27, 2007.

On April 9, 2007, Cemex announced that it signed an agreement with Rinker, pursuant to which Cemex agreed to increase its offer price for the shares of Rinker stock to $15.85 per share. This increased the total enterprise value of the transaction to approximately $15 billion. This offer expired on May 18, 2007, and is subject to Cemex's acquisition of 90 percent of the Rinker shares. As part of the agreement, the Rinker Board of Directors unanimously agreed to recommend to its shareholders that they accept Cemex's increased offer in the absence of a superior proposal.

B. The Competitive Effects of the Transaction on the Markets for Ready Mix Concrete, Concrete Block, and Aggregate

1. Relevant Product Markets

a. Production, Distribution, and Sale of Ready Mix Concrete

The Amended Complaint alleges that the production, distribution, and sale of ready mix concrete for use in large projects is a relevant product market within the meaning of Section 7 of the Clayton Act. Ready mix concrete is a building material made up of a combination of cement, fine and coarse aggregate, small amounts of chemical additives, and water. Ready mix concrete is unique because it is pliable when freshly mixed, can be molded into a variety of forms, and is strong and permanent when hardened. For many building applications, there is no substitute for ready mix concrete.

Ready mix concrete is sold pursuant to bids, which are based on extensive specifications from the customer regarding, among other things, the amount of concrete, the various strengths of concrete, and the size and timing of the concrete pours. Not all suppliers of ready mix concrete can service every kind of project. For example, servicing certain types of large projects, such as large state department of transportation highway and bridge building projects and high-rise building projects, requires ready mix concrete suppliers to be able to provide: (a) A large number of cubic yards of concrete; (b) large daily pours of concrete, which require the concrete supplier to schedule trucks to arrive continuously at a project; (c) concrete having multiple pounds per square inch specifications; and (d) tests to ensure that the concrete meets project engineering specifications. If the concrete does not meet the project specifications or the concrete is not poured continuously, the customer may suffer direct and consequential losses as

[1] Paragraph VIII(B) of the original proposed Final Judgment provided that if Cemex and Rinker subsequently reached an agreement relating to Cemex's acquisition of Rinker, Cemex would require Rinker to sign and become a party to an amended Hold Separate Stipulation and Order.

[2] In addition, Paragraph VIII(B) of the original proposed Final Judgment was deleted in the amended Final Judgment because Rinker has been added to the Amended Hold Separate Stipulation and Order. There were no other substantive changes to the Amended Complaint or amended proposed Final Judgment.

a result of defective concrete. Purchasers of ready mix concrete for such large projects require that the suppliers have: (a) Multiple ready mix concrete plants in a geographic area; (b) the ability to produce large amounts of concrete with multiple specifications; (c) backup plants; (d) a large number of concrete trucks; (e) a sizeable and well-trained workforce; (f) the demonstrated ability to service such a large project; and (g) considerable financial backing to remedy any problems relating to defective concrete.

Each large project is bid separately and ready mix concrete suppliers can identify the specific market conditions that apply to each large project, including the number of competitors that potentially could service the project's requirements. Ready mix concrete suppliers can and do charge different prices to customers based on the particular project's requirements and market conditions.

The Amended Complaint alleges that a small but significant post-acquisition increase in the price of ready mix concrete that meets particular bid specifications would not cause the purchasers of ready mix concrete for large projects to substitute another building material in sufficient quantities, or to utilize a supplier of ready mix concrete without the characteristics described above with sufficient frequency, so as to make such a price increase unprofitable.

Accordingly, the production, distribution, and sale of ready mix concrete for use in large projects is a line of commerce and a relevant product market.

b. Concrete Block

The Amended Complaint alleges that concrete block is a relevant product market within the meaning of Section 7 of the Clayton Act in the state of Florida from Orlando south. Concrete block is a construction material used to build exterior and interior walls in residential and commercial structures. In the state of Florida, from Orlando south, the walls of residential structures are built almost exclusively with concrete block. For nearly all residential construction applications in this area, a small but significant post-acquisition increase in the price of concrete block would not cause the purchasers of concrete block to substitute another product such as poured concrete or polyurethane block in sufficient quantities so as to make such a price increase unprofitable. Accordingly, within the state of Florida, from Orlando south, concrete block is a relevant product market.

c. Aggregate

The Amended Complaint alleges that the production and distribution of aggregate that meets specifications set by state departments of transportation and the American Society of Testing Materials for use in ready mix concrete and asphalt projects is a relevant product market within the meaning of Section 7 of the Clayton Act. Aggregate is rock mined from either quarries or pits that is crushed, washed, and mixed with sand, cement, and water to produce ready mix concrete. It is also used to make asphalt concrete for use in building roads. Different sizes of rock are needed to meet different concrete and asphalt specifications. There are no substitutes for aggregate because it differs from other types of stone products in its physical composition, functional characteristics, customary uses, and pricing. It must meet specifications of state departments of transportation or the American Society of Testing Materials for the specific type of asphalt or ready mix concrete being produced. The Amended Complaint further alleges that a small but significant post-acquisition increase in the price of aggregate that meets such specifications for use in ready mix concrete and asphalt projects would not cause the purchasers of aggregate to substitute another product in sufficient quantities so as to make such a price increase unprofitable. Accordingly, the production and distribution of aggregate that meets specifications of state departments of transportation or the American Society of Testing Materials for use in ready mix concrete and asphalt projects is a relevant product market.

2. Relevant Geographic Markets

a. Ready Mix Concrete

The ready mix concrete needed for large projects, such as highways, bridges, and high-rise buildings, is bid on a project-by-project basis. Ready mix concrete suppliers can identify the specific market conditions that apply to each project, including the number of competitors that potentially could service the location of the project. Ready mix concrete suppliers charge different prices to customers based on the particular location of a project.

The suppliers with the ability to bid on large projects are those with plants located within the metropolitan area in which the project is located. The cost of transporting ready mix concrete is high compared to the value of the product. As concrete is hauled greater distances, the transportation costs begin to diminish the profitability of a load of concrete. Therefore, suppliers attempt to stay close to their batch plants to minimize the cost of hauling concrete.

Further, because concrete begins to set while being driven to the job site, it is highly perishable. Therefore, contractors and state departments of transportation typically limit the time concrete can spend in a truck to 90 minutes or less. Of this 90-minute window, contractors and state departments of transportation typically allow only a portion—often only 30 minutes—to be consumed by driving time.

Due to its perishability and the cost of hauling concrete, depending on the size of the city and the associated traffic, the distance concrete can reasonably be transported for large projects, such as highways, bridges, and high-rise buildings in a metropolitan area, is limited to the metropolitan area and, in many cases, to only portions of that area. Accordingly, the relevant markets consist of the locations within the metropolitan areas of Fort Walton Beach/Panama City/Pensacola, Jacksonville, Orlando, Tampa/St. Petersburg, and Fort Myers/Naples, Florida, and the metropolitan areas of Flagstaff and Tucson, Arizona, to which Cemex and Rinker are among a small number of firms that compete to supply ready mix concrete.

b. Concrete Block

The cost of transporting concrete block is high compared to the value of the product. Manufacturers or third-party haulers deliver concrete block to customer job sites by truck. As delivery distance increases, the ratio of transportation costs to the price of concrete block increases. In urban areas, this ratio most often confines the transport of concrete block to the metropolitan area.

The Amended Complaint alleges that a small but significant post-acquisition increase in the price of concrete block in either the metropolitan Tampa/St. Petersburg area or the metropolitan Fort Myers/Naples area would not cause customers of concrete block to procure concrete block from outside these areas in sufficient quantities so as to make such a price increase unprofitable. Accordingly, metropolitan Tampa/St. Petersburg and metropolitan Fort Myers/Naples are relevant geographic markets.

c. Aggregate

Aggregate is a bulky, heavy, and relatively low-cost product. The cost of transporting aggregate is high compared to the value of the product. Suppliers cannot economically transport aggregate

to the Tucson area from locations outside of metropolitan Tucson. First, transportation costs limit the distance aggregate can be economically transported from an aggregate pit to a ready mix concrete plant (for aggregate pits that are not co-located with ready mix concrete plants) or from an aggregate pit to the job site. In metropolitan Tucson, the ready mix concrete plants are typically co-located with the aggregate pits to minimize transportation costs. Second, the location of other aggregate suppliers limits the distance that aggregate can economically travel.

The Amended Complaint alleges that a small but significant post-acquisition increase in the price of aggregate in metropolitan Tucson would not cause customers of aggregate to procure aggregate in sufficient quantities from outside this area so as to make such a price increase unprofitable. Accordingly, metropolitan Tucson is a relevant geographic market.

3. Anticompetitive Effects of the Acquisition

a. Ready Mix Concrete

The Amended Complaint alleges that the proposed acquisition will eliminate competition between Cemex and Rinker and reduce the number of suppliers of ready mix concrete that might bid on certain types of large projects, such as highways, bridges, and high-rise buildings, from three to two in metropolitan Tampa/St. Petersburg and metropolitan Fort Walton Beach/Panama City/Pensacola, Florida, and in metropolitan Tucson, Arizona. The proposed acquisition will eliminate the competition between Cemex and Rinker and reduce the number of suppliers of ready mix concrete that might bid on certain types of large projects, such as highways, bridges, and high-rise buildings, from four to three generally, and in some areas or for some projects from three to two, in metropolitan Orlando, metropolitan Fort Myers/Naples, and metropolitan Jacksonville, Florida. Accordingly, the Amended Complaint alleges that the proposed acquisition will substantially increase the likelihood that Cemex will unilaterally increase the price of ready mix concrete to a significant number of customers in the affected metropolitan areas. Moreover, in metropolitan Flagstaff, Arizona, the proposed acquisition will reduce the number of suppliers of ready mix concrete that might bid on certain types of large projects, such as highways, bridges, and high-rise buildings, to only one.

Absent the constraint of competition between Cemex and Rinker, post-acquisition Cemex will have a greater ability to exercise market power by raising prices to customers for whom Rinker and Cemex were their closest and second-closest sources of ready mix concrete. The responses of other ready mix concrete producers in the relevant areas would not be sufficient to constrain a unilateral exercise of market power by Cemex after the acquisition.

Further, Cemex's elimination of Rinker as an independent competitor in the production and distribution of ready mix concrete is likely to facilitate anticompetitive coordination among the remaining producers that can bid on large projects in each relevant geographic market. Mixes of the same strength of concrete are relatively standard and homogeneous, and producers have access to information about competitors' output, capacity, and pricing. Moreover, participants in ready mix markets have successfully engaged in anticompetitive coordination in the past. Given these market conditions, eliminating one of the few ready mix concrete suppliers that can bid on large projects is likely to increase further the ability of the remaining competitors to coordinate successfully.

Successful entry or expansion into the production and distribution of ready mix concrete for large projects is difficult, time-consuming, and costly. In order to be able to bid on large projects, such as highways, bridges, and high-rise buildings, it is not sufficient simply to be able to produce ready mix concrete. A new entrant or an existing producer must have multiple ready mix concrete plants in a geographic area, the ability to produce large amounts of concrete with multiple specifications, backup plants, a large number of concrete trucks, a sizeable and well trained workforce, the demonstrated ability and reputation to be able to service such a large project, and considerable financial backing to remedy any problems relating to defective concrete.

In addition, opening a ready mix concrete batch plant in a metropolitan area is difficult because of the need to acquire the land for the site of such a batch plant. The location of a batch plant is important because of the perishability of the ready mix concrete. In Florida, batch plants typically require approximately three to five acres of land to comply with environmental and land use regulations. Finding the appropriate site for such a plant close enough to the large projects is difficult, because in metropolitan areas such land is already utilized or does not have the appropriate zoning. Obtaining the land use permits or zoning variances is difficult, costly, and time-consuming, as well. Furthermore, in addition to building the new batch plant, an entrant would also have to secure sources of cement and aggregate, which are inputs into ready mix concrete. Accordingly, entry or expansion by any other firm so that it is able to bid on large ready mix concrete projects will not be timely, likely, or sufficient to deter an anticompetitive price increase by Cemex after the acquisition.

b. Concrete Block

In metropolitan Tampa/St. Petersburg and metropolitan Fort Myers/Naples, Florida, the acquisition will eliminate competition between Cemex and Rinker. The acquisition will give Cemex control of approximately 60 percent of the concrete block capacity in metropolitan Tampa/St. Petersburg, and approximately 69 percent of the concrete block capacity in metropolitan Fort Myers/Naples. The acquisition will substantially increase the likelihood that Cemex will unilaterally increase the price of concrete block to a significant number of customers in metropolitan Tampa/St. Petersburg and metropolitan Naples/Fort Myers. The responses of other concrete block producers in the relevant areas would not be sufficient to constrain a unilateral exercise of market power by Cemex after the acquisition. In addition, without the constraint of competition between Cemex and Rinker, post-acquisition Cemex will have a greater ability to exercise market power by raising prices to customers for whom Rinker and Cemex were their closest and second-closest sources of concrete block supply.

Further, Cemex's elimination of Rinker as an independent competitor in the production and distribution of concrete block is likely to facilitate anticompetitive coordination among the remaining concrete block producers in each relevant geographic market. Concrete block is a homogeneous commodity and producers have access to information about competitors' output, capacity, and costs. Given these market conditions, eliminating one of the few concrete block competitors is likely to increase further the ability of the remaining competitors to coordinate successfully.

Moreover, in metropolitan Tampa/St. Petersburg and metropolitan Fort Myers/Naples, successful entry or expansion into the production and distribution of concrete block is difficult, time-consuming, and costly, and such entry would not be timely, likely, or sufficient to defeat an anticompetitive price increase in the

event that Cemex acquires Rinker. Properly zoned parcels of land of the necessary size are scarce. Locating or securing proper zoning, development, building, air quality, and environmental permits and building a concrete block plant can take more than two years. Building a new concrete block plant costs approximately $8 to $12 million. Accordingly, entry or the threat of entry into the concrete block market is not likely to deter an anticompetitive price increase by Cemex after the acquisition.

c. Aggregate

In metropolitan Tucson, the proposed acquisition will eliminate competition between Cemex and Rinker. The proposed acquisition will also reduce the number of significant suppliers of aggregate from five to four in the market generally, and, in some locations for which the third or fourth most proximate supplier faces higher transportation costs than the nearest two, the number of suppliers could be reduced to as few as two or three. The acquisition will substantially increase the likelihood that Cemex will unilaterally increase the price of aggregate to a significant number of customers.

Moreover, Cemex's elimination of Rinker as an independent competitor in the production and distribution of aggregate is likely to facilitate anti-competitive coordination among the remaining aggregate producers in Tucson. Aggregate is a homogeneous commodity and producers have access to information about competitors' output, capacity, and costs. Given these market conditions, eliminating one of the few aggregate competitors is likely to increase further the ability of the remaining competitors to coordinate successfully.

Further, in Tucson, successful entry or expansion into the production and distribution of aggregate is difficult, time-consuming, and costly, and such entry would not be timely, likely, or sufficient to defeat an anticompetitive price increase in the event that Cemex acquires Rinker. There are few new sites on which to locate aggregate pits in metropolitan Tucson. First, for aggregate used on transportation projects, the aggregate pits must be located in a river bed or wash. Second, aggregate is a finite resource in metropolitan Tucson, and several aggregate pits have been depleted in the past several years. Third, requests to open new aggregate pits often face fierce public opposition. Fourth, obtaining the necessary environmental and land use permits for aggregate pits is difficult in metropolitan Tucson. Fifth, the Arizona Aggregate Mine Reclamation Act requires financial assurances and other requirements for companies seeking to open a new aggregate pit, continuing to operate an existing pit, or expanding an existing pit. Accordingly, entry or the threat of entry into the aggregate market is not likely to deter an anticompetitive price increase by Cemex after the acquisition.

III. Explanation of the Proposed Final Judgment

A. The Divestiture Assets

The divestitures provided for in the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the markets for the production and distribution of: (1) Ready mix concrete in the metropolitan areas of Fort Walton Beach/Panama City/Pensacola, Jacksonville, Orlando, Tampa/St. Petersburg, and Fort Myers/Naples, Florida, and the metropolitan areas of Flagstaff and Tucson, Arizona; (2) concrete block in the metropolitan areas of Tampa/St. Petersburg and Fort Myers/Naples, Florida; and (3) aggregate in metropolitan Tucson, Arizona. In each metropolitan area for ready mix concrete, the divestitures will establish a new, independent, and economically viable competitor that can bid on large projects, such as highways, bridges, and high-rise buildings. In metropolitan Tampa/St. Petersburg and Fort Myers/Naples, the divestitures will also establish new, independent, and economically viable competitors that can produce and distribute concrete block. Further, the divestitures will provide the new ready mix concrete competitor in Tucson, Arizona, with sufficient aggregate reserves to compete effectively in that market.

The Divestiture Assets are:

A. Ready mix concrete plants:

1. Fort Walton Beach/Panama City/Pensacola, Florida Area

a. Rinker's Crestview plant, located at 5420 Fairchild Road, Crestview, FL 32539;

b. Rinker's Fort Walton plant, located at 1787 FIM Boulevard, Fort Walton Beach, FL 32547;

c. Rinker's Milton plant, located at 6250 Da Lisa Road, Milton, FL 32583;

d. Rinker's Panama City plant, located at 1901–B East 15th Street, Panama City, FL 32405;

e. Rinker's Panama City Beach plant, located at 17750 Hutchinson Road, Panama City Beach, FL 32407;

f. Rinker's Pensacola plant, located at 415 Hyatt Street, Pensacola, FL 32503;

g. Rinker's Port St. Joe plant, located at 1145 Industrial Road, Port St. Joe, FL 32456;

h. Rinker's Point Washington plant, located at the intersection of East Highway 98 and Old Ferry Road, Santa Rosa Beach, FL 32459;

2. Jacksonville, Florida Area

a. Cemex's Main Street plant, located at 9214 North Main Street, Jacksonville, FL 32218;

b. Cemex's Southside Florida Mining Boulevard plant, located at 9715 East Florida Mining Boulevard, Jacksonville, FL 32223;

3. Orlando, Florida Area

a. Cemex's East Orlando plant, located at 7400 Narcoossee Road, Orlando, FL 32822;

b. Cemex's Goldenrod plant, located at 4000 Forsyth Road, Winter Park, FL 32792;

c. Cemex's Winter Garden plant, located at 201 Hennis Road, Winter Garden, FL 34787;

d. Rinker's Kennedy plant, located at 1406 Atlanta Avenue, Orlando, FL 32806;

4. Tampa/St. Petersburg, Florida Area

a. Rinker's Clearwater plant, located at 3757 118th Avenue North, Clearwater, FL 33762;

b. Rinker's Odessa plant, located at 12025 State Road 54, Odessa, FL 33556;

c. Rinker's Odessa Keys plant, located at 11913 State Road 54, Odessa, FL 33556;

d. Rinker's Riverview plant, located at 6723 South 78th Street, Riverview, FL 33569;

e. Rinker's Tampa plant, located at 6106 East Hanna Avenue, Tampa, FL 33610;

f. Rinker's Tampa Keys plant, located at 1811 North 57th Street, Tampa, FL 33619;

5. Fort Myers/Naples, Florida Area

a. Rinker's Ave Maria plant, located at 4811 Ave Maria Boulevard, Immokalee, FL 34142;

b. Rinker's Bonita Springs plant, located at 25061 Old U.S. Highway 41 South, Bonita Springs, FL 34135;

c. Rinker's Canal Street plant, located at 4262 Canal Street, Fort Myers, FL 33916;

d. Rinker's Cape Coral (Pine Island) plant, located at 2401 SW Pine Island Road, Cape Coral, FL 33991;

e. Rinker's Naples plant, located at 9210 Collier Boulevard, Naples, FL 34114;

f. Rinker's South Fort Myers plant, located at 7270 Alico Road, Fort Myers, FL 33912;

6. Flagstaff, Arizona Area

Cemex's Brannen plant, located at 633 East Brannen Avenue, Flagstaff, AZ 86001;

7. Tucson, Arizona Area

a. Cemex's Ina plant, located at 5400 West Massingale Road, Tucson, AZ 85743;

b. Rinker's Green Valley plant, located at 18701 South Old Nogales Highway, Sahuarita, AZ 85629;

c. Rinker's Poorman Road plant, located at 6500 South Old Spanish Trail, Tucson, AZ 85747;

d. Rinker's Valencia plant, located at 1011 West Valencia Road, Tucson, AZ 85706;

B. Concrete Block plants:

1. Tampa/St. Petersburg, Florida Area

a. Rinker's Odessa plant, located at 12025 State Road 54, Odessa, FL 33556;

b. Rinker's Palmetto plant, located at 600 9th Street West, Palmetto, FL 34221;

c. Rinker's Tampa plant, located at 6302 North 56th Street, Tampa, FL 33610;

2. Fort Myers/Naples, Florida Area

a. Rinker's Bonita Springs plant, located at 25091 Old U.S. Highway 41 South, Bonita Springs, FL 34135;

b. Rinker's Coral Rock plant, located at 41451 Cook Brown Road, Punta Gorda, FL 33982;

c. Rinker's South Fort Myers plant, located at 7270 Alico Road, Fort Myers, FL 33912;

C. Aggregate plants:

1. Cemex's Ina plant, located at 5400 West Massingale Road, Tucson, AZ 85743; and

2. Rinker's Green Valley plant, located at 18701 South Old Nogales Highway, Sahuarita, AZ 85629.

The sale of the Divestiture Assets according to the terms of the proposed Final Judgment will ensure that Cemex's acquisition does not harm competition in any of the affected geographic areas for ready mix concrete, concrete block, and aggregate. In the following geographic areas, Cemex is required to divest all of the ready mix concrete plants it would acquire from Rinker: Fort Walton Beach/Panama City/Pensacola, Tampa/St. Petersburg, and Fort Myers/Naples, Florida. In addition, in Tampa/St. Petersburg and Fort/Myers/Naples, Florida, Cemex is required to divest all of the concrete block plants it would acquire from Rinker. Further, in Flagstaff, Arizona, Cemex is required to divest its only ready mix concrete plant and will acquire only one ready mix concrete plant from Rinker.

In the other three metropolitan areas of concern, the proposed Final Judgment requires divestiture of a sufficient number of ready mix concrete plants to ensure that competition is preserved. In metropolitan Orlando, Florida, Cemex operates five plants and Rinker operates four plants. The proposed Final Judgment requires the divestiture of four plants: (1) Three Cemex plants located northwest, northeast, and southeast of downtown Orlando; and (2) one Rinker plant located in downtown Orlando. With these four plants, the acquirer will be able to service large projects anywhere in metropolitan Orlando, and for each of the divested plants, another of those plants could serve as an effective back-up facility. The proposed Final Judgment does not require the divestiture of Cemex's downtown facility because it is co-located with one of Rinker's two downtown facilities, and Cemex anticipates achieving efficiencies in raw material supply by retaining its plant and the downtown Rinker plant at the same location.

Within the Jacksonville, Florida, metropolitan area, Cemex currently operates three plants and Rinker operates four plants. The proposed Final Judgment requires the divestiture of two of Cemex's plants—one south of downtown and the other north. Together these two plants will be able to preserve pre-merger competition between Cemex and Rinker in Jacksonville. The proposed Final Judgment does not require the divestiture of Cemex's downtown plant because Rinker has no plant in the downtown area, and the two plants to be divested can service the downtown area as or more effectively than Rinker's plants. Moreover, Cemex's downtown facility is co-located with a concrete block plant that Cemex will retain and a divestiture of the ready mix concrete facilities at that location would not allow Cemex to achieve efficiencies related to the co-location.

In the Tucson, Arizona, metropolitan area, Cemex operates four ready mix concrete facilities and Rinker operates five. The proposed Final Judgment requires the divestiture of four ready mix concrete facilities: three Rinker facilities and one Cemex facility. This relief is adequate to preserve competition because it provides the acquirer with the same number of ready mix concrete facilities as Cemex operates and ensures that the acquirer will have access to supplies of aggregates needed to compete effectively. In particular, by requiring the divestiture of Cemex's Ina plant instead of one of Rinker's other two plants, and by separately requiring that all of the divested ready mix concrete plants be sold to the same acquirer that purchases Rinker's aggregate facilities at Green Valley and Cemex's aggregate facilities at Ina, the proposed Final Judgment will give the acquirer access to aggregates that is at least equivalent to that of Rinker.

B. Selected Provisions of the Proposed Final Judgment

In antitrust cases involving mergers in which the United States seeks a divestiture remedy, it requires completion of the divestiture within the shortest time period reasonable under the circumstances. A quick divestiture has the benefits of restoring competition lost in the acquisition and reducing the possibility of dissipation of the value of the assets. Paragraph (A) of the proposed Final Judgment requires Cemex to divest the Divestiture Assets as viable ongoing businesses within 120 days after the Divestiture Trigger,[3] or five days after notice of the entry of the Final Judgment by the Court, whichever is later. The Divestiture Trigger is the earlier of two dates: the date on which Cemex elects a majority of the Board of Directors of Rinker, or 45 days after Cemex obtains a number of shares of Rinker stock in excess of 50 percent of the outstanding shares of Rinker. The 120-day time period to effectuate the divestitures begins to run from the Divestiture Trigger, rather than the filing of the Complaint, because the deal originally involved a hostile, cash tender offer. Cemex represented to the United States that under Australian law, it could not effectuate the divestitures until it had obtained in excess of 50 percent of the outstanding Rinker shares and had elected a majority of Rinker's Board of Directors. The Divestiture Trigger thus requires Cemex to start the 120-day clock as soon as it elects a majority of the Rinker Board and can effectuate the divestitures, while establishing an outer time limit of 45 days if Cemex obtains the majority of outstanding shares but delays electing a new Board.

Given that the proposed transaction is a tender offer, the proposed Final Judgment contains provisions to ensure that relief will be effective. Paragraph

[3] In this matter, the proposed Final Judgment provides that Cemex has 120 days after the Divestiture Trigger to accomplish the divestitures because they involve multiple geographic markets and several different types of assets. During the period before Cemex effectuates the divestitures, the Amended Hold Separate Stipulation and Order will preserve the assets to be divested and require that each defendant continue to operate its assets separately from the other's assets, thereby maintaining competition.

IV(J) of the proposed Final Judgment requires that Cemex divest all its interest in Rinker within six months from the date that the Final Judgment is signed by the Court if Cemex does not acquire a number of shares of Rinker stock in excess of 50 percent of the outstanding shares of Rinker. This provision ensures that if Cemex does not acquire a sufficient number of shares to effectuate the divestiture of the assets owned by Rinker prior to an acquisition by Cemex, then Cemex will not be permitted to own enough shares of Rinker to allow Cemex to have some form of control over Rinker even though it is unable to effectuate the divestitures.

In addition, if for any reason Cemex is unable to divest any of the Divestiture Assets or make those assets available for sale by the trustee, or if Cemex cannot warrant that the Divestiture Assets will be operational on the date of the divestiture and that there are no material defects in the environmental, zoning, or other permits pertaining to the operation of the Divestiture Assets, paragraph IV(H) provides that for each affected asset, the United States, in its sole discretion, may select one or more alternative assets owned by Cemex that are located in the same geographic area to be divested in lieu of the affected Divestiture Asset.[4] This provision is necessary to protect against a variety of situations in which a Divestiture Asset owned by Rinker prior to the acquisition by Cemex could not be divested. This will ensure that each acquirer has sufficient assets to be able to compete for the projects for which Cemex and Rinker currently compete.

Further, paragraph IV(I) of the proposed Final Judgment provides that all the ready mix concrete plants in a geographic area must be divested to a single acquirer, all the concrete block plants in a geographic area must be divested to a single acquirer, and both aggregate plants in Tucson must be divested to the same acquirer that purchases the Tucson-area divested ready mix concrete plants. This provision ensures that Cemex's acquisition does not harm competition in the affected product and geographic markets.

Paragraph IV(I) of the proposed Final Judgment also provides that the assets must be divested in such a way as to satisfy the United States in its sole discretion that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Cemex must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

Finally, section V of the proposed Final Judgment provides that in the event that Cemex does not accomplish the divestitures within the periods prescribed in the proposed Final Judgment, the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that Cemex will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are 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 divestitures. If the divestitures have not been accomplished at the end of the six months, 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 the defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

The United States and defendants 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, 1401 H St. NW., Suite 3000, Antitrust Division, United States Department of Justice, 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 defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Cemex's acquisition of Rinker. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the production and distribution of ready mix concrete, concrete block, and aggregate in the markets identified by the United States and that such a remedy would achieve all or substantially all the relief the United States would have obtained through litigation, but avoids 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-day comment period, after

[4] Paragraph IV(H) does not apply to the Fort Walton Beach/Panama City/Pensacola area, where Cemex's ready mix concrete assets are owned and operated through a joint venture between Cemex and Ready Mix USA, Inc. Accordingly, Cemex is not able unilaterally to sell any of its ready mix concrete plants in that area and it would be extremely difficult and costly for Cemex to terminate its interest in the joint venture. The United States determined that the benefit of requiring Cemex to terminate its interest in the joint venture or to make these assets available for sale would be significantly outweighed by the negative impact on the joint venture, which operates in a large number of areas that are unaffected by Cemex's acquisition of Rinker.

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 or 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) & (B). 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 determine 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 requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[5] 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 that is 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). The Court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations because this may only reflect underlying weakness in the government's case or concessions made during negotiation.'' *United States* v. *SBC Commc'ns, Inc.,* Nos. 05–2102 and 05–2103, 200FWL 1020746, at *16 (D.D.C. Mar. 29, 2007).

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. As this Court recently confirmed in *SBC Commc'ns,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' 2007 WL 1020746, at *14.

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)(1) (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).

These amendments, however, did not change the fundamental role of courts in reviewing proposed settlements. To the contrary, 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-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

This Court recently examined the role of the district court in reviewing proposed final judgments in light of the 2004 amendments, confirming that the amendments ''effected minimal changes[ ] and that this Court's scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 2007 WL 1020746, at *9. This Court concluded that the amendments did not alter the articulation of the public interest standard in *Microsoft. See id.* at *15.

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the

[5] *Cf. BNS,* 858 F.2d at 463 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *Gillette,* 406 F. Supp. at 716 (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' '').

APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: May 23, 2007.

Respectfully submitted,

Frederick H. Parmenter, VA Bar No. 18184,

Attorney, U.S. Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW., Suite 3000, Washington, DC 20530, (202) 307–0620.

Certificate of Service

I, Frederick H. Parmenter, hereby certify that on May ____, 2007, I caused a copy of the foregoing Competitive Impact Statement to be served on defendants Cemex, S.A.B. de C.V. and Rinker Group Limited by mailing the document electronically to the duly authorized representative of the defendant as follows:

Counsel for Defendant Cemex, S.A.B. de C.V.

John E. Beerbower, Esquire, Cravath, Swaine & Moore LLP, Worldwide Plaza, 825 Eighth Avenue, New York, New York 110019, *jbeerbower@cravath.com.*

Counsel for Defendant Rinker Group Limited

Kevin J. Arquit, Esquire, Peter C. Thomas, Esquire, Simpson Thacher & Bartlett LLP, 425 Lexington Avenue, New York, New York 10017, *karquit@stblaw.com, pthomas@stblaw.com.*

Frederick H. Parmenter, VA Bar No. 18184,

Attorney, U.S. Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW., Suite 3000, Washington, DC 20530, (202) 307–0620.

[FR Doc. 07–2856 Filed 6–11–07; 8:45 am]

BILLING CODE 4410–11–M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Advisory Committee on the Records of Congress; Meeting

AGENCY: National Archives and Records Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Archives and Records Administration (NARA) announces a meeting of the Advisory Committee on the Records of Congress. The committee advises NARA on the full range of programs, policies, and plans for the Center for Legislative Archives in the Office of Records Services.

DATES: June 25, 2007 from 10 a.m. to 11 a.m.

ADDRESSES: The U.S. Capitol Building, Room S–211, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Richard H. Hunt, Director; Center for Legislative Archives; (202) 357–5350.

SUPPLEMENTARY INFORMATION:

Agenda:

Introduction of New Members

Discussion of Committee Goals

Update on the Center for Legislative Archives

Other current issues and new business

The meeting is open to the public.

Dated: June 7, 2007.

Mary Ann Hadyka,

Committee Management Officer.

[FR Doc. E7–11284 Filed 6–11–07; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

SUMMARY: The NRC is preparing a submittal to OMB for review of continued approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* NRC Form 327, Special Nuclear Material (SNM) and Source Material (SM) Physical Inventory Summary Report, and NUREG/BR–0096, Instructions and Guidance for Completing Physical Inventory Summary Reports.

2. *Current OMB approval number:* 3150–0139.

3. *How often the collection is required:* The frequency of reporting corresponds to the frequency of required inventories, which depends essentially on the strategic significance of the SNM covered by the particular license. Certain licensees possessing strategic SNM are required to report inventories every 6 months. Licensees possessing SNM of moderate strategic significance must report every 9 months in accordance with the revised regulation in 10 CFR part 74.43. Licensees possessing SNM of low strategic significance must report annually, except two licensees must report their dynamic inventories every 2 months and a static inventory on an annual basis.

4. *Who is required or asked to report:* Fuel facility licensees possessing special nuclear material.

5. *The number of annual respondents:* 9.

6. *The number of hours needed annually to complete the requirement or request:* 100 hours (an average of approximately 4 hours per response for 25 responses).

7. *Abstract:* NRC Form 327 is submitted by fuel facility licensees to account for special nuclear material. The data is used by NRC to assess licensee material control and accounting programs and to confirm the absence of (or detect the occurrence of) special nuclear material theft or diversion. NUREG/BR–0096 provides specific guidance and instructions for completing the form in accordance with the requirements appropriate for a particular licensee.

Submit, by August 13, 2007, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions about the information collection requirement may be directed to the NRC Clearance Officer, Margaret A. Janney (T–5 F52), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–415–7245, or by Internet electronic mail to *INFOCOLLECTS@NRC.GOV*.

Dated at Rockville, Maryland, this 5th day of June, 2007.

For the Nuclear Regulatory Commission.

Margaret A. Janney,

NRC Clearance Officer, Office of Information Services.

[FR Doc. E7–11301 Filed 6–11–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos . 50–097 and 50–157]

Notice of License Terminations for Cornell University Zero Power Reactor (ZPR) and Cornell University Triga Reactor

The U.S. Nuclear Regulatory Commission (NRC) is noticing the termination of Facility Operating License No. R–89 for the Zero Power Reactor (ZPR) and Facility Operating License No. R–80 for the TRIGA Reactor.

The NRC has terminated the license of the decommissioned ZPR and TRIGA reactor, at the Ward Center for Nuclear Studies (Ward Center) on the Cornell University campus in Cornell, New York, and has released the site for unrestricted use. The licensee requested termination of the license in a letter to NRC dated February 28, 2007. The Ward Center TRIGA Reactor and ZPR provided training for Nuclear Engineering students and various services for researchers in all departments of the College of Engineering, the College of Arts and Sciences (departments of Physics, Chemistry, Biology) and the College of Veterinary Medicine. The University permanently ceased operation of the ZPR on September 6, 1996. Cornell University stopped routine operation of the Ward Center TRIGA Reactor on June 30, 2002.

Cornell submitted the Decommissioning Plan for the Ward Center on August 22, 2003, as supplemented on May 13, September 27, October 26 and December 13, 2005, and February 13, 2006. The NRC approved the Cornell decommissioning plan by Amendment No. 8, dated June 6, 2006, and by Amendment No. 14, dated June 15, 2006, for the Cornell TRIGA reactor and Cornell ZPR facility respectively.

Cornell submitted the Final Status Survey (FSS) Plan for the Ward Center on October 10, 2006. The NRC approved the FSS Plan by letter dated October 26, 2006, noting that the survey plan was consistent with the guidance in NUREG–1757, ''Consolidated Decommissioning Guidance'' and the MARSSIM [Multi-Agency Radiation Survey and Site Investigation Manual] methodology.

Cornell submitted the FSS report for the former Ward Center on January 19, 2007. The NRC approved the FSS report by letter dated February 8, 2007, noting that the survey data was in accordance with the Decommissioning Plan and the FSS Plan. The report documented that compliance with the criteria in the NRC-approved decommissioning plan for both reactors had been demonstrated.

On April 27, 2007, NRC Region I issued inspection reports 05000097/2006001 and 05000157/2006001 for the research reactors at the Ward Center. The inspector interviewed licensee staff, observed work in progress, and reviewed selected documents related to the licensee's FSS measurements. The inspector concluded that measurements, sampling, and analyses performed were consistent with criteria specified in the FSS Plan. The inspector also made confirmatory measurements throughout the facility and obtained six split samples (three exterior soil samples and three slag/gravel samples from beneath the reactor pool) which were submitted to the NRC's analytical contractor. The confirmatory measurements and confirmatory sample results did not identify radioactive material in excess of the criteria specified in the FSS Plan.

Pursuant to 10 CFR 50.82(b)(6), the NRC staff has concluded that both reactors have been decommissioned in accordance with the approved decommissioning plans and that the terminal radiation surveys and associated documentation demonstrate that the facilities and site may be released in accordance with the criteria in the NRC-approved decommissioning plans. Further, on the basis of the decommissioning activities carried out by Cornell, the NRC's review of the licensee's final status survey report, the results of NRC inspections conducted at the Ward Center, and the results of NRC confirmatory surveys, the NRC has concluded that the decommissioning process is complete and the facilities and sites may be released for unrestricted use. Therefore Facility Operating License Nos. R–89 and R–80 are terminated.

For further details with respect to the proposed action, see the licensee's letter dated February 28, 2007. The above referenced documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR) at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who have problems in accessing the documents in ADAMS should call the NRC PDR reference staff at 1–800–397–4209 or 301–415–4737 or e-mail *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 5th day of June 2007.

For the Nuclear Regulatory Commission.

Keith I. McConnell,

Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. E7–11333 Filed 6–11–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–498 and 50–499]

STP Nuclear Operating Company; South Texas Project, Units 1 And 2; Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating Licenses, numbered NPF–76 and NPF–80, issued to STP Nuclear Operating Company et. al. (the licensee) for operation of the South Texas Project (STP), Units 1 and 2, respectively, located in Matagorda County, Texas.

The proposed amendments would provide a new action for selected Technical Specifications (TSs) limiting conditions for operation to permit extending the completion times of action requirements, provided risk is assessed and managed. A new program, the Configuration Risk Management Program (CRMP), would be added to the Administrative Controls of TSs.

The amendments request is a pilot submittal in support of risk-informed TS initiative 4b. The Nuclear Energy Institute (NEI) has separately developed a risk-informed methodology, documented in NEI 06–09 Rev. 0, which provides a method to evaluate and extend completion times using a CRMP in support of initiative 4b. This methodology document has been approved by the NRC staff in a safety evaluation dated May 17, 2007.

Before issuance of the proposed license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendments request involves no significant hazards consideration. Under the Commission's regulations in Title 10

of the Code of Federal Regulations (10 CFR), § 50.92, this means that operation of the facility in accordance with the proposed amendments would not (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change to the Technical Specifications involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed changes to the Technical Specifications to add a new TS 3.13.1 and TS 3.13.2 and to change specific TS to apply the new TS 3.13.1 do not involve a significant increase in the probability of an accident previously evaluated because the changes involve no change to the plant or its modes of operation. In addition, the risk-informed configuration management program will be applied to effectively manage the availability of required systems, structures, and components to assure there is no significant increase in the probability of an accident. These proposed changes do not increase the consequences of an accident because the design-basis mitigation function of the affected systems is not changed and the risk-informed configuration management program will be applied to effectively manage the availability of systems, structures and components required to mitigate the consequences of an accident. The application of the risk-informed configuration management program is considered a substantial technological improvement over current methods.

Changing TS 6.8.3.k to reference the EPRI [Electric Power Research Institute] Risk-Managed Technical Specification Guidelines is an administrative change that establishes the industry standard as the STP licensing basis. Meeting the standard provides additional assurance that the risk management program properly manages the plant configuration risk. Consequently, it does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Changes to the affected TS require some minor grammatical and structure changes to effectively incorporate the reference to TS 3.13.1. These changes are editorial and administrative and have no safety significance. The changes to the TS Index are administrative and have no technical or safety significance.

Therefore, none of the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change to the Technical Specifications create the possibility of a new or different kind of accident from any accident previously evaluated?

None of the proposed changes involves a new mode of operation or design configuration. There are no new or different systems, structures, or components proposed by these changes. Therefore, there is no possibility of a new or different kind of accident.

3. Does the proposed change to the Technical Specifications involve a significant reduction to a margin of safety?

Proposed new TS 3.13.1 and TS 3.13.2 and the associated changes to the specifications that apply the new TS 3.13.1 implement a risk-informed configuration management program to assure that adequate margins of safety are maintained. Application of these new specifications and the configuration management program considers cumulative effects of multiple systems or components being out of service and does so more effectively than the current Technical Specifications. Therefore, application of these new specifications will not involve a significant reduction in a margin of safety.

Changing TS 6.8.31k to reference the EPRI Risk-Managed Technical Specification Guidelines is an administrative change that establishes the industry standard as the STP licensing basis. Meeting the standard provides additional assurance that the risk management program properly manages the plant configuration risk. Consequently, it does not involve a significant reduction in the margin of safety.

Changes to the affected TS require some minor grammatical and structure changes to effectively incorporate the reference to TS 3.13.1. These changes are editorial and administrative and have no safety significance. The changes to the TS Index are administrative and have no technical or safety significance.

Based on the evaluation above, none of the proposed changes involves a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendments request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendments prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

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 licenses 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 PDR, located at One White Flint North, Public File Area O1F21, 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 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 requestors/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/requestor 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 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.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

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(c)(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 A.H. Gutterman, Esq., Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW., Washington, DC 20004, the attorney for the licensee.

For further details with respect to this action, see the application for amendment dated June 6, 2006, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. 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, 301–415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 5th day of June, 2007.

For the Nuclear Regulatory Commission.

Mohan C Thadani,

Senior Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E7–11300 Filed 6–11–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

DATE: Weeks of June 11, 18, 25, July 2, 9, 16, 2007.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

MATTERS TO BE CONSIDERED:

Week of June 11, 2007

There are no meetings scheduled for the Week of June 11, 2007.

Week of June 18, 2007—Tentative

There are no meetings scheduled for the Week of June 18, 2007.

Week of June 25, 2007—Tentative

There are no meetings scheduled for the Week of June 25, 2007.

Week of July 2, 2007—Tentative

There are no meetings scheduled for the Week of July 2, 2007.

Week of July 9, 2007—Tentative

There are no meetings scheduled for the Week of July 9, 2007.

Week of July 16, 2007—Tentative

Wednesday, July 18, 2007

1 p.m. Briefing on Digital Instrumentation and Control (Public Meeting).

This meeting will be webcast live at the Web address *http://www.nrc.gov.*

* * * * *

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Michelle Schroll, (301) 415–1662.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *REB3@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: June 7, 2007.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. 07–2926 Filed 6–8–07; 1:01 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–17; EA–07–124]

In the Matter of Portland General Electric Company, Trojan Independent Spent Fuel Storage Installation, Modifying License (Effective Immediately)

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Issuance of order imposing fingerprinting and criminal history check requirements for unescorted access to certain spent fuel storage facilities.

FOR FURTHER INFORMATION CONTACT: L. Raynard Wharton, Senior Project Manager, Licensing and Inspection Directorate, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards (NMSS), U.S. Nuclear Regulatory Commission (NRC), Rockville, MD 20852. Telephone: (301) 492–3316; fax number: (301) 492–3348; e-mail: *lrw@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

Pursuant to 10 CFR 2.202, NRC (or the Commission) is providing notice, in the matter of Trojan Independent Spent Fuel Storage Installation (ISFSI) Order Modifying License (Effective Immediately).

II. Further Information

I.

The NRC has issued a specific license, to the Portland General Electric Company (PGE), authorizing storage of spent fuel in an ISFSI, in accordance with the Atomic Energy Act (AEA) of 1954, as amended, and Title 10 of the Code of Federal Regulations (10 CFR) part 72. On August 8, 2005, the Energy Policy Act of 2005 (EPAct) was enacted. Section 652 of the EPAct amended Section 149, of the AEA, to require fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check of any individual who is permitted unescorted access to radioactive material or other property subject to regulation by the Commission, which the Commission determines to be of such significance to the public health and safety or the common defense and security, as to warrant fingerprinting and background checks. The Commission has determined that spent fuel storage facilities meet the requisite threshold warranting these additional measures. Though a rulemaking to implement the fingerprinting provisions of the EPAct is currently underway, the NRC has decided to implement this particular requirement by Order, in part, prior to the completion of the rulemaking because a deliberate malevolent act by an individual with unescorted access to spent fuel storage facilities has a potential to result in significant adverse impacts to the public health and safety or the common defense and security.

Those exempted from fingerprinting requirements under 10 CFR 73.61 [72 FR 4945 (February 2, 2007)] are also exempt from the fingerprinting requirements under this Order. In addition, individuals who have had a favorably decided U.S. Government criminal history records check within the last five (5) years, or individuals who have active federal security clearance (provided in either case that they make available the appropriate documentation), have satisfied the EPAct fingerprinting requirement and need not be fingerprinted again. Also, individuals who have been fingerprinted and granted access to Safeguards Information (SGI) by the reviewing official under the previous fingerprinting order, ''Order Imposing Fingerprinting and Criminal History Check Requirements for Access to Safeguards Information'' (EA–06–298) do not need to be fingerprinted again.

Subsequent to the terrorist events of September 11, 2001, the NRC issued security Orders requiring certain entities to implement Interim Compensatory Measures (ICMs) and Additional Security Measures (ASMs) for certain radioactive material. The requirements imposed by these Orders and the measures licensees have developed to comply with these Orders, were designated by the NRC as SGI and were not released to the public. These Orders included a local criminal history records check to determine trustworthiness and reliability of individuals seeking unescorted access to spent fuel storage facilities. ''Access'' means that an individual could exercise some physical control over the material or device. In accordance with Section 149 of the AEA, as amended by the EPAct, the Commission is imposing FBI criminal history records check requirements, as set forth in the Order for all individuals allowed unescorted access to protected areas, secure areas, and critical target areas, for certain spent fuel facility licensees. These requirements will remain in effect until the Commission determines otherwise. In addition, pursuant to 10 CFR 2.202, I find that in light of the common defense and security matters identified above, which warrant the issuance of this Order, the public health, safety, and interest require that this Order be effective immediately.

II

Accordingly, pursuant to Sections 51, 53, 63, 81, 147, 149, 161b, 161i, 161o, 182, and 186 of the AEA of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, Parts 72 and 73, *It is hereby ordered,* effective immediately, that your specific license is modified as follows:

A. PGE shall, within twenty (20) days of the date of this Order, establish and maintain a fingerprinting program that meets the requirements of the

Attachment to this Order, for unescorted access to spent fuel storage facilities.

B. PGE shall, in writing, within twenty (20) days from the date of this Order, notify the Commission: (1) Of receipt and confirmation that compliance with the Order will be achieved, (2) if unable to comply with any of the requirements described in the Attachment, or (3) if compliance with any of the requirements are unnecessary in its specific circumstances. The notification shall provide PGE's justification for seeking relief from, or variation of, any specific requirement.

C. In accordance with the NRC's ''Order Imposing Fingerprinting and Criminal History Records Check Requirements for Access to Safeguards Information,'' only an NRC-approved reviewing official shall review the results of a FBI criminal history records check. The reviewing official shall determine whether an individual may have, or continue to have, unescorted access to spent fuel storage facilities. Fingerprinting and the FBI identification and criminal history records check are not required for individuals that are exempted from fingerprinting requirements under 10 CFR 73.61 [72 FR 4945 (February 2, 2007)]. In addition, individuals who have had a favorably decided U.S. Government criminal history records check within the last five (5) years, or have an active Federal security clearance (provided in each case that the appropriate documentation is made available to PGE's reviewing official), have satisfied the EPAct fingerprinting requirement and need not be fingerprinted again.

D. Fingerprints shall be submitted and reviewed in accordance with the procedures described in the Attachment to this Order. Individuals who have been fingerprinted and granted access to SGI by the reviewing official, under the NRC's Order No. EA–06–298 do not need to be fingerprinted again for purposes of authorizing unescorted access. No person may have access to SGI or unescorted access to any radioactive material or property subject to regulation by the NRC if the NRC has determined, in accordance with its administrative review process based on fingerprinting and an FBI identification and criminal history records check, either that the person may not have access to SGI or that the person may not have unescorted access to radioactive material or property subject to regulation by the NRC.

E. PGE may allow any individual who currently has unescorted access to spent fuel storage facilities, in accordance with the ICM and ASM Security Orders, to continue to have unescorted access, pending a decision by the reviewing official (based on fingerprinting, an FBI criminal history records check, and a trustworthiness and reliability determination) that the individual may continue to have unescorted access to spent fuel storage facilities. PGE shall complete implementation of the requirements of the Attachment to this Order within ninety (90) days from the date of issuance of this Order.

PGE responses to Condition B, shall be submitted to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555. In addition, licensee responses are security-related information or official use-only and shall be properly marked.

The Director, Office of Nuclear Material Safety and Safeguards, may, in writing, relax or rescind any of the above conditions upon demonstration of good cause by PGE.

III

In accordance with 10 CFR 2.202, PGE must, and any other person adversely affected by this Order, may, submit an answer to this Order, and may request a hearing regarding this Order, within twenty (20) days from the date of this Order. Where good cause is shown, consideration will be given to extending the time, to either submit an answer, or request a hearing. A request for extension of time in which to submit an answer or request a hearing must be made in writing to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. The answer may consent to this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically set forth the matters of fact and law of which PGE, or any other person adversely affected relies and the reasons as to why the Order should not have been issued. Any answer or request for a hearing shall be submitted to the Secretary, Office of the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies shall also be sent to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555; to the Assistant General Counsel for Materials Litigation and Enforcement at the same address; and to PGE, if the answer or hearing request is by an individual other than PGE. Because of possible delays in delivery of mail to United States Government offices, it is requested that answers and requests for hearing be transmitted to the Secretary of the Commission, either by means of facsimile transmission to (301) 415–1101, or via e-mail to *hearingdocket@nrc.gov*, and also to the Office of the General Counsel, either by means of facsimile transmission to (301) 415–3725, or via e-mail to *OGCMailCenter@nrc.gov*. If a person other than PGE requests a hearing, that person shall set forth, with particularity, the manner in which his/her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309.

If a hearing is requested by PGE or an individual whose interest is adversely affected, the Commission will issue an Order designating the time and place of a hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), PGE may, in addition to demanding a hearing, at the time the answer is filed, or sooner, move that the presiding officer set aside the immediate effectiveness of the Order on the grounds that the Order, including the need for immediate effectiveness, is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions, as specified above in Section III, shall be final twenty (20) days from the date of this Order without further Order or proceedings.

If an extension of time for requesting a hearing has been approved, the provisions as specified above in Section III shall be final when the extension expires, if a hearing request has not been received. An answer or a request for a hearing shall not stay the immediate effectiveness of this order.

Dated: May 29, 2007.

For the Nuclear Regulatory Commission.

Michael F. Weber,

Director, Office of Nuclear Material, Safety and Safeguards.

Requirements for Fingerprinting and Criminal History Records; Checks of Individuals When Licensee's Reviewing Official Is Determining Unescorted Access to Spent Fuel Storage Facilities

General Requirements

Licensees shall comply with the following requirements of this Attachment.

1. Each licensee subject to the provisions of this Attachment shall fingerprint each individual who is

seeking or permitted unescorted access to the spent fuel storage facility. The licensee shall review and use the information received from the Federal Bureau of Investigation (FBI) and ensure that the provisions contained in the subject Order and this Attachment are satisfied.

2. The licensee shall notify each affected individual that the fingerprints will be used to secure a review of his/her criminal history record and inform the individual of the procedures for revising the record or including an explanation in the record, as specified in the ''Right to Correct and Complete Information'' section of this Attachment.

3. Fingerprints for unescorted access need not be taken if an employed individual (e.g., a licensee employee, contractor, manufacturer, or supplier) is relieved from the fingerprinting requirement by 10 CFR 73.61 for unescorted access, has had a favorably decided U.S. Government criminal history records check within the last five (5) years, or has an active Federal security clearance. Written confirmation from the Agency/employer that granted the Federal security clearance or reviewed the criminal history records check must be provided. The licensee must retain this documentation for a period of three (3) years from the date the individual no longer requires unescorted access to the spent fuel storage facility associated with the licensee's activities.

4. All fingerprints obtained by the licensee, pursuant to this Order, must be submitted to the Commission for transmission to the FBI.

5. The licensee shall review the information received from the FBI and consider it, in conjunction with the trustworthiness and reliability requirements established by the previous ICM and ASM Security Orders, in making a determination whether to grant, or continue to allow, unescorted access to the spent fuel storage facility.

6. The licensee shall use any information obtained as part of a criminal history records check solely for the purpose of determining an individual's suitability for unescorted access to the spent fuel storage facility.

7. The licensee shall document the basis for its determination whether to grant, or continue to allow, unescorted access to the spent fuel storage facility.

Prohibitions

A licensee shall not base a final determination to deny an individual access to the spent fuel storage facility solely on information received from the FBI, involving an arrest more than one (1) year old, for which there is no information as to disposition of the case, or an arrest that resulted in dismissal of the charge or an acquittal.

A licensee shall not use information received from a criminal history records check obtained pursuant to this Order in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States, nor shall the licensee use the information in any way that would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

Procedures for Processing Fingerprint Checks

For the purpose of complying with this Order, licensees shall, using an appropriate method listed in 10 CFR 73.4, submit to the Nuclear Regulatory Commission's (NRC's) Division of Facilities and Security, Mail Stop T–6E46, one completed, legible standard fingerprint card (Form FD–258, ORIMDNRCOOOZ) or, where practicable, other fingerprint records for each individual seeking unescorted access to the spent fuel storage facility, to the Director of the Division of Facilities and Security, marked for the attention of the Division's Criminal History Check Section. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by calling (301) 415–5877, or via e-mail to *forms@nrc.gov*. Practicable alternative formats are set forth in 10 CFR 73.4. The licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards.

The NRC will review submitted fingerprint cards for completeness. Any Form FD–258 fingerprint record containing omissions or evident errors will be returned to the licensee for corrections. The fee for processing fingerprint checks includes one resubmission if the initial submission is returned by the FBI because the fingerprint impressions cannot be classified. The one free resubmission must have the FBI Transaction Control Number reflected on the resubmission. If additional submissions are necessary, they will be treated as initial submittals and will require a second payment of the processing fee.

Fees for processing fingerprint checks are due upon application. Licensees shall submit payment with the application for processing fingerprints by corporate check, certified check, cashier's check, money order, or electronic payment, made payable to ''U.S. NRC.'' [For guidance on making electronic payments, contact the Facilities Security Branch, Division of Facilities and Security, at (301) 415–7404]. Combined payment for multiple applications is acceptable. The application fee (currently $27) is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an NRC processing fee, which covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission will directly notify licensees, who are subject to this regulation of any fee changes.

The Commission will forward, to the submitting licensee, all data received from the FBI as a result of the licensee's application(s) for criminal history records checks, including the FBI fingerprint record.

Right To Correct and Complete Information

Prior to any final adverse determination, the licensee shall make available, to the individual, the contents of any criminal records. obtained from the FBI, for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the licensee for a period of one (1) year from the date of the notification.

If, after reviewing the record, an individual believes that the record is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct application, by the individual challenging the record, to the agency (i.e., law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation Identification Division, Washington, DC 20537–9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary, in accordance with the information supplied by that agency. The licensee must allow at least ten (10) days for an individual to initiate an action

challenging the results of an FBI criminal history records check after the record is made available for his/her review. The licensee may make a final determination for unescorted access to the spent fuel storage facility based on the criminal history records check, only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination for unescorted access to the spent fuel storage facility, the licensee shall provide the individual its documented basis for denial. During the review process for assuring correct and complete information, unescorted access to the spent fuel storage facility shall not be granted to an individual.

Protection of Information

1. Each licensee that obtains a criminal records check for an individual, pursuant to this Order, shall establish and maintain a system of files and procedures for protecting the record and the personal information from unauthorized disclosure.

2. The licensee may not disclose the record nor personal information collected and maintained to persons other than the subject individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the process of determining unescorted access to the spent fuel storage facility. No individual authorized to have access to the information may redisseminate the information to any other individual who does not have a need-to-know.

3. The personal information obtained on an individual from a criminal history records check may be transferred to another licensee if the licensee holding the criminal history record receives the individual's written request to redisseminate the information contained in his/her file, and the gaining licensee verifies information such as the individual's name, date of birth, social security number, sex, and other applicable physical characteristics, for identification purposes.

4. The licensee shall make criminal history records, obtained under this section, available for examination by an authorized NRC representative, to determine compliance with the regulations and laws.

5. The licensee shall retain all fingerprint and criminal history records received from the FBI, or a copy, if the individual's file has been transferred, for three (3) years after termination of employment or denial to unescorted access to the spent fuel storage facility. After the required three (3) year period, these documents shall be destroyed by a method that will prevent reconstruction of the information in whole, or in part.

[FR Doc. 07–2879 Filed 6–11–07; 8:45 am]

BILLING CODE 7590–01–M

POSTAL SERVICE

Sunshine Act Meeting

TIME AND DATE: 12 p.m., Tuesday, June 19, 2007.

PLACE: Washington, DC, at U.S. Postal Service Headquarters, 475 L'Enfant Plaza, SW.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Tuesday, June 19 at 12 p.m. (Closed)

1. Strategic Issues.
2. Postal Regulatory Commission Second Opinion and Recommended Decision on Reconsideration in Docket No. R2006–1, Postal Rate and Fee Changes.
3. Rate Case Update.
4. Labor Negotiations Update.
5. Financial Update.
6. Personnel Matters and Compensation Issues.
7. Governors' Executive Session—Discussion of prior agenda items and Board Governance.

CONTACT PERSON FOR MORE INFORMATION: Wendy A. Hocking, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260–1000. Telephone (202) 268–4800.

Wendy A. Hocking,

Secretary.

[FR Doc. 07–2914 Filed 6–7–07; 4:36 pm]

BILLING CODE 7710–12–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–27851; 812–13391]

Barclays Global Fund Advisors; Notice of Application

June 6, 2007.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Temporary order and notice of application for a permanent order under section 9(c) of the Investment Company Act of 1940 (the ''Act'').

Summary of Application: Applicant has received a temporary order exempting it from section 9(a) of the Act, with respect to an injunction entered against Barclays Bank PLC (''Barclays'') on June 6, 2007 by the United States District Court for the Southern District of New York (the ''District Court''), until the Commission takes final action on an application for a permanent order. Applicant also has applied for a permanent order.

Applicants: Barclays Global Fund Advisors (''BGFA'' or the ''Applicant'').[1]

Filing Date: The application was filed on May 30, 2007. Applicant has agreed to file a final amendment during the notice period, the substance of which is reflected in this notice.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on July 2, 2007, and should be accompanied by proof of service on Applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicant, c/o Ira P. Shapiro, Esq., Barclays Global Fund Advisors, 45 Fremont Street, San Francisco, CA 94105.

FOR FURTHER INFORMATION CONTACT: Courtney S. Thornton, Senior Counsel, at (202) 551–6812, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a temporary order and a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 100 F Street, NE., Washington, DC 20549–0102 (tel. 202–551–5850).

Applicant's Representations

1. BGFA, a California corporation registered under the Investment Advisers Act of 1940, serves as investment adviser to the series of iShares Trust, iShares, Inc. and Master Investment Portfolio (the ''Advised Funds''), each a registered open-end management investment company. BGFA also serves as sub-adviser to

[1] Applicant requests that any relief granted pursuant to the application also apply to any other company of which Barclays is or hereafter becomes an affiliated person (together with Applicant, ''Covered Persons'').

certain series of State Farm Variable Product Trust and American Century Capital Portfolios, Inc. (collectively with the Advised Funds, the ''Funds''), each a registered open-end management investment company. BGFA is a wholly-owned subsidiary of Barclays Global Investors, N.A. (''BGI''), a limited purpose trust company that provides investment management services for client accounts and certain unregistered investment vehicles and, through its subsidiaries, is one of the world's largest providers of exchange traded funds (''ETFs''). BGI is a majority-owned subsidiary of Barclays Bank PLC (''Barclays''), which is a major global financial services provider organized under the laws of England and Wales.

2. On June 6, 2007, the District Court entered a final judgment against Barclays in a matter brought by the Commission (the ''Final Judgment'').[2] The Commission alleged in the complaint (''Complaint'') that Barclays had violated section 17(a) of the Securities Act of 1933 (''Securities Act''), section 10(b) of the Securities Exchange Act of 1934 (''Exchange Act'') and rule 10b–5 under the Exchange Act by engaging in the purchase and sale of certain distressed debt securities while aware of material, non-public information concerning such distressed debt issuers.[3] Without admitting or denying the allegations in the Complaint, Barclays consented to the entry of the Final Judgment. The Final Judgment permanently enjoins Barclays directly or through its officers, directors, agents and employees from violating section 10(b) of the Exchange Act and rule 10b–5 under the Exchange Act and section 17(a) of the Securities Act (the ''Injunction'').[4] Barclays also consented to the payment of disgorgement plus prejudgment interest in addition to civil penalties in an aggregate amount of approximately $10.9 million.

Applicant's Legal Analysis

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company, registered unit investment trust or registered face-amount certificate company. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company, any affiliated person of which has been disqualified under the provisions of section 9(a)(2). ''Affiliated person'' is defined in section 2(a)(3) of the Act to include any person directly or indirectly controlling, controlled by, or under common control with, the other person. Applicant states that Barclays is an affiliated person of the Applicant within the meaning of section 2(a)(3) of the Act because Barclays controls the Applicant. Applicant states that, as a result of the Injunction, it would be subject to the prohibitions of section 9(a).

2. Section 9(c) of the Act provides that the Commission shall grant an application for an exemption from the disqualification provisions of section 9(a) of the Act if it is established that these provisions, as applied to the applicants, are unduly or disproportionately severe or that the conduct of the applicants has been such as not to make it against the public interest or protection of investors to grant the exemption. Applicant has filed an application pursuant to section 9(c) seeking temporary and permanent orders exempting it from the disqualification provisions of section 9(a) of the Act.

3. Applicant believes it meets the standards for exemption specified in section 9(c). Applicant states that the prohibitions of section 9(a) as applied to it would be unduly and disproportionately severe and that the conduct of Applicant has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a).

4. Applicant states that none of its current or former officers, directors or employees participated in any way in the conduct underlying the Injunction. Applicant further states that the conduct underlying the Injunction did not involve any Funds.

5. Applicant states that the inability to continue providing advisory services to the Funds would result in potentially severe hardships for the Funds and their shareholders. Applicant also states that it has distributed, or will distribute as soon as reasonably practicable, written materials, including an offer to meet in person to discuss the materials, to the boards of directors or trustees of the Funds (the ''Boards''), including the directors or trustees who are not ''interested persons,'' as defined in section 2(a)(19) of the Act, of the Funds and their independent legal counsel, as defined in rule 0–1(a)(6) under the Act, regarding the circumstances of the Final Judgment, any impact on the Funds, and the filing of the application. Applicant will provide the Boards with all information concerning the Final Judgment and the application that is necessary for the Funds to fulfill their disclosure and other obligations under the federal securities laws.

6. Applicant also asserts that, if it were barred from providing services to the Funds, the effect on its business and employees would be severe. Applicant states that it has committed substantial resources to establish an expertise in advising the Funds. Applicant has previously sought and received an exemption under section 9(c) of the Act on one occasion.[5]

Applicant's Condition

Applicant agrees that any order granting the requested relief shall be subject to the following condition:

Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, Covered Persons, including, without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemption granted under the Act in connection with the application.

Temporary Order

The Commission has considered the matter and finds that Applicant has made the necessary showing to justify granting a temporary exemption.

Accordingly, *It is hereby ordered,* pursuant to section 9(c) of the Act, that the Covered Persons are granted a temporary exemption from the provisions of section 9(a), effective forthwith, solely with respect to the Injunction, subject to the condition in the application, until the date the Commission takes final action on an application for a permanent order.

[2] *United States Securities and Exchange Commission* v. *Barclays Bank PLC, et al.*, Final Judgment as to Barclays Bank PLC, 07–CV–04472 (MGC) (S.D.N.Y., filed June 4, 2007).

[3] Steven J. Landzberg, a former director and proprietary trader for Barclays, was also alleged to have been involved in the conduct underlying the Complaint.

[4] The Final Judgment also enjoins Mr. Landzberg from violating section 10(b) of the Exchange Act and rule 10b–5 under the Exchange Act, and section 17(a) of the Securities Act and imposes civil penalties on Mr. Landzberg. The requested temporary and permanent orders will not apply to Mr. Landzberg or to any company of which Mr. Landzberg is or becomes an affiliated person.

[5] *Wells Fargo Bank, N.A., et al.*, Investment Company Act Release Nos. 16311 (Mar. 11, 1988) (notice and temporary order) and 16355 (Apr. 7, 1988) (permanent order).

By the Commission.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–11295 Filed 6–11–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55876; File No. PCAOB–2007–02]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rule on Auditing Standard No. 5, an Audit of Internal Control Over Financial Reporting That Is Integrated With an Audit of Financial Statements, and Related Independence Rule and Conforming Amendments

June 7, 2007.

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the ''Act''), notice is hereby given that on May 25, 2007, the Public Company Accounting Oversight Board (the ''Board'' or the ''PCAOB'') filed with the Securities and Exchange Commission (the ''Commission'' or ''SEC'') the proposed rules described in Items I and II below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons. The text of the proposed rules consists of proposed Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That is Integrated with an Audit of Financial Statements*, and Related Independence Rule and conforming amendments to its auditing standards.

I. Board's Statement of the Terms of Substance of the Proposed Rules

On May 24, 2007, the Board adopted Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That is Integrated with an Audit of Financial Statements (''Auditing Standard No. 5''); Rule 3525, Audit Committee Pre-Approval of Non-Audit Services Related to Internal Control Over Financial Reporting*, and conforming amendments to its auditing standards. The proposed rule text is set out below.

Auditing Standard No. 5—An Audit of Internal Control Over Financial Reporting That Is Integrated With an Audit of Financial Statements

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Introduction

1. This standard establishes requirements and provides direction that applies when an auditor is engaged to perform an audit of *management's assessment* [1] of the effectiveness of *internal control over financial reporting* (''the audit of internal control over financial reporting'') that is integrated with an audit of the financial statements.[2]

2. Effective internal control over financial reporting provides reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes.[3] If one or more *material weaknesses* exist, the company's internal control over financial reporting cannot be considered effective.[4]

3. The auditor's objective in an audit of internal control over financial reporting is to express an opinion on the effectiveness of the company's internal control over financial reporting. Because a company's internal control cannot be considered effective if one or more material weaknesses exist, to form a basis for expressing an opinion, the auditor must plan and perform the audit to obtain competent evidence that is sufficient to obtain reasonable assurance [5] about whether material weaknesses exist as of the date specified in management's assessment. A material weakness in internal control over financial reporting may exist even when financial statements are not materially misstated.

4. The general standards [6] are applicable to an audit of internal control over financial reporting. Those standards require technical training and proficiency as an auditor, independence, and the exercise of due professional care, including professional skepticism. This standard establishes the fieldwork and reporting standards applicable to an audit of internal control over financial reporting.

5. The auditor should use the same suitable, recognized control framework to perform his or her audit of internal control over financial reporting as management uses for its annual evaluation of the effectiveness of the company's internal control over financial reporting.[7]

Integrating the Audits

6. The audit of internal control over financial reporting should be integrated with the audit of the financial statements. The objectives of the audits are not identical, however, and the auditor must plan and perform the work to achieve the objectives of both audits.

7. In an integrated audit of internal control over financial reporting and the financial statements, the auditor should design his or her testing of controls to accomplish the objectives of both audits simultaneously—

- To obtain sufficient evidence to support the auditor's opinion on internal control over financial reporting as of year-end, and
- To obtain sufficient evidence to support the auditor's control risk assessments for purposes of the audit of financial statements.

8. Obtaining sufficient evidence to support control risk assessments as low for purposes of the financial statement audit ordinarily allows the auditor to reduce the amount of audit work that otherwise would have been necessary to opine on the financial statements. (*See* Appendix B for additional direction on integration.)

Note: In some circumstances, particularly in some audits of smaller and less complex companies, the auditor might choose not to assess control risk as low for purposes of the audit of the financial statements. In such circumstances, the auditor's tests of the operating effectiveness of controls would be performed principally for the purpose of supporting his or her opinion on whether the company's internal control over financial reporting is effective as of year-end. The results of the auditor's financial statement auditing procedures also should inform his or her risk assessments in determining the testing necessary to conclude on the effectiveness of a control.

Planning the Audit

9. The auditor should properly plan the audit of internal control over financial reporting and properly supervise any assistants. When planning an integrated audit, the auditor should evaluate whether the following matters are important to the company's financial statements and internal control over financial reporting and, if so, how they will affect the auditor's procedures—

- Knowledge of the company's internal control over financial reporting obtained during other engagements performed by the auditor;
- Matters affecting the industry in which the company operates, such as financial reporting practices, economic conditions, laws and regulations, and technological changes;
- Matters relating to the company's business, including its organization, operating characteristics, and capital structure;
- The extent of recent changes, if any, in the company, its operations, or its internal control over financial reporting;
- The auditor's preliminary judgments about materiality, risk, and other factors relating to the determination of material weaknesses;
- Control deficiencies previously communicated to the audit committee [8] or management;
- Legal or regulatory matters of which the company is aware;
- The type and extent of available evidence related to the effectiveness of the company's internal control over financial reporting;
- Preliminary judgments about the effectiveness of internal control over financial reporting;
- Public information about the company relevant to the evaluation of the likelihood of material financial statement misstatements and the effectiveness of the company's internal control over financial reporting;
- Knowledge about risks related to the company evaluated as part of the auditor's client acceptance and retention evaluation; and

[1] Terms defined in Appendix A, *Definitions*, are set in boldface type (*italics* in the **Federal Register** printing) the first time they appear.

[2] This auditing standard supersedes Auditing Standard No. 2, *An Audit of Internal Control Over Financial Reporting Performed in Conjunction with An Audit of Financial Statements*, and is the standard on attestation engagements referred to in Section 404(b) of the Act. It also is the standard referred to in Section 103(a)(2)(A)(iii) of the Act.

[3] *See* Securities Exchange Act Rules 13a–15(f) and 15d–15(f), 17 CFR §§ 240.13a–15(f) and 240.15d–15(f); Paragraph A5.

[4] *See* Item 308 of Regulation S–K, 17 CFR 229.308.

[5] *See* AU sec. 230, *Due Professional Care in the Performance of Work*, for further discussion of the concept of reasonable assurance in an audit.

[6] *See* AU sec. 150, *Generally Accepted Auditing Standards*.

[7] *See* Securities Exchange Act Rules 13a–15(c) and 15d–15(c), 17 CFR 240.13a–15(c) and 240.15d–15(c). SEC rules require management to base its evaluation of the effectiveness of the company's internal control over financial reporting on a suitable, recognized control framework (also known as control criteria) established by a body or group that followed due-process procedures, including the broad distribution of the framework for public comment. For example, the report of the Committee of Sponsoring Organizations of the Treadway Commission (known as the COSO report) provides such a framework, as does the report published by the Financial Reporting Council, Internal Control Revised Guidance for Directors on the Combined Code, October 2005 (known as the Turnbull Report).

[8] If no audit committee exists, all references to the audit committee in this standard apply to the entire board of directors of the company. *See* 15 U.S.C. 78c(a)58 and 7201(a)(3).

• The relative complexity of the company's operations.

Note: Many smaller companies have less complex operations. Additionally, some larger, complex companies may have less complex units or processes. Factors that might indicate less complex operations include: fewer business lines; less complex business processes and financial reporting systems; more centralized accounting functions; extensive involvement by senior management in the day-to-day activities of the business; and fewer levels of management, each with a wide span of control.

Role of Risk Assessment

10. Risk assessment underlies the entire audit process described by this standard, including the determination of *significant accounts and disclosures* and *relevant assertions*, the selection of controls to test, and the determination of the evidence necessary for a given control.

11. A direct relationship exists between the degree of risk that a material weakness could exist in a particular area of the company's internal control over financial reporting and the amount of audit attention that should be devoted to that area. In addition, the risk that a company's internal control over financial reporting will fail to prevent or detect misstatement caused by fraud usually is higher than the risk of failure to prevent or detect error. The auditor should focus more of his or her attention on the areas of highest risk. On the other hand, it is not necessary to test controls that, even if deficient, would not present a reasonable possibility of material misstatement to the financial statements.

12. The complexity of the organization, business unit, or process, will play an important role in the auditor's risk assessment and the determination of the necessary procedures.

Scaling the Audit

13. The size and complexity of the company, its business processes, and business units, may affect the way in which the company achieves many of its *control objectives*. The size and complexity of the company also might affect the risks of misstatement and the controls necessary to address those risks. Scaling is most effective as a natural extension of the risk-based approach and applicable to the audits of all companies. Accordingly, a smaller, less complex company, or even a larger, less complex company might achieve its control objectives differently than a more complex company.[9]

Addressing the Risk of Fraud

14. When planning and performing the audit of internal control over financial reporting, the auditor should take into account the results of his or her fraud risk assessment.[10] As part of identifying and testing entity-level controls, as discussed beginning at paragraph 22, and selecting other controls to test, as discussed beginning at paragraph 39, the auditor should evaluate whether the company's controls sufficiently address identified risks of material misstatement due to fraud and controls intended to address the risk of management override of other controls. Controls that might address these risks include—

• Controls over significant, unusual transactions, particularly those that result in late or unusual journal entries;

• Controls over journal entries and adjustments made in the period-end financial reporting process;

• Controls over related party transactions;

• Controls related to significant management estimates; and

• Controls that mitigate incentives for, and pressures on, management to falsify or inappropriately manage financial results.

15. If the auditor identifies deficiencies in controls designed to prevent or detect fraud during the audit of internal control over financial reporting, the auditor should take into account those deficiencies when developing his or her response to risks of material misstatement during the financial statement audit, as provided in AU sec. 316.44 and .45.

Using the Work of Others

16. The auditor should evaluate the extent to which he or she will use the work of others to reduce the work the auditor might otherwise perform himself or herself. AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements,* applies in an integrated audit of the financial statements and internal control over financial reporting.

17. For purposes of the audit of internal control, however, the auditor may use the work performed by, or receive direct assistance from, internal auditors, company personnel (in addition to internal auditors), and third parties working under the direction of management or the audit committee that provides evidence about the effectiveness of internal control over financial reporting. In an integrated audit of internal control over financial reporting and the financial statements, the auditor also may use this work to obtain evidence supporting the auditor's assessment of control risk for purposes of the audit of the financial statements.

18. The auditor should assess the competence and objectivity of the persons whose work the auditor plans to use to determine the extent to which the auditor may use their work. The higher the degree of competence and objectivity, the greater use the auditor may make of the work. The auditor should apply paragraphs .09 through .11 of AU sec. 322 to assess the competence and objectivity of internal auditors. The auditor should apply the principles underlying those paragraphs to assess the competence and objectivity of persons other than internal auditors whose work the auditor plans to use.

Note: For purposes of using the work of others, competence means the attainment and maintenance of a level of understanding and knowledge that enables that person to perform ably the tasks assigned to them, and objectivity means the ability to perform those tasks impartially and with intellectual honesty. To assess competence, the auditor should evaluate factors about the person's qualifications and ability to perform the work the auditor plans to use. To assess objectivity, the auditor should evaluate whether factors are present that either inhibit or promote a person's ability to perform with the necessary degree of objectivity the work the auditor plans to use.

Note: The auditor should not use the work of persons who have a low degree of objectivity, regardless of their level of competence. Likewise, the auditor should not use the work of persons who have a low level of competence regardless of their degree of objectivity. Personnel whose core function is to serve as a testing or compliance authority at the company, such as internal auditors, normally are expected to have greater competence and objectivity in performing the type of work that will be useful to the auditor.

19. The extent to which the auditor may use the work of others in an audit of internal control also depends on the risk associated with the control being tested. As the risk associated with a control increases, the need for the auditor to perform his or her own work on the control increases.

[9] The SEC Advisory Committee on Smaller Public Companies considered a company's size with respect to compliance with the internal control reporting provisions of the Act. *See* Advisory Committee on Smaller Public Companies to the United States Securities and Exchange Commission, Final Report, at p. 5 (April 23, 2006).

[10] *See* paragraphs .19 through .42 of AU sec. 316, *Consideration of Fraud in a Financial Statement Audit*, regarding identifying risks that may result in material misstatement due to fraud.

Materiality

20. In planning the audit of internal control over financial reporting, the auditor should use the same materiality considerations he or she would use in planning the audit of the company's annual financial statements.[11]

Using a Top-Down Approach

21. The auditor should use a top-down approach to the audit of internal control over financial reporting to select the controls to test. A top-down approach begins at the financial statement level and with the auditor's understanding of the overall risks to internal control over financial reporting. The auditor then focuses on entity-level controls and works down to significant accounts and disclosures and their relevant assertions. This approach directs the auditor's attention to accounts, disclosures, and assertions that present a reasonable possibility of material misstatement to the *financial statements and related disclosures*. The auditor then verifies his or her understanding of the risks in the company's processes and selects for testing those controls that sufficiently address the assessed risk of misstatement to each relevant assertion.

Note: The top-down approach describes the auditor's sequential thought process in identifying risks and the controls to test, not necessarily the order in which the auditor will perform the auditing procedures.

Identifying Entity-Level Controls

22. The auditor must test those entity-level controls that are important to the auditor's conclusion about whether the company has effective internal control over financial reporting. The auditor's evaluation of entity-level controls can result in increasing or decreasing the testing that the auditor otherwise would have performed on other controls.

23. Entity-level controls vary in nature and precision—

- Some entity-level controls, such as certain control environment controls, have an important, but indirect, effect on the likelihood that a misstatement will be detected or prevented on a timely basis. These controls might affect the other controls the auditor selects for testing and the nature, timing, and extent of procedures the auditor performs on other controls.
- Some entity-level controls monitor the effectiveness of other controls. Such controls might be designed to identify possible breakdowns in lower-level controls, but not at a level of precision that would, by themselves, sufficiently address the assessed risk that misstatements to a relevant assertion will be prevented or detected on a timely basis. These controls, when operating effectively, might allow the auditor to reduce the testing of other controls.
- Some entity-level controls might be designed to operate at a level of precision that would adequately prevent or detect on a timely basis misstatements to one or more relevant assertions. If an entity-level control sufficiently addresses the assessed risk of misstatement, the auditor need not test additional controls relating to that risk.

24. Entity-level controls include—

- Controls related to the control environment;
- Controls over management override;

Note: Controls over management override are important to effective internal control over financial reporting for all companies, and may be particularly important at smaller companies because of the increased involvement of senior management in performing controls and in the period-end financial reporting process. For smaller companies, the controls that address the risk of management override might be different from those at a larger company. For example, a smaller company might rely on more detailed oversight by the audit committee that focuses on the risk of management override.

- The company's risk assessment process;
- Centralized processing and controls, including shared service environments;
- Controls to monitor results of operations;
- Controls to monitor other controls, including activities of the internal audit function, the audit committee, and self-assessment programs;
- Controls over the period-end financial reporting process; and
- Policies that address significant business control and risk management practices.

25. *Control Environment.* Because of its importance to effective internal control over financial reporting, the auditor must evaluate the control environment at the company. As part of evaluating the control environment, the auditor should assess—

- Whether management's philosophy and operating style promote effective internal control over financial reporting;
- Whether sound integrity and ethical values, particularly of top management, are developed and understood; and
- Whether the Board or audit committee understands and exercises oversight responsibility over financial reporting and internal control.

26. *Period-end Financial Reporting Process.* Because of its importance to financial reporting and to the auditor's opinions on internal control over financial reporting and the financial statements, the auditor must evaluate the period-end financial reporting process. The period-end financial reporting process includes the following—

- Procedures used to enter transaction totals into the general ledger;
- Procedures related to the selection and application of accounting policies;
- Procedures used to initiate, authorize, record, and process journal entries in the general ledger;
- Procedures used to record recurring and nonrecurring adjustments to the annual and quarterly financial statements; and
- Procedures for preparing annual and quarterly financial statements and related disclosures.

Note: Because the annual period-end financial reporting process normally occurs after the ''as-of'' date of management's assessment, those controls usually cannot be tested until after the as-of date.

27. As part of evaluating the period-end financial reporting process, the auditor should assess—

- Inputs, procedures performed, and outputs of the processes the company uses to produce its annual and quarterly financial statements;
- The extent of information technology (''IT'') involvement in the period-end financial reporting process;
- Who participates from management;
- The locations involved in the period-end financial reporting process;
- The types of adjusting and consolidating entries; and
- The nature and extent of the oversight of the process by management, the board of directors, and the audit committee.

Note: The auditor should obtain sufficient evidence of the effectiveness of those quarterly controls that are important to determining whether the company's controls sufficiently address the assessed risk of misstatement to each relevant assertion as of the date of management's assessment. However, the auditor is not required to obtain sufficient evidence for each quarter individually.

Identifying Significant Accounts and Disclosures and Their Relevant Assertions

28. The auditor should identify significant accounts and disclosures and their relevant assertions. Relevant assertions are those financial statement assertions that have a reasonable possibility of containing a misstatement

[11] *See* AU sec. 312, *Audit Risk and Materiality in Conducting an Audit*, which provides additional explanation of materiality.

that would cause the financial statements to be materially misstated. The financial statement assertions include [12]—

- Existence or occurrence
- Completeness
- Valuation or allocation
- Rights and obligations
- Presentation and disclosure

Note: The auditor may base his or her work on assertions that differ from those in this standard if the auditor has selected and tested controls over the pertinent risks in each significant account and disclosure that have a reasonable possibility of containing misstatements that would cause the financial statements to be materially misstated.

29. To identify significant accounts and disclosures and their relevant assertions, the auditor should evaluate the qualitative and quantitative risk factors related to the financial statement line items and disclosures. Risk factors relevant to the identification of significant accounts and disclosures and their relevant assertions include—

- Size and composition of the account;
- Susceptibility to misstatement due to errors or fraud;
- Volume of activity, complexity, and homogeneity of the individual transactions processed through the account or reflected in the disclosure;
- Nature of the account or disclosure;
- Accounting and reporting complexities associated with the account or disclosure;
- Exposure to losses in the account;
- Possibility of significant contingent liabilities arising from the activities reflected in the account or disclosure;
- Existence of related party transactions in the account; and
- Changes from the prior period in account or disclosure characteristics.

30. As part of identifying significant accounts and disclosures and their relevant assertions, the auditor also should determine the likely sources of potential misstatements that would cause the financial statements to be materially misstated. The auditor might determine the likely sources of potential misstatements by asking himself or herself ''what could go wrong?'' within a given significant account or disclosure.

31. The risk factors that the auditor should evaluate in the identification of significant accounts and disclosures and their relevant assertions are the same in the audit of internal control over financial reporting as in the audit of the financial statements; accordingly, significant accounts and disclosures and their relevant assertions are the same for both audits.

Note: In the financial statement audit, the auditor might perform substantive auditing procedures on financial statement accounts, disclosures and assertions that are not determined to be significant accounts and disclosures and relevant assertions.[13]

32. The components of a potential significant account or disclosure might be subject to significantly differing risks. If so, different controls might be necessary to adequately address those risks.

33. When a company has multiple locations or business units, the auditor should identify significant accounts and disclosures and their relevant assertions based on the consolidated financial statements. Having made those determinations, the auditor should then apply the direction in Appendix B for multiple locations scoping decisions.

Understanding Likely Sources of Misstatement

34. To further understand the likely sources of potential misstatements, and as a part of selecting the controls to test, the auditor should achieve the following objectives—

- Understand the flow of transactions related to the relevant assertions, including how these transactions are initiated, authorized, processed, and recorded;
- Verify that the auditor has identified the points within the company's processes at which a misstatement—including a misstatement due to fraud—could arise that, individually or in combination with other misstatements, would be material;
- Identify the controls that management has implemented to address these potential misstatements; and
- Identify the controls that management has implemented over the prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could result in a material misstatement of the financial statements.

35. Because of the degree of judgment required, the auditor should either perform the procedures that achieve the objectives in paragraph 34 himself or herself or supervise the work of others who provide direct assistance to the auditor, as described in AU sec. 322.

36. The auditor also should understand how IT affects the company's flow of transactions. The auditor should apply paragraphs .16 through .20, .30 through .32, and .77 through .79, of AU sec. 319, *Consideration of Internal Control in a Financial Statement Audit,* which discuss the effect of information technology on internal control over financial reporting and the risks to assess.

Note: The identification of risks and controls within IT is not a separate evaluation. Instead, it is an integral part of the top-down approach used to identify significant accounts and disclosures and their relevant assertions, and the controls to test, as well as to assess risk and allocate audit effort as described by this standard.

37. *Performing Walkthroughs.* Performing walkthroughs will frequently be the most effective way of achieving the objectives in paragraph 34. In performing a walkthrough, the auditor follows a transaction from origination through the company's processes, including information systems, until it is reflected in the company's financial records, using the same documents and information technology that company personnel use. Walkthrough procedures usually include a combination of inquiry, observation, inspection of relevant documentation, and re-performance of controls.

38. In performing a walkthrough, at the points at which important processing procedures occur, the auditor questions the company's personnel about their understanding of what is required by the company's prescribed procedures and controls. These probing questions, combined with the other walkthrough procedures, allow the auditor to gain a sufficient understanding of the process and to be able to identify important points at which a necessary control is missing or not designed effectively. Additionally, probing questions that go beyond a narrow focus on the single transaction used as the basis for the walkthrough allow the auditor to gain an understanding of the different types of significant transactions handled by the process.

Selecting Controls To Test

39. The auditor should test those controls that are important to the auditor's conclusion about whether the company's controls sufficiently address the assessed risk of misstatement to each relevant assertion.

[12] *See* AU sec. 326, *Evidential Matter,* which provides additional information on financial statement assertions.

[13] This is because his or her assessment of the risk that undetected misstatement would cause the financial statements to be materially misstated is unacceptably high (*see* AU sec. 312.39 for further discussion about undetected misstatement) or as a means of introducing unpredictability in the procedures performed (*see* paragraph 61 and AU sec. 316.50 for further discussion about predictability of auditing procedures).

40. There might be more than one control that addresses the assessed risk of misstatement to a particular relevant assertion; conversely, one control might address the assessed risk of misstatement to more than one relevant assertion. It is neither necessary to test all controls related to a relevant assertion nor necessary to test redundant controls, unless redundancy is itself a control objective.

41. The decision as to whether a control should be selected for testing depends on which controls, individually or in combination, sufficiently address the assessed risk of misstatement to a given relevant assertion rather than on how the control is labeled (*e.g.*, entity-level control, transaction-level control, control activity, monitoring control, *preventive control, detective control*).

Testing Controls

Testing Design Effectiveness

42. The auditor should test the design effectiveness of controls by determining whether the company's controls, if they are operated as prescribed by persons possessing the necessary authority and competence to perform the control effectively, satisfy the company's control objectives and can effectively prevent or detect errors or fraud that could result in material misstatements in the financial statements.

Note: A smaller, less complex company might achieve its control objectives in a different manner from a larger, more complex organization. For example, a smaller, less complex company might have fewer employees in the accounting function, limiting opportunities to segregate duties and leading the company to implement alternative controls to achieve its control objectives. In such circumstances, the auditor should evaluate whether those alternative controls are effective.

43. Procedures the auditor performs to test design effectiveness include a mix of inquiry of appropriate personnel, observation of the company's operations, and inspection of relevant documentation. Walkthroughs that include these procedures ordinarily are sufficient to evaluate design effectiveness.

Testing Operating Effectiveness

44. The auditor should test the operating effectiveness of a control by determining whether the control is operating as designed and whether the person performing the control possesses the necessary authority and competence to perform the control effectively.

Note: In some situations, particularly in smaller companies, a company might use a third party to provide assistance with certain financial reporting functions. When assessing the competence of personnel responsible for a company's financial reporting and associated controls, the auditor may take into account the combined competence of company personnel and other parties that assist with functions related to financial reporting.

45. Procedures the auditor performs to test operating effectiveness include a mix of inquiry of appropriate personnel, observation of the company's operations, inspection of relevant documentation, and re-performance of the control.

Relationship of Risk to the Evidence To Be Obtained

46. For each control selected for testing, the evidence necessary to persuade the auditor that the control is effective depends upon the risk associated with the control. The risk associated with a control consists of the risk that the control might not be effective and, if not effective, the risk that a material weakness would result. As the risk associated with the control being tested increases, the evidence that the auditor should obtain also increases.

Note: Although the auditor must obtain evidence about the effectiveness of controls for each relevant assertion, the auditor is not responsible for obtaining sufficient evidence to support an opinion about the effectiveness of each individual control. Rather, the auditor's objective is to express an opinion on the company's internal control over financial reporting overall. This allows the auditor to vary the evidence obtained regarding the effectiveness of individual controls selected for testing based on the risk associated with the individual control.

47. Factors that affect the risk associated with a control include—

- The nature and materiality of misstatements that the control is intended to prevent or detect;
- The inherent risk associated with the related account(s) and assertion(s);
- Whether there have been changes in the volume or nature of transactions that might adversely affect control design or operating effectiveness;
- Whether the account has a history of errors;
- The effectiveness of entity-level controls, especially controls that monitor other controls;
- The nature of the control and the frequency with which it operates;
- The degree to which the control relies on the effectiveness of other controls (*e.g.*, the control environment or information technology general controls);
- The competence of the personnel who perform the control or monitor its performance and whether there have been changes in key personnel who perform the control or monitor its performance;
- Whether the control relies on performance by an individual or is automated (*i.e.*, an automated control would generally be expected to be lower risk if relevant information technology general controls are effective); and

Note: A less complex company or business unit with simple business processes and centralized accounting operations might have relatively simple information systems that make greater use of off-the-shelf packaged software without modification. In the areas in which off-the-shelf software is used, the auditor's testing of information technology controls might focus on the application controls built into the pre-packaged software that management relies on to achieve its control objectives and the IT general controls that are important to the effective operation of those application controls.

- The complexity of the control and the significance of the judgments that must be made in connection with its operation.

Note: Generally, a conclusion that a control is not operating effectively can be supported by less evidence than is necessary to support a conclusion that a control is operating effectively.

48. When the auditor identifies deviations from the company's controls, he or she should determine the effect of the deviations on his or her assessment of the risk associated with the control being tested and the evidence to be obtained, as well as on the operating effectiveness of the control.

Note: Because effective internal control over financial reporting cannot, and does not, provide absolute assurance of achieving the company's control objectives, an individual control does not necessarily have to operate without any deviation to be considered effective.

49. The evidence provided by the auditor's tests of the effectiveness of controls depends upon the mix of the nature, timing, and extent of the auditor's procedures. Further, for an individual control, different combinations of the nature, timing, and extent of testing may provide sufficient evidence in relation to the risk associated with the control.

Note: Walkthroughs usually consist of a combination of inquiry of appropriate personnel, observation of the company's operations, inspection of relevant documentation, and re-performance of the control and might provide sufficient evidence of operating effectiveness, depending on the risk associated with the control being tested, the specific procedures performed as part of the walkthrough and the results of those procedures.

50. *Nature of Tests of Controls.* Some types of tests, by their nature, produce

greater evidence of the effectiveness of controls than other tests. The following tests that the auditor might perform are presented in order of the evidence that they ordinarily would produce, from least to most: inquiry, observation, inspection of relevant documentation, and re-performance of a control.

Note: Inquiry alone does not provide sufficient evidence to support a conclusion about the effectiveness of a control.

51. The nature of the tests of effectiveness that will provide competent evidence depends, to a large degree, on the nature of the control to be tested, including whether the operation of the control results in documentary evidence of its operation. Documentary evidence of the operation of some controls, such as management's philosophy and operating style, might not exist.

Note: A smaller, less complex company or unit might have less formal documentation regarding the operation of its controls. In those situations, testing controls through inquiry combined with other procedures, such as observation of activities, inspection of less formal documentation, or re-performance of certain controls, might provide sufficient evidence about whether the control is effective.

52. *Timing of Tests of Controls.* Testing controls over a greater period of time provides more evidence of the effectiveness of controls than testing over a shorter period of time. Further, testing performed closer to the date of management's assessment provides more evidence than testing performed earlier in the year. The auditor should balance performing the tests of controls closer to the as-of date with the need to test controls over a sufficient period of time to obtain sufficient evidence of operating effectiveness.

53. Prior to the date specified in management's assessment, management might implement changes to the company's controls to make them more effective or efficient or to address control deficiencies. If the auditor determines that the new controls achieve the related objectives of the control criteria and have been in effect for a sufficient period to permit the auditor to assess their design and operating effectiveness by performing tests of controls, he or she will not need to test the design and operating effectiveness of the superseded controls for purposes of expressing an opinion on internal control over financial reporting. If the operating effectiveness of the superseded controls is important to the auditor's control risk assessment, the auditor should test the design and operating effectiveness of those superseded controls, as appropriate. (*See* additional direction on integration beginning at paragraph B1.)

54. *Extent of Tests of Controls.* The more extensively a control is tested, the greater the evidence obtained from that test.

55. *Roll-Forward Procedures.* When the auditor reports on the effectiveness of controls as of a specific date and obtains evidence about the operating effectiveness of controls at an interim date, he or she should determine what additional evidence concerning the operation of the controls for the remaining period is necessary.

56. The additional evidence that is necessary to update the results of testing from an interim date to the company's year-end depends on the following factors—

- The specific control tested prior to the as-of date, including the risks associated with the control and the nature of the control, and the results of those tests;
- The sufficiency of the evidence of effectiveness obtained at an interim date;
- The length of the remaining period; and
- The possibility that there have been any significant changes in internal control over financial reporting subsequent to the interim date.

Note: In some circumstances, such as when evaluation of the foregoing factors indicates a low risk that the controls are no longer effective during the roll-forward period, inquiry alone might be sufficient as a roll-forward procedure.

Special Considerations for Subsequent Years' Audits

57. In subsequent years' audits, the auditor should incorporate knowledge obtained during past audits he or she performed of the company's internal control over financial reporting into the decision-making process for determining the nature, timing, and extent of testing necessary. This decision-making process is described in paragraphs 46 through 56.

58. Factors that affect the risk associated with a control in subsequent years' audits include those in paragraph 47 and the following —

- The nature, timing, and extent of procedures performed in previous audits,
- The results of the previous years' testing of the control, and
- Whether there have been changes in the control or the process in which it operates since the previous audit.

59. After taking into account the risk factors identified in paragraphs 47 and 58, the additional information available in subsequent years' audits might permit the auditor to assess the risk as lower than in the initial year. This, in turn, might permit the auditor to reduce testing in subsequent years.

60. The auditor may also use a benchmarking strategy for automated application controls in subsequent years' audits. Benchmarking is described further beginning at paragraph B28.

61. In addition, the auditor should vary the nature, timing, and extent of testing of controls from year to year to introduce unpredictability into the testing and respond to changes in circumstances. For this reason, each year the auditor might test controls at a different interim period, increase or reduce the number and types of tests performed, or change the combination of procedures used.

Evaluating Identified Deficiencies

62. The auditor must evaluate the severity of each control *deficiency* that comes to his or her attention to determine whether the deficiencies, individually or in combination, are material weaknesses as of the date of management's assessment. In planning and performing the audit, however, the auditor is not required to search for deficiencies that, individually or in combination, are less severe than a material weakness.

63. The severity of a deficiency depends on—

- Whether there is a reasonable possibility that the company's controls will fail to prevent or detect a misstatement of an account balance or disclosure; and
- The magnitude of the potential misstatement resulting from the deficiency or deficiencies.

64. The severity of a deficiency does not depend on whether a misstatement actually has occurred but rather on whether there is a reasonable possibility that the company's controls will fail to prevent or detect a misstatement.

65. Risk factors affect whether there is a reasonable possibility that a deficiency, or a combination of deficiencies, will result in a misstatement of an account balance or disclosure. The factors include, but are not limited to, the following—

- The nature of the financial statement accounts, disclosures, and assertions involved;
- The susceptibility of the related asset or liability to loss or fraud;
- The subjectivity, complexity, or extent of judgment required to determine the amount involved;
- The interaction or relationship of the control with other controls,

including whether they are interdependent or redundant;

- The interaction of the deficiencies; and
- The possible future consequences of the deficiency.

Note: The evaluation of whether a control deficiency presents a reasonable possibility of misstatement can be made without quantifying the probability of occurrence as a specific percentage or range.

Note: Multiple control deficiencies that affect the same financial statement account balance or disclosure increase the likelihood of misstatement and may, in combination, constitute a material weakness, even though such deficiencies may individually be less severe. Therefore, the auditor should determine whether individual control deficiencies that affect the same significant account or disclosure, relevant assertion, or component of internal control collectively result in a material weakness.

66. Factors that affect the magnitude of the misstatement that might result from a deficiency or deficiencies in controls include, but are not limited to, the following—

- The financial statement amounts or total of transactions exposed to the deficiency; and
- The volume of activity in the account balance or class of transactions exposed to the deficiency that has occurred in the current period or that is expected in future periods.

67. In evaluating the magnitude of the potential misstatement, the maximum amount that an account balance or total of transactions can be overstated is generally the recorded amount, while understatements could be larger. Also, in many cases, the probability of a small misstatement will be greater than the probability of a large misstatement.

68. The auditor should evaluate the effect of compensating controls when determining whether a control deficiency or combination of deficiencies is a material weakness. To have a mitigating effect, the compensating control should operate at a level of precision that would prevent or detect a misstatement that could be material.

Indicators of Material Weaknesses

69. Indicators of material weaknesses in internal control over financial reporting include—

- Identification of fraud, whether or not material, on the part of senior management; [14]
- Restatement of previously issued financial statements to reflect the correction of a material misstatement; [15]
- Identification by the auditor of a material misstatement of financial statements in the current period in circumstances that indicate that the misstatement would not have been detected by the company's internal control over financial reporting; and
- Ineffective oversight of the company's external financial reporting and internal control over financial reporting by the company's audit committee.

70. When evaluating the severity of a deficiency, or combination of deficiencies, the auditor also should determine the level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs that they have reasonable assurance that transactions are recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles. If the auditor determines that a deficiency, or combination of deficiencies, might prevent prudent officials in the conduct of their own affairs from concluding that they have reasonable assurance that transactions are recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles, then the auditor should treat the deficiency, or combination of deficiencies, as an indicator of a material weakness.

Wrapping-Up

Forming an Opinion

71. The auditor should form an opinion on the effectiveness of internal control over financial reporting by evaluating evidence obtained from all sources, including the auditor's testing of controls, misstatements detected during the financial statement audit, and any identified control deficiencies.

Note: As part of this evaluation, the auditor should review reports issued during the year by internal audit (or similar functions) that address controls related to internal control over financial reporting and evaluate control deficiencies identified in those reports.

72. After forming an opinion on the effectiveness of the company's internal control over financial reporting, the auditor should evaluate the presentation of the elements that management is required, under the SEC's rules, to present in its annual report on internal control over financial reporting.[16]

73. If the auditor determines that any required elements of management's annual report on internal control over financial reporting are incomplete or improperly presented, the auditor should follow the direction in paragraph C2.

74. The auditor may form an opinion on the effectiveness of internal control over financial reporting only when there have been no restrictions on the scope of the auditor's work. A scope limitation requires the auditor to disclaim an opinion or withdraw from the engagement (see paragraphs C3 through C7).

Obtaining Written Representations

75. In an audit of internal control over financial reporting, the auditor should obtain written representations from management—

a. Acknowledging management's responsibility for establishing and maintaining effective internal control over financial reporting;

b. Stating that management has performed an evaluation and made an assessment of the effectiveness of the company's internal control over financial reporting and specifying the control criteria;

c. Stating that management did not use the auditor's procedures performed during the audits of internal control over financial reporting or the financial statements as part of the basis for management's assessment of the effectiveness of internal control over financial reporting;

d. Stating management's conclusion, as set forth in its assessment, about the effectiveness of the company's internal control over financial reporting based on the control criteria as of a specified date;

e. Stating that management has disclosed to the auditor all deficiencies in the design or operation of internal control over financial reporting identified as part of management's evaluation, including separately disclosing to the auditor all such deficiencies that it believes to be significant deficiencies or material weaknesses in internal control over financial reporting;

f. Describing any fraud resulting in a material misstatement to the company's financial statements and any other fraud that does not result in a material misstatement to the company's financial statements but involves senior management or management or other

[14] For the purpose of this indicator, the term ''senior management'' includes the principal executive and financial officers signing the company's certifications as required under Section 302 of the Act as well as any other members of senior management who play a significant role in the company's financial reporting process.

[15] *See* Financial Accounting Standards Board Statement No. 154, *Accounting Changes and Error Corrections*, regarding the correction of a misstatement.

[16] *See* Item 308(a) of Regulations S–B and S–K, 17 CFR 228.308(a) and 229.308(a).

employees who have a significant role in the company's internal control over financial reporting;

g. Stating whether control deficiencies identified and communicated to the audit committee during previous engagements pursuant to paragraphs 77 and 79 have been resolved,* and specifically identifying any that have not; and

h. Stating whether there were, subsequent to the date being reported on, any changes in internal control over financial reporting or other factors that might significantly affect internal control over financial reporting, including any corrective actions taken by management with regard to significant deficiencies and material weaknesses.

76. The failure to obtain written representations from management, including management's refusal to furnish them, constitutes a limitation on the scope of the audit. As discussed further in paragraph C3, when the scope of the audit is limited, the auditor should either withdraw from the engagement or disclaim an opinion. Further, the auditor should evaluate the effects of management's refusal on his or her ability to rely on other representations, including those obtained in the audit of the company's financial statements.

77. AU sec. 333, *Management Representations*, explains matters such as who should sign the letter, the period to be covered by the letter, and when to obtain an updated letter.

Communicating Certain Matters

78. The auditor must communicate, in writing, to management and the audit committee all material weaknesses identified during the audit. The written communication should be made prior to the issuance of the auditor's report on internal control over financial reporting.

79. If the auditor concludes that the oversight of the company's external financial reporting and internal control over financial reporting by the company's audit committee is ineffective, the auditor must communicate that conclusion in writing to the board of directors.

80. The auditor also should consider whether there are any deficiencies, or combinations of deficiencies, that have been identified during the audit that are significant deficiencies and must communicate such deficiencies, in writing, to the audit committee.

81. The auditor also should communicate to management, in writing, all deficiencies in internal control over financial reporting (*i.e.*, those deficiencies in internal control over financial reporting that are of a lesser magnitude than material weaknesses) identified during the audit and inform the audit committee when such a communication has been made. When making this communication, it is not necessary for the auditor to repeat information about such deficiencies that has been included in previously issued written communications, whether those communications were made by the auditor, internal auditors, or others within the organization.

82. The auditor is not required to perform procedures that are sufficient to identify all control deficiencies; rather, the auditor communicates deficiencies in internal control over financial reporting of which he or she is aware.

83. Because the audit of internal control over financial reporting does not provide the auditor with assurance that he or she has identified all deficiencies less severe than a material weakness, the auditor should not issue a report stating that no such deficiencies were noted during the audit.

84. When auditing internal control over financial reporting, the auditor may become aware of fraud or possible illegal acts. In such circumstances, the auditor must determine his or her responsibilities under AU sec. 316, *Consideration of Fraud in a Financial Statement Audit*, AU sec. 317, *Illegal Acts by Clients*, and Section 10A of the Securities Exchange Act of 1934.[17]

Reporting on Internal Control

85. The auditor's report on the audit of internal control over financial reporting must include the following elements [18]—

a. A title that includes the word *independent*;

b. A statement that management is responsible for maintaining effective internal control over financial reporting and for assessing the effectiveness of internal control over financial reporting;

c. An identification of management's report on internal control;

d. A statement that the auditor's responsibility is to express an opinion on the company's internal control over financial reporting based on his or her audit;

e. A definition of internal control over financial reporting as stated in paragraph A5;

f. A statement that the audit was conducted in accordance with the standards of the Public Company Accounting Oversight Board (United States);

g. A statement that the standards of the Public Company Accounting Oversight Board require that the auditor plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects;

h. A statement that an audit includes obtaining an understanding of internal control over financial reporting, assessing the risk that a material weakness exists, testing and evaluating the design and operating effectiveness of internal control based on the assessed risk, and performing such other procedures as the auditor considered necessary in the circumstances;

i. A statement that the auditor believes the audit provides a reasonable basis for his or her opinion;

j. A paragraph stating that, because of inherent limitations, internal control over financial reporting may not prevent or detect misstatements and that projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate;

k. The auditor's opinion on whether the company maintained, in all material respects, effective internal control over financial reporting as of the specified date, based on the control criteria;

l. The manual or printed signature of the auditor's firm;

m. The city and state (or city and country, in the case of non-U.S. auditors) from which the auditor's report has been issued; and

n. The date of the audit report.

Separate or Combined Reports

86. The auditor may choose to issue a combined report (*i.e.*, one report containing both an opinion on the financial statements and an opinion on internal control over financial reporting) or separate reports on the company's financial statements and on internal control over financial reporting.

87. The following example combined report expressing an unqualified opinion on financial statements and an unqualified opinion on internal control over financial reporting illustrates the report elements described in this section.

* PCAOB staff have told the Commission staff that the references to paragraphs 77 and 79 in paragraph 75.g. of the proposed rule should instead refer to paragraphs 78 and 80, and that this typographical error will be corrected. Telephone conversation between Sharon Virag, Associate Chief Auditor, PCAOB, and Brian Croteau, Associate Chief Accountant, SEC, on June 4, 2007.

[17] *See* 15 U.S.C. 78j–1.

[18] *See* Appendix C, which provides direction on modifications to the author's report that are required in certain circumstances.

Report of Independent Registered Public Accounting Firm

[Introductory paragraph]

We have audited the accompanying balance sheets of W Company as of December 31, 20X8 and 20X7, and the related statements of income, stockholders' equity and comprehensive income, and cash flows for each of the years in the three-year period ended December 31, 20X8. We also have audited W Company's internal control over financial reporting as of December 31, 20X8, based on [I*dentify control criteria, for example, ''criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).''*]. W Company's management is responsible for these financial statements, for maintaining effective internal control over financial reporting, and for its assessment of the effectiveness of internal control over financial reporting, included in the accompanying [title of management's report]. Our responsibility is to express an opinion on these financial statements and an opinion on the company's internal control over financial reporting based on our audits.

[Scope paragraph]

We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audits to obtain reasonable assurance about whether the financial statements are free of material misstatement and whether effective internal control over financial reporting was maintained in all material respects. Our audits of the financial statements included examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management, and evaluating the overall financial statement presentation. Our audit of internal control over financial reporting included obtaining an understanding of internal control over financial reporting, assessing the risk that a material weakness exists, and testing and evaluating the design and operating effectiveness of internal control based on the assessed risk. Our audits also included performing such other procedures as we considered necessary in the circumstances. We believe that our audits provide a reasonable basis for our opinions.

[Definition paragraph]

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) Pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

[Inherent limitations paragraph]

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

[Opinion paragraph]

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of W Company as of December 31, 20X8 and 20X7, and the results of its operations and its cash flows for each of the years in the three-year period ended December 31, 20X8 in conformity with accounting principles generally accepted in the United States of America. Also in our opinion, W Company maintained, in all material respects, effective internal control over financial reporting as of December 31, 20X8, based on [*Identify control criteria, for example, ''criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).''*].

[*Signature*]

[*City and State or Country*]

[*Date*]

88. If the auditor chooses to issue a separate report on internal control over financial reporting, he or she should add the following paragraph to the auditor's report on the financial statements—

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), W Company's internal control over financial reporting as of December 31, 20X8, based on [*identify control criteria*] and our report dated *[date of report, which should be the same as the date of the report on the financial statements*] expressed [*include nature of opinion*].

The auditor also should add the following paragraph to the report on internal control over financial reporting—

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the [*identify financial statements*] of W Company and our report dated [*date of report, which should be the same as the date of the report on the effectiveness of internal control over financial reporting*] expressed [*include nature of opinion*].

Report Date

89. The auditor should date the audit report no earlier than the date on which the auditor has obtained sufficient competent evidence to support the auditor's opinion. Because the auditor cannot audit internal control over financial reporting without also auditing the financial statements, the reports should be dated the same.

Material Weaknesses

90. Paragraphs 62 through 70 describe the evaluation of deficiencies. If there are deficiencies that, individually or in combination, result in one or more material weaknesses, the auditor must express an adverse opinion on the company's internal control over financial reporting, unless there is a restriction on the scope of the engagement.[19]

91. When expressing an adverse opinion on internal control over financial reporting because of a material weakness, the auditor's report must include—

- The definition of a material weakness, as provided in paragraph A7.
- A statement that a material weakness has been identified and an identification of the material weakness described in management's assessment.

Note: If the material weakness has not been included in management's assessment, the report should be modified to state that a material weakness has been identified but not included in management's assessment. Additionally, the auditor's report should include a description of the material weakness, which should provide the users of the audit report with specific information about the nature of the material weakness and its actual and potential effect on the presentation of the company's financial statements issued during the existence of the weakness. In this case, the auditor also should communicate in writing to the audit committee that the material weakness was not disclosed or identified as a material weakness in management's assessment. If the material weakness has been included in management's assessment but the auditor concludes that the disclosure of the material weakness is not fairly presented in all material respects, the auditor's report should describe this conclusion as well as the information necessary to fairly describe the material weakness.

92. The auditor should determine the effect his or her adverse opinion on internal control has on his or her opinion on the financial statements. Additionally, the auditor should disclose whether his or her opinion on the financial statements was affected by the adverse opinion on internal control over financial reporting.

[19] *See* paragraph C3 for direction when the scope of the engagement has been limited.

Note: If the auditor issues a separate report on internal control over financial reporting in this circumstance, the disclosure required by this paragraph may be combined with the report language described in paragraphs 88 and 91. The auditor may present the combined language either as a separate paragraph or as part of the paragraph that identifies the material weakness.

Subsequent Events

93. Changes in internal control over financial reporting or other factors that might significantly affect internal control over financial reporting might occur subsequent to the date as of which internal control over financial reporting is being audited but before the date of the auditor's report. The auditor should inquire of management whether there were any such changes or factors and obtain written representations from management relating to such matters, as described in paragraph 75h.

94. To obtain additional information about whether changes have occurred that might affect the effectiveness of the company's internal control over financial reporting and, therefore, the auditor's report, the auditor should inquire about and examine, for this subsequent period, the following—

- Relevant internal audit (or similar functions, such as loan review in a financial institution) reports issued during the subsequent period,
- Independent auditor reports (if other than the auditor's) of deficiencies in internal control,
- Regulatory agency reports on the company's internal control over financial reporting, and
- Information about the effectiveness of the company's internal control over financial reporting obtained through other engagements.

95. The auditor might inquire about and examine other documents for the subsequent period. Paragraphs .01 through .09 of AU sec. 560, *Subsequent Events*, provide direction on subsequent events for a financial statement audit that also may be helpful to the auditor performing an audit of internal control over financial reporting.

96. If the auditor obtains knowledge about subsequent events that materially and adversely affect the effectiveness of the company's internal control over financial reporting as of the date specified in the assessment, the auditor should issue an adverse opinion on internal control over financial reporting (and follow the direction in paragraph C2 if management's assessment states that internal control over financial reporting is effective). If the auditor is unable to determine the effect of the subsequent event on the effectiveness of the company's internal control over financial reporting, the auditor should disclaim an opinion. As described in paragraph C13, the auditor should disclaim an opinion on management's disclosures about corrective actions taken by the company after the date of management's assessment, if any.

97. The auditor may obtain knowledge about subsequent events with respect to conditions that did not exist at the date specified in the assessment but arose subsequent to that date and before issuance of the auditor's report. If a subsequent event of this type has a material effect on the company's internal control over financial reporting, the auditor should include in his or her report an explanatory paragraph describing the event and its effects or directing the reader's attention to the event and its effects as disclosed in management's report.

98. After the issuance of the report on internal control over financial reporting, the auditor may become aware of conditions that existed at the report date that might have affected the auditor's opinion had he or she been aware of them. The auditor's evaluation of such subsequent information is similar to the auditor's evaluation of information discovered subsequent to the date of the report on an audit of financial statements, as described in AU sec. 561, *Subsequent Discovery of Facts Existing at the Date of the Auditor's Report*.

Appendix A—Definitions

A1. For purposes of this standard, the terms listed below are defined as follows—

A2. A *control objective* provides a specific target against which to evaluate the effectiveness of controls. A control objective for internal control over financial reporting generally relates to a relevant assertion and states a criterion for evaluating whether the company's control procedures in a specific area provide reasonable assurance that a misstatement or omission in that relevant assertion is prevented or detected by controls on a timely basis.

A3. A *deficiency* in internal control over financial reporting exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent or detect misstatements on a timely basis.

- A deficiency in *design* exists when (a) A control necessary to meet the control objective is missing or (b) an existing control is not properly designed so that, even if the control operates as designed, the control objective would not be met.
- A deficiency in *operation* exists when a properly designed control does not operate as designed, or when the person performing the control does not possess the necessary authority or competence to perform the control effectively.

A4. *Financial statements and related disclosures* refers to a company's financial statements and notes to the financial statements as presented in accordance with generally accepted accounting principles (''GAAP''). References to financial statements and related disclosures do not extend to the preparation of management's discussion and analysis or other similar financial information presented outside a company's GAAP-basis financial statements and notes.

A5. *Internal control over financial reporting* is a process designed by, or under the supervision of, the company's principal executive and principal financial officers, or persons performing similar functions, and effected by the company's board of directors, management, and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP and includes those policies and procedures that—

(1) Pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company;

(2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and

(3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.[1]

Note: The auditor's procedures as part of either the audit of internal control over financial reporting or the audit of the financial statements are not part of a company's internal control over financial reporting.

Note: Internal control over financial reporting has inherent limitations. Internal control over financial reporting is a process that involves human diligence and compliance and is subject to lapses in judgment and breakdowns resulting from human failures. Internal control over financial reporting also can be circumvented by collusion or improper management override. Because of such limitations, there is a risk that material misstatements will not be prevented or detected on a timely basis by internal control over financial reporting. However, these inherent limitations are known features of the financial reporting process. Therefore, it is possible to design into the process safeguards to reduce, though not eliminate, this risk.

A6. *Management's assessment* is the assessment described in Item 308(a)(3) of Regulations S–B and S–K that is included in management's annual report on internal control over financial reporting.[2]

A7. A *material weakness* is a deficiency, or a combination of deficiencies, in internal

[1] *See* Securities Exchange Act Rules 13a–15(f) and 15d–15(f), 17 CFR 240.13a–15(f) and 240.15d–15(f).

[2] *See* 17 CFR 228.308(a)(3) and 229.308(a)(3).

control over financial reporting, such that there is a *reasonable possibility* that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis.

Note: There is a *reasonable possibility* of an event, as used in this standard, when the likelihood of the event is either ''reasonably possible'' or ''probable,'' as those terms are used in Financial Accounting Standards Board Statement No. 5, *Accounting for Contingencies* (''FAS 5'').[3]

A8. Controls over financial reporting may be *preventive controls* or *detective controls*. Effective internal control over financial reporting often includes a combination of preventive and detective controls.

• Preventive controls have the objective of preventing errors or fraud that could result in a misstatement of the financial statements from occurring.

• Detective controls have the objective of detecting errors or fraud that has already occurred that could result in a misstatement of the financial statements.

A9. A *relevant assertion* is a financial statement assertion that has a reasonable possibility of containing a misstatement or misstatements that would cause the financial statements to be materially misstated. The determination of whether an assertion is a relevant assertion is based on inherent risk, without regard to the effect of controls.

A10. An account or disclosure is a *significant account or disclosure* if there is a reasonable possibility that the account or disclosure could contain a misstatement that, individually or when aggregated with others, has a material effect on the financial statements, considering the risks of both overstatement and understatement. The determination of whether an account or disclosure is significant is based on inherent risk, without regard to the effect of controls.

A11. A *significant deficiency* is a deficiency, or a combination of deficiencies, in internal control over financial reporting that is less severe than a material weakness, yet important enough to merit attention by those responsible for oversight of the company's financial reporting.

Appendix B—Special Topics

Integration of Audits

B1. *Tests of Controls in an Audit of Internal Control.* The objective of the tests of controls in an audit of internal control over financial reporting is to obtain evidence about the effectiveness of controls to support the auditor's opinion on the company's internal control over financial reporting. The auditor's opinion relates to the effectiveness of the company's internal control over financial reporting as of a *point in time and taken as a whole*.

B2. To express an opinion on internal control over financial reporting as of a point in time, the auditor should obtain evidence that internal control over financial reporting has operated effectively for a sufficient period of time, which may be less than the entire period (ordinarily one year) covered by the company's financial statements. To express an opinion on internal control over financial reporting taken as a whole, the auditor must obtain evidence about the effectiveness of selected controls over all relevant assertions. This requires that the auditor test the design and operating effectiveness of controls he or she ordinarily would not test if expressing an opinion only on the financial statements.

B3. When concluding on the effectiveness of internal control over financial reporting for purposes of expressing an opinion on internal control over financial reporting, the auditor should incorporate the results of any additional tests of controls performed to achieve the objective related to expressing an opinion on the financial statements, as discussed in the following section.

B4. *Tests of Controls in an Audit of Financial Statements.* To express an opinion on the financial statements, the auditor ordinarily performs tests of controls and substantive procedures. The objective of the tests of controls the auditor performs for this purpose is to assess control risk. To assess control risk for specific financial statement assertions at less than the maximum, the auditor is required to obtain evidence that the relevant controls operated effectively during the *entire period* upon which the auditor plans to place reliance on those controls. However, the auditor is not required to assess control risk at less than the maximum for *all* relevant assertions and, for a variety of reasons, the auditor may choose not to do so.

B5. When concluding on the effectiveness of controls for the purpose of assessing control risk, the auditor also should evaluate the results of any additional tests of controls performed to achieve the objective related to expressing an opinion on the company's internal control over financial reporting, as discussed in paragraph B2. Consideration of these results may require the auditor to alter the nature, timing, and extent of substantive procedures and to plan and perform further tests of controls, particularly in response to identified control deficiencies.

B6. *Effect of Tests of Controls on Substantive Procedures.* If, during the audit of internal control over financial reporting, the auditor identifies a deficiency, he or she should determine the effect of the deficiency, if any, on the nature, timing, and extent of substantive procedures to be performed to reduce audit risk in the audit of the financial statements to an appropriately low level.

B7. Regardless of the assessed level of control risk or the assessed risk of material misstatement in connection with the audit of the financial statements, the auditor should perform substantive procedures for all relevant assertions. Performing procedures to express an opinion on internal control over financial reporting does not diminish this requirement.

B8. *Effect of Substantive Procedures on the Auditor's Conclusions About the Operating Effectiveness of Controls.* In an audit of internal control over financial reporting, the auditor should evaluate the effect of the findings of the substantive auditing procedures performed in the audit of financial statements on the effectiveness of internal control over financial reporting. This evaluation should include, at a minimum—

• The auditor's risk assessments in connection with the selection and application of substantive procedures, especially those related to fraud.

• Findings with respect to illegal acts and related party transactions.

• Indications of management bias in making accounting estimates and in selecting accounting principles.

• Misstatements detected by substantive procedures. The extent of such misstatements might alter the auditor's judgment about the effectiveness of controls.

B9. To obtain evidence about whether a selected control is effective, the control must be tested directly; the effectiveness of a control cannot be inferred from the absence of misstatements detected by substantive procedures. The absence of misstatements detected by substantive procedures, however, should inform the auditor's risk assessments in determining the testing necessary to conclude on the effectiveness of a control.

Multiple Locations Scoping Decisions

B10. In determining the locations or business units at which to perform tests of controls, the auditor should assess the risk of material misstatement to the financial statements associated with the location or business unit and correlate the amount of audit attention devoted to the location or business unit with the degree of risk.

Note: The auditor may eliminate from further consideration locations or business units that, individually or when aggregated with others, do not present a reasonable possibility of material misstatement to the company's consolidated financial statements.

B11. In assessing and responding to risk, the auditor should test controls over specific risks that present a reasonable possibility of material misstatement to the company's consolidated financial statements. In lower-risk locations or business units, the auditor first might evaluate whether testing entity-level controls, including controls in place to provide assurance that appropriate controls exist throughout the organization, provides the auditor with sufficient evidence.

B12. In determining the locations or business units at which to perform tests of controls, the auditor may take into account work performed by others on behalf of management. For example, if the internal auditors' planned procedures include relevant audit work at various locations, the auditor may coordinate work with the internal auditors and reduce the number of locations or business units at which the auditor would otherwise need to perform auditing procedures.

B13. The direction in paragraph 61 regarding special considerations for subsequent years' audits means that the auditor should vary the nature, timing, and extent of testing of controls at locations or business units from year to year.

B14. *Special Situations.* The scope of the audit should include entities that are acquired on or before the date of management's assessment and operations that are accounted for as discontinued operations on the date of management's

[3] *See* FAS 5, paragraph 3.

assessment. The direction in this multiple-locations discussion describes how to determine whether it is necessary to test controls at these entities or operations.

B15. For equity method investments, the scope of the audit should include controls over the reporting in accordance with generally accepted accounting principles, in the company's financial statements, of the company's portion of the investees' income or loss, the investment balance, adjustments to the income or loss and investment balance, and related disclosures. The audit ordinarily would not extend to controls at the equity method investee.

B16. In situations in which the SEC allows management to limit its assessment of internal control over financial reporting by excluding certain entities, the auditor may limit the audit in the same manner. In these situations, the auditor's opinion would not be affected by a scope limitation. However, the auditor should include, either in an additional explanatory paragraph or as part of the scope paragraph in his or her report, a disclosure similar to management's regarding the exclusion of an entity from the scope of both management's assessment and the auditor's audit of internal control over financial reporting. Additionally, the auditor should evaluate the reasonableness of management's conclusion that the situation meets the criteria of the SEC's allowed exclusion and the appropriateness of any required disclosure related to such a limitation. If the auditor believes that management's disclosure about the limitation requires modification, the auditor should follow the same communication responsibilities that are described in paragraphs .29 through .32 of AU sec. 722, *Interim Financial Information.* If management and the audit committee do not respond appropriately, in addition to fulfilling those responsibilities, the auditor should modify his or her report on the audit of internal control over financial reporting to include an explanatory paragraph describing the reasons why the auditor believes management's disclosure requires modification.

Use of Service Organizations

B17. AU sec. 324, *Service Organizations,* applies to the audit of financial statements of a company that obtains services from another organization that are part of the company's information system. The auditor may apply the relevant concepts described in AU sec. 324 to the audit of internal control over financial reporting.

B18. AU sec. 324.03 describes the situation in which a service organization's services are part of a company's information system. If the service organization's services are part of a company's information system, as described therein, then they are part of the information and communication component of the company's internal control over financial reporting. When the service organization's services are part of the company's internal control over financial reporting, the auditor should include the activities of the service organization when determining the evidence required to support his or her opinion.

B19. AU sec. 324.07 through .16 describe the procedures that the auditor should perform with respect to the activities performed by the service organization. The procedures include—

a. Obtaining an understanding of the controls at the service organization that are relevant to the entity's internal control and the controls at the user organization over the activities of the service organization, and

b. Obtaining evidence that the controls that are relevant to the auditor's opinion are operating effectively.

B20. Evidence that the controls that are relevant to the auditor's opinion are operating effectively may be obtained by following the procedures described in AU sec. 324.12. These procedures include—

a. Obtaining a service auditor's report on controls placed in operation and tests of operating effectiveness, or a report on the application of agreed-upon procedures that describes relevant tests of controls.

Note: The service auditor's report referred to above means a report with the service auditor's opinion on the service organization's description of the design of its controls, the tests of controls, and results of those tests performed by the service auditor, and the service auditor's opinion on whether the controls tested were operating effectively during the specified period (in other words, ''reports on controls placed in operation and tests of operating effectiveness'' described in AU sec. 324.24b). A service auditor's report that does not include tests of controls, results of the tests, and the service auditor's opinion on operating effectiveness (in other words, ''reports on controls placed in operation'' described in AU sec. 324.24a) does not provide evidence of operating effectiveness. Furthermore, if the evidence regarding operating effectiveness of controls comes from an agreed-upon procedures report rather than a service auditor's report issued pursuant to AU sec. 324, the auditor should evaluate whether the agreed-upon procedures report provides sufficient evidence in the same manner described in the following paragraph.

b. Performing tests of the user organization's controls over the activities of the service organization (*e.g.*, testing the user organization's independent re-performance of selected items processed by the service organization or testing the user organization's reconciliation of output reports with source documents).

c. Performing tests of controls at the service organization.

B21. If a service auditor's report on controls placed in operation and tests of operating effectiveness is available, the auditor may evaluate whether this report provides sufficient evidence to support his or her opinion. In evaluating whether such a service auditor's report provides sufficient evidence, the auditor should assess the following factors—

- The time period covered by the tests of controls and its relation to the as-of date of management's assessment,
- The scope of the examination and applications covered, the controls tested, and the way in which tested controls relate to the company's controls, and
- The results of those tests of controls and the service auditor's opinion on the operating effectiveness of the controls.

Note: These factors are similar to factors the auditor would consider in determining whether the report provides sufficient evidence to support the auditor's assessed level of control risk in an audit of the financial statements, as described in AU sec. 324.16.

B22. If the service auditor's report on controls placed in operation and tests of operating effectiveness contains a qualification that the stated control objectives might be achieved only if the company applies controls contemplated in the design of the system by the service organization, the auditor should evaluate whether the company is applying the necessary procedures.

B23. In determining whether the service auditor's report provides sufficient evidence to support the auditor's opinion, the auditor should make inquiries concerning the service auditor's reputation, competence, and independence. Appropriate sources of information concerning the professional reputation of the service auditor are discussed in paragraph .10a of AU sec. 543, *Part of Audit Performed by Other Independent Auditors.*

B24. When a significant period of time has elapsed between the time period covered by the tests of controls in the service auditor's report and the date specified in management's assessment, additional procedures should be performed. The auditor should inquire of management to determine whether management has identified any changes in the service organization's controls subsequent to the period covered by the service auditor's report (such as changes communicated to management from the service organization, changes in personnel at the service organization with whom management interacts, changes in reports or other data received from the service organization, changes in contracts or service level agreements with the service organization, or errors identified in the service organization's processing). If management has identified such changes, the auditor should evaluate the effect of such changes on the effectiveness of the company's internal control over financial reporting. The auditor also should evaluate whether the results of other procedures he or she performed indicate that there have been changes in the controls at the service organization.

B25. The auditor should determine whether to obtain additional evidence about the operating effectiveness of controls at the service organization based on the procedures performed by management or the auditor and the results of those procedures and on an evaluation of the following risk factors. As risk increases, the need for the auditor to obtain additional evidence increases.

- The elapsed time between the time period covered by the tests of controls in the service auditor's report and the date specified in management's assessment,
- The significance of the activities of the service organization,

• Whether there are errors that have been identified in the service organization's processing, and

• The nature and significance of any changes in the service organization's controls identified by management or the auditor.

B26. If the auditor concludes that additional evidence about the operating effectiveness of controls at the service organization is required, the auditor's additional procedures might include—

• Evaluating procedures performed by management and the results of those procedures.

• Contacting the service organization, through the user organization, to obtain specific information.

• Requesting that a service auditor be engaged to perform procedures that will supply the necessary information.

• Visiting the service organization and performing such procedures.

B27. The auditor should not refer to the service auditor's report when expressing an opinion on internal control over financial reporting.

Benchmarking of Automated Controls

B28. Entirely automated application controls are generally not subject to breakdowns due to human failure. This feature allows the auditor to use a ''benchmarking'' strategy.

B29. If general controls over program changes, access to programs, and computer operations are effective and continue to be tested, and if the auditor verifies that the automated application control has not changed since the auditor established a baseline (*i.e.*, last tested the application control), the auditor may conclude that the automated application control continues to be effective without repeating the prior year's specific tests of the operation of the automated application control. The nature and extent of the evidence that the auditor should obtain to verify that the control has not changed may vary depending on the circumstances, including depending on the strength of the company's program change controls.

B30. The consistent and effective functioning of the automated application controls may be dependent upon the related files, tables, data, and parameters. For example, an automated application for calculating interest income might be dependent on the continued integrity of a rate table used by the automated calculation.

B31. To determine whether to use a benchmarking strategy, the auditor should assess the following risk factors. As these factors indicate lower risk, the control being evaluated might be well-suited for benchmarking. As these factors indicate increased risk, the control being evaluated is less suited for benchmarking. These factors are—

• The extent to which the application control can be matched to a defined program within an application.

• The extent to which the application is stable (*i.e.*, there are few changes from period to period).

• The availability and reliability of a report of the compilation dates of the programs placed in production. (This information may be used as evidence that controls within the program have not changed.)

B32. Benchmarking automated application controls can be especially effective for companies using purchased software when the possibility of program changes is remote—*e.g.*, when the vendor does not allow access or modification to the source code.

B33. After a period of time, the length of which depends upon the circumstances, the baseline of the operation of an automated application control should be reestablished. To determine when to reestablish a baseline, the auditor should evaluate the following factors—

• The effectiveness of the IT control environment, including controls over application and system software acquisition and maintenance, access controls and computer operations.

• The auditor's understanding of the nature of changes, if any, on the specific programs that contain the controls.

• The nature and timing of other related tests.

• The consequences of errors associated with the application control that was benchmarked.

• Whether the control is sensitive to other business factors that may have changed. For example, an automated control may have been designed with the assumption that only positive amounts will exist in a file. Such a control would no longer be effective if negative amounts (credits) begin to be posted to the account.

Appendix C—Special Reporting Situations

Report Modifications

C1. The auditor should modify his or her report if any of the following conditions exist.

a. Elements of management's annual report on internal control are incomplete or improperly presented,

b. There is a restriction on the scope of the engagement,

c. The auditor decides to refer to the report of other auditors as the basis, in part, for the auditor's own report,

d. There is other information contained in management's annual report on internal control over financial reporting, or

e. Management's annual certification pursuant to Section 302 of the Sarbanes-Oxley Act is misstated.

C2. *Elements of Management's Annual Report on Internal Control Over Financial Reporting Are Incomplete or Improperly Presented.* If the auditor determines that elements of management's annual report on internal control over financial reporting are incomplete or improperly presented, the auditor should modify his or her report to include an explanatory paragraph describing the reasons for this determination. If the auditor determines that the required disclosure about a material weakness is not fairly presented in all material respects, the auditor should follow the direction in paragraph 91.

C3. *Scope Limitations.* The auditor can express an opinion on the company's internal control over financial reporting only if the auditor has been able to apply the procedures necessary in the circumstances. If there are restrictions on the scope of the engagement, the auditor should withdraw from the engagement or disclaim an opinion. A disclaimer of opinion states that the auditor does not express an opinion on the effectiveness of internal control over financial reporting.

C4. When disclaiming an opinion because of a scope limitation, the auditor should state that the scope of the audit was not sufficient to warrant the expression of an opinion and, in a separate paragraph or paragraphs, the substantive reasons for the disclaimer. The auditor should not identify the procedures that were performed nor include the statements describing the characteristics of an audit of internal control over financial reporting (paragraph 85 g, h, and i); to do so might overshadow the disclaimer.

C5. When the auditor plans to disclaim an opinion and the limited procedures performed by the auditor caused the auditor to conclude that a material weakness exists, the auditor's report also should include—

• The definition of a material weakness, as provided in paragraph A7.

• A description of any material weaknesses identified in the company's internal control over financial reporting. This description should provide the users of the audit report with specific information about the nature of any material weakness and its actual and potential effect on the presentation of the company's financial statements issued during the existence of the weakness. This description also should address the requirements in paragraph 91.

C6. The auditor may issue a report disclaiming an opinion on internal control over financial reporting as soon as the auditor concludes that a scope limitation will prevent the auditor from obtaining the reasonable assurance necessary to express an opinion. The auditor is not required to perform any additional work prior to issuing a disclaimer when the auditor concludes that he or she will not be able to obtain sufficient evidence to express an opinion.

Note: In this case, in following the direction in paragraph 89 regarding dating the auditor's report, the report date is the date that the auditor has obtained sufficient competent evidence to support the representations in the auditor's report.

C7. If the auditor concludes that he or she cannot express an opinion because there has been a limitation on the scope of the audit, the auditor should communicate, in writing, to management and the audit committee that the audit of internal control over financial reporting cannot be satisfactorily completed.

C8. *Opinions Based, in Part, on the Report of Another Auditor.* When another auditor has audited the financial statements and internal control over financial reporting of one or more subsidiaries, divisions, branches, or components of the company, the auditor should determine whether he or she may serve as the principal auditor and use the work and reports of another auditor as a basis, in part, for his or her opinion. AU sec. 543, *Part of Audit Performed by Other Independent Auditors,* provides direction on

the auditor's decision of whether to serve as the principal auditor of the financial statements. If the auditor decides it is appropriate to serve as the principal auditor of the financial statements, then that auditor also should be the principal auditor of the company's internal control over financial reporting. This relationship results from the requirement that an audit of the financial statements must be performed to audit internal control over financial reporting; only the principal auditor of the financial statements can be the principal auditor of internal control over financial reporting. In this circumstance, the principal auditor of the financial statements must participate sufficiently in the audit of internal control over financial reporting to provide a basis for serving as the principal auditor of internal control over financial reporting.

C9. When serving as the principal auditor of internal control over financial reporting, the auditor should decide whether to make reference in the report on internal control over financial reporting to the audit of internal control over financial reporting performed by the other auditor. In these circumstances, the auditor's decision is based on factors analogous to those of the auditor who uses the work and reports of other independent auditors when reporting on a company's financial statements as described in AU sec. 543.

C10. The decision about whether to make reference to another auditor in the report on the audit of internal control over financial reporting might differ from the corresponding decision as it relates to the audit of the financial statements. For example, the audit report on the financial statements may make reference to the audit of a significant equity investment performed by another independent auditor, but the report on internal control over financial reporting might not make a similar reference because management's assessment of internal control over financial reporting ordinarily would not extend to controls at the equity method investee.[1]

C11. When the auditor decides to make reference to the report of the other auditor as a basis, in part, for his or her opinion on the company's internal control over financial reporting, the auditor should refer to the report of the other auditor when describing the scope of the audit and when expressing the opinion.

C12. *Management's Annual Report on Internal Control Over Financial Reporting Containing Additional Information.* Management's annual report on internal control over financial reporting may contain information in addition to the elements described in paragraph 72 that are subject to the auditor's evaluation.

C13. If management's annual report on internal control over financial reporting could reasonably be viewed by users of the report as including such additional information, the auditor should disclaim an opinion on the information.

C14. If the auditor believes that management's additional information contains a material misstatement of fact, he or she should discuss the matter with management. If, after discussing the matter with management, the auditor concludes that a material misstatement of fact remains, the auditor should notify management and the audit committee, in writing, of the auditor's views concerning the information. AU sec. 317, *Illegal Acts by Clients* and Section 10A of the Securities Exchange Act of 1934 may also require the auditor to take additional action.[2]

Note: If management makes the types of disclosures described in paragraph C12 outside its annual report on internal control over financial reporting and includes them elsewhere within its annual report on the company's financial statements, the auditor would not need to disclaim an opinion. However, in that situation, the auditor's responsibilities are the same as those described in this paragraph if the auditor believes that the additional information contains a material misstatement of fact.

C15. *Management's Annual Certification Pursuant to Section 302 of the Sarbanes-Oxley Act is Misstated.* If matters come to the auditor's attention as a result of the audit of internal control over financial reporting that lead him or her to believe that modifications to the disclosures about changes in internal control over financial reporting (addressing changes in internal control over financial reporting occurring during the fourth quarter) are necessary for the annual certifications to be accurate and to comply with the requirements of Section 302 of the Act and Securities Exchange Act Rule 13a–14(a) or 15d–14(a), whichever applies,[3] the auditor should follow the communication responsibilities as described in AU sec. 722 *Interim Financial Information,* for any interim period. However, if management and the audit committee do not respond appropriately, in addition to the responsibilities described in AU sec. 722, the auditor should modify his or her report on the audit of internal control over financial reporting to include an explanatory paragraph describing the reasons the auditor believes management's disclosures should be modified.

Filings Under Federal Securities Statutes

C16. AU sec. 711, *Filings Under Federal Securities Statutes,* describes the auditor's responsibilities when an auditor's report is included in registration statements, proxy statements, or periodic reports filed under the federal securities statutes. The auditor should apply AU sec. 711 with respect to the auditor's report on internal control over financial reporting included in such filings. In addition, the auditor should extend the direction in AU sec. 711.10 to inquire of and obtain written representations from officers and other executives responsible for financial and accounting matters about whether any events have occurred that have a material effect on the audited financial statements to matters that could have a material effect on internal control over financial reporting.

C17. When the auditor has fulfilled these responsibilities and intends to consent to the inclusion of his or her report on internal control over financial reporting in the securities filing, the auditor's consent should clearly indicate that both the audit report on financial statements and the audit report on internal control over financial reporting (or both opinions if a combined report is issued) are included in his or her consent.

Rule 3525: Audit Committee Pre-Approval of Non-Audit Services Related to Internal Control Over Financial Reporting

In connection with seeking audit committee pre-approval to perform for an audit client any permissible non-audit service related to internal control over financial reporting, a registered public accounting firm shall—

(a) Describe, in writing, to the audit committee of the issuer the scope of the service;

(b) Discuss with the audit committee of the issuer the potential effects of the service on the independence of the firm; and

Note: Independence requirements provide that an auditor is not independent of his or her audit client if the auditor is not, or a reasonable investor with knowledge of all relevant facts and circumstances would conclude that the auditor is not, capable of exercising objective and impartial judgment on all issues encompassed within the accountant's engagement. Several principles guide the application of this general standard, including whether the auditor assumes a management role or audits his or her own work. Therefore, an auditor would not be independent if, for example, management had delegated its responsibility for internal control over financial reporting to the auditor or if the auditor had designed or implemented the audit client's internal control over financial reporting.

(c) Document the substance of its discussion with the audit committee of the issuer.

Conforming Amendments to PCAOB Auditing Standards

AU sec. 230, ''Due Professional Care in the Performance of Work''

Statement on Auditing Standards (''SAS'') No. 1, ''Codification of Auditing Standards and Procedures,'' section 230, ''Due Professional Care in the Performance of Work'' (AU sec. 230, ''Due Professional Care in the Performance of Work''), as amended, is amended as follows—

a. Paragraph .10 is replaced with—

The exercise of due professional care allows the auditor to obtain *reasonable assurance* about whether the financial statements are free of material misstatement, whether caused by error or fraud, or whether any material weaknesses exist as of the date of management's assessment. Absolute assurance is not attainable because of the nature of audit evidence and the characteristics of fraud. Although not absolute assurance, reasonable assurance is a high level of assurance. Therefore, an audit conducted in accordance with the standards of the Public Company Accounting Oversight Board (United States) may not detect a material weakness in internal control over

[1] *See* paragraph B15, for further discussion of the evaluation of the controls over financial reporting for an equity method investment.

[2] *See* 15 U.S.C. 78j–1.

[3] *See* 17 CFR 240.13a–14(a) and 240.15d–14(a).

financial reporting or a material misstatement to the financial statements.

b. The term ''financial statements'' within the first sentence of paragraph .13 is replaced with the term ''financial statements or internal control over financial reporting.''

c. The second sentence of paragraph .13 is replaced with—

Therefore, the subsequent discovery that either a material misstatement, whether from error or fraud, exists in the financial statements or a material weakness in internal control over financial reporting exists does not, in and of itself, evidence (a) Failure to obtain reasonable assurance, (b) inadequate planning, performance, or judgment, (c) the absence of due professional care, or (d) a failure to comply with the standards of the Public Company Accounting Oversight Board (United States).

AU sec. 310, ''Appointment of the Independent Auditor''

SAS No. 1, ''Codification of Auditing Standards and Procedures,'' section 310, ''Appointment of the Independent Auditor'' (AU sec. 310, ''Appointment of the Independent Auditor''), as amended, is amended as follows—

a. The third bullet point of paragraph .06 is replaced with—

Management is responsible for establishing and maintaining effective internal control over financial reporting. If, in an integrated audit of financial statements and internal control over financial reporting, the auditor concludes that he or she cannot express an opinion on internal control over financial reporting because there has been a limitation on the scope of the audit, he or she should communicate, in writing, to management and the audit committee that the audit of internal control over financial reporting cannot be satisfactorily completed.

b. The eighth bullet point of paragraph .06 is amended as follows—

Under *Integrated audit of financial statements and internal control over financial reporting*, the last sub-bullet point is replaced with the following—

To the board of directors—any conclusion that the audit committee's oversight of the company's external financial reporting and internal control over financial reporting is ineffective.

Under *Audit of financial statements*, the last sub-bullet is replaced with the following—

To the board of directors—if the auditor becomes aware that the oversight of the company's external financial reporting and internal control over financial reporting by the audit committee is ineffective, that conclusion.

AU sec. 311, ''Planning and Supervision''

SAS No. 22, ''Planning and Supervision'' (AU sec. 311, ''Planning and Supervision''), as amended, is amended as follows—

Within the note to paragraph 1, the reference to paragraph 39 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraph 9 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

AU sec. 312, ''Audit Risk and Materiality in Conducting an Audit''

SAS No. 47, ''Audit Risk and Materiality in Conducting an Audit'' (AU sec. 312, ''Audit Risk and Materiality in Conducting an Audit''), as amended, is amended as follows—

a. Within the note to paragraph 3, the reference to paragraphs 22–23 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraph 20 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

b. Within the note to paragraph 7, the reference to paragraphs 24–26 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs 14–15 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

c. The note to paragraph 12 is replaced with—

Note: When performing an integrated audit of financial statements and internal control over financial reporting, refer to paragraphs 9 and 20 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*, regarding planning considerations and materiality, respectively.

d. Within the note to paragraph 18, the reference to Appendix B, *Additional Performance Requirements and Directions; Extent-of-Testing Examples* of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs B10–B16 of Appendix B, *Special Topics*, of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

e. Within the note to paragraph 30, the reference to paragraphs 147–149 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs 6–8 and paragraphs B1–B5 of Appendix B, *Special Topics*, of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

AU sec. 313, ''Substantive Tests Prior to the Balance-Sheet Date''

SAS No. 45, ''Omnibus Statement on Auditing Standards—1983'' (AU sec. 313, ''Substantive Tests Prior to the Balance-Sheet Date''), is amended as follows—

Within the note to paragraph 1, the reference to paragraphs 98–103 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs 52–53 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

AU sec. 315, ''Communications Between Predecessor and Successor Auditors''

SAS No. 84, ''Communications Between Predecessor and Successor Auditors'' (AU sec. 315, ''Communications Between Predecessor and Successor Auditors''), as amended, is amended as follows—

The last sentence of paragraph 16 is replaced with—

Furthermore, the predecessor auditor is not a specialist as defined in AU sec. 336, *Using the Work of a Specialist*, nor does the predecessor auditor's work constitute the work of others as described in AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements*, or paragraphs 16–19 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

AU sec. 316, ''Consideration of Fraud in a Financial Statement Audit''

SAS No. 99, ''Consideration of Fraud in a Financial Statement Audit'' (AU sec. 316, ''Consideration of Fraud in a Financial Statement Audit''), is amended as follows—

Within the note to paragraph 1, the reference to paragraphs 24–26 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs 14–15 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

AU sec. 319, ''Consideration of Internal Control in a Financial Statement Audit''

SAS No. 55, ''Consideration of Internal Control in a Financial Statement Audit'' (AU sec. 319, ''Consideration of Internal Control in a Financial Statement Audit''), as amended, is amended as follows—

a. The note to paragraph 2 is replaced with—

Note: Refer to paragraph A9 of Appendix A, *Definitions*, of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements* for the definition of a relevant assertion and paragraphs 28–33 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements* for discussion of identifying relevant assertions.

b. Within the note to paragraph 9, the reference to Appendix B, *Additional Performance Requirements and Directions; Extent of Testing Examples*, of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs B10–B16 of Appendix B, *Special Topics*, of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

c. The last sentence of paragraph 33 is deleted.

d. The note to paragraph 65 is deleted.

e. The note to paragraph 83 is deleted.

f. Within the note to paragraph 97, the reference to paragraphs 104–105 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraph 54 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

g. The appendix at paragraph 110 is deleted.

AU sec. 322, ''The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements''

SAS No. 65, ''The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements'' (AU sec. 322, ''The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements''), is amended as follows—

a. Within the note to paragraph 1, the reference to paragraphs 108–126 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs 16–19 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

b. The note to paragraph 20 is deleted.

c. Within the note to paragraph 22, the reference to paragraph 122 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs 18–19 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

AU sec. 324, ''Service Organizations''

SAS No. 70, ''Service Organizations'' (AU sec. 324, ''Service Organizations''), as amended, is amended as follows—

Within the note to paragraph 1, the reference to Appendix B, *Additional Performance Requirements and Directions; Extent-of-Testing Examples*, of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs B17–B27 of Appendix B, *Special Topics*, of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

AU sec. 325, ''Communications About Control Deficiencies in an Audit of Financial Statements'' [4]

AU sec. 325, ''Communications About Control Deficiencies in an Audit of Financial Statements'' is amended as follows—

a. The first bullet point before paragraph 1 is amended as follows—

The reference to paragraphs 207–214 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs 78–84 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

b. The first bullet point in paragraph 1 is replaced with—

A deficiency in design exists when (a) A control necessary to meet the control objective is missing or (b) an existing control is not properly designed so that, even if the control operates as designed, the control objective would not be met.

c. Paragraph 2 is replaced with—

A significant deficiency is a deficiency, or a combination of deficiencies, in internal control over financial reporting, that is less severe than a material weakness yet important enough to merit attention by those responsible for oversight of the company's financial reporting.

d. The notes to paragraph 2 are deleted.

e. Paragraph 3 is replaced with—

A material weakness is a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis.

Note: There is a reasonable possibility of an event when the likelihood of the event is either ''reasonably possible'' or ''probable,'' as those terms are used in paragraph 3 of Financial Accounting Standards Board Statement No. 5, *Accounting for Contingencies*.

Note: In evaluating whether a deficiency exists and whether deficiencies, either individually or in combination with other deficiencies, are material weaknesses, the auditor should follow the direction in paragraphs 62–70 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

f. Paragraph 5 is replaced with—

If oversight of the company's external financial reporting and internal control over financial reporting by the company's audit committee is ineffective, that circumstance should be regarded as an indicator that a material weakness in internal control over financial reporting exists. Although there is not an explicit requirement to evaluate the effectiveness of the audit committee's oversight in an audit of only the financial statements, if the auditor becomes aware that the oversight of the company's external financial reporting and internal control over financial reporting by the company's audit committee is ineffective, the auditor must communicate that information in writing to the board of directors.

g. The last sentence of paragraph 9 is replaced with—

In an audit of financial statements only, auditing interpretation 1 to AU sec. 325, ''Reporting on the Existence of Material Weaknesses,'' continues to apply except that the term ''reportable condition'' means ''significant deficiency'' as defined in paragraph 2 of this standard.

AU sec. 9325, ''Communication of Internal Control Related Matters Noted in an Audit: Auditing Interpretations of Section 325''

AU sec. 9325, ''Communication of Internal Control Related Matters Noted in an Audit: Auditing Interpretations of Section 325'' is amended as follows—

The note prior to paragraph 1 is replaced with—

Note: In an audit of financial statements only, auditing interpretation 1 to AU sec. 325, ''Reporting on the Existence of Material Weaknesses,'' continues to apply except that the term ''reportable condition'' means ''significant deficiency'' as defined in paragraph 2 of this standard. Within the example report within paragraph 4 of the interpretation, the third sentence is replaced with the definition of a material weakness in paragraph A7 of Appendix A, *Definitions*, of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

AU sec. 328, ''Auditing Fair Value Measurements and Disclosures''

SAS No. 101, ''Auditing Fair Value Measurements and Disclosures'' (AU sec. 328, ''Auditing Fair Value Measurements and Disclosures''), is amended as follows—

The first sentence of paragraph 41 is replaced with—

Events and transactions that occur after the balance-sheet date but before the date of the auditor's report (for example, a sale of an investment shortly after the balance-sheet date), may provide audit evidence regarding management's fair value measurements as of the balance-sheet date [7]

[7] The auditor's consideration of a subsequent event or transaction, as contemplated in this paragraph, is a substantive test and thus differs from the review of subsequent events performed pursuant to section 560, *Subsequent Events*.

AU sec. 332, ''Auditing Derivative Instruments, Hedging Activities, and Investments in Securities''

SAS No. 92, ''Auditing Derivative Instruments, Hedging Activities, and Investments in Securities'' (AU sec. 332, ''Auditing Derivative Instruments, Hedging Activities, and Investments in Securities''), is amended as follows—

The note to paragraph 11 is replaced with—

Note: When performing an integrated audit of financial statements and internal control over financial reporting, paragraph 39 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*, states ''[t]he auditor should test those controls that are important to the auditor's conclusion about whether the company's controls sufficiently address the assessed risk of misstatement to each relevant assertion.'' Therefore, in an integrated audit of financial statements and internal control over financial reporting, if there are relevant assertions related to the company's investment in derivatives and securities, the auditor's understanding of controls should include controls over derivatives and securities transactions from their initiation to their inclusion in the financial statements and should encompass controls placed in operation by the entity and service organizations whose services are part of the entity's information system.

[4] When the Board adopted Auditing Standard No. 2, it superseded SAS No. 60 in the context of an integrated audit of financial statements and internal control over financial reporting by paragraphs 207–214 of Auditing Standard No. 2. *See* PCAOB Release No. 2004–008, *Conforming Amendments to PCAOB Interim Standards Resulting From the Adoption of PCAOB Auditing Standard No. 2, ''An Audit of Internal Control Over Financial Reporting Performed in Conjunction with An Audit of Financial Statements''* (Sept. 15, 2004). As a result of superseding Auditing Standard No. 2, paragraphs 78–84 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*, now supersede SAS No. 60 in the context of an integrated audit.

AU sec. 333, ''Management Representations''

SAS No. 85, ''Management Representations'' (AU sec. 333, ''Management Representations''), as amended, is amended as follows—

a. Within the note to paragraph 5, the reference to paragraphs 142–144 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs 75–77 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

b. The second sentence of paragraph 9 is replaced with—

Because the auditor is concerned with events occurring through the date of his or her report that may require adjustment to or disclosure in the financial statements, the representations should be made as of the date of the auditor's report.

AU sec. 9337, ''Inquiry of a Client's Lawyer Concerning Litigation, Claims, and Assessments: Auditing Interpretations of Section 337''

AU sec. 9337, ''Inquiry of a Client's Lawyer Concerning Litigation, Claims, and Assessments: Auditing Interpretations of Section 337'' is amended as follows—

a. The last sentence of paragraph 4 is replaced with—

What is the relationship between the effective date of the lawyer's response and the date of the auditor's report?

b. Paragraph 5 is replaced with—

Interpretation—Section 560.10 through .12 indicates that the auditor is concerned with events, which may require adjustment to, or disclosure in, the financial statements, occurring through the date of his or her report. Therefore, the latest date of the period covered by the lawyer's response (the ''effective date'') should be as close to the date of the auditor's report as is practicable in the circumstances. Consequently, specifying the effective date of the lawyer's response to reasonably approximate the expected date of the auditor's report will in most instances obviate the need for an updated response from the lawyer.

AU sec. 341, ''The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern''

SAS No. 59, ''The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern'' (AU sec. 341, ''The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern''), as amended, is amended as follows—

The second sentence of paragraph 2 is replaced with—

The auditor's evaluation is based on his or her knowledge of relevant conditions and events that exist at or have occurred prior to the date of the auditor's report.

AU sec. 342, ''Auditing Accounting Estimates''

SAS No. 57, ''Auditing Accounting Estimates'' (AU sec. 342, ''Auditing Accounting Estimates''), is amended as follows—

a. Subparagraph c. of paragraph 10 is replaced with—

c. Review subsequent events or transactions occurring prior to the date of the auditor's report.

b. Paragraph 13 is replaced with—

Review subsequent events or transactions. Events or transactions sometimes occur subsequent to the date of the balance sheet, but prior to the date of the auditor's report, that are important in identifying and evaluating the reasonableness of accounting estimates or key factors or assumptions used in the preparation of the estimate. In such circumstances, an evaluation of the estimate or of a key factor or assumption may be minimized or unnecessary as the event or transaction can be used by the auditor in evaluating their reasonableness.

AU sec. 380, ''Communication With Audit Committees''

SAS No. 61, ''Communication With Audit Committees'' (AU sec. 380, ''Communication With Audit Committees''), as amended, is amended as follows—

Within footnote 1 to paragraph 1, the reference to PCAOB Auditing Standard No. 2 is replaced with a reference to PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

AU sec. 508, ''Reports on Audited Financial Statements''

SAS No. 58, ''Reports on Audited Financial Statements'' (AU sec. 508, ''Reports on Audited Financial Statements''), as amended, is amended as follows—

Within the note to paragraph 1, the reference to paragraphs 162–199 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs 85–98 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements* and Appendix C, *Special Reporting Situations*, of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*. The sentence that reads ''In addition, *see* Appendix A, *Illustrative Reports on Internal Control Over Financial Reporting*, of PCAOB Auditing Standard No. 2, which includes an illustrative combined audit report and examples of separate reports,'' is replaced with, ''In addition, *see* paragraphs 86–88 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements* which includes an illustrative combined audit report.''

AU sec. 530, ''Dating of the Independent Auditor's Report''

SAS No. 1, ''Codification of Auditing Standards and Procedures,'' section 530, ''Dating of the Independent Auditor's Report'' (AU sec. 530, ''Dating of the Independent Auditor's Report''), as amended, is amended as follows—

a. Paragraph .01 is replaced with—

The auditor should date the audit report no earlier than the date on which the auditor has obtained sufficient competent evidence to support the auditor's opinion. Paragraph .05 describes the procedure to be followed when a subsequent event occurring after the report date is disclosed in the financial statements.

Note: When performing an integrated audit of financial statements and internal control over financial reporting, the auditor's reports on the company's financial statements and on internal control over financial reporting should be dated the same date.

Note: If the auditor concludes that a scope limitation will prevent the auditor from obtaining the reasonable assurance necessary to express an opinion on the financial statements, then the auditor's report date is the date that the auditor has obtained sufficient competent evidence to support the representations in the auditor's report.

b. Paragraph .05 is replaced with—

The independent auditor has two methods for dating the report when a subsequent event disclosed in the financial statements occurs after the auditor has obtained sufficient competent evidence on which to base his or her opinion, but before the issuance of the related financial statements. The auditor may use ''dual dating,'' for example, ''February 16, 20____, except for Note ____, as to which the date is March 1, 20____,'' or may date the report as of the later date. In the former instance, the responsibility for events occurring subsequent to the original report date is limited to the specific event referred to in the note (or otherwise disclosed). In the latter instance, the independent auditor's responsibility for subsequent events extends to the later report date and, accordingly, the procedures outlined in section 560.12 generally should be extended to that date.

c. Within the heading before paragraph .03, the reference to ''completion of field work'' is replaced with ''the date of the independent auditor's report.''

AU sec. 543, ''Part of Audit Performed by Other Independent Auditors''

SAS No. 1, ''Codification of Auditing Standards and Procedures,'' section 543, ''Part of Audit Performed by Other Independent Auditors'' (AU sec. 543, ''Part of Audit Performed by Other Independent Auditors''), as amended, is amended as follows—

Within the note to paragraph .01, the reference to paragraphs 182–185 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs C8–C11 of Appendix C, *Special Reporting Situations*, of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

AU sec. 560, ''Subsequent Events''

SAS No. 1, ''Codification of Auditing Standards and Procedures,'' section 560, ''Subsequent Events'' (AU sec. 560, ''Subsequent Events''), as amended, is amended as follows—

a. Within the note to paragraph .01, the reference to paragraphs 186–189 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs 93–97 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

b. The second sentence of paragraph .12 is replaced with—

These procedures should be performed at or near the date of the auditor's report.

AU sec. 561, ''Subsequent Discovery of Facts Existing at the Date of the Auditor's Report''

SAS No. 1, ''Codification of Auditing Standards and Procedures,'' section 561, ''Subsequent Discovery of Facts Existing at the Date of the Auditor's Report'' (AU sec. 561, ''Subsequent Discovery of Facts Existing at the Date of the Auditor's Report''), as amended, is amended as follows—

Within the note to paragraph .01, the reference to paragraph 197 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraph 98 of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

AU sec. 711, ''Filings Under Federal Securities Statutes''

SAS No. 37, ''Filings Under Federal Securities Statutes'' (AU sec. 711, ''Filings Under Federal Securities Statutes''), is amended as follows—

a. Within the note to paragraph 2, the reference to paragraphs 198–199 of PCAOB Auditing Standard No. 2 is replaced with a reference to paragraphs C16–C17 of Appendix C, *Special Reporting Situations*, of PCAOB Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

b. The third sentence of paragraph 10 is replaced with—

The likelihood that the auditor will discover subsequent events necessarily decreases following the date of the auditor's report, and, as a practical matter, after that time the independent auditor may rely, for the most part, on inquiries of responsible officials and employees.

AU sec. 722, ''Interim Financial Information''

SAS No. 100, ''Interim Financial Information'' (AU sec. 722, ''Interim Financial Information''), is amended as follows—

a. The following is inserted after the first sentence of paragraph 3—

The SEC also requires management, with the participation of the principal executive and financial officers (the certifying officers) to make certain quarterly and annual certifications with respect to the company's internal control over financial reporting.[2]

[2] *See* Section 302 of the Sarbanes-Oxley Act of 2002, and Securities Exchange Act Rule 13a–14(a) or 15d–14(a), (17 CFR 240.13a–14a or 17 CFR 240.15d–14a), whichever applies.

b. The note to paragraph 3 is deleted.

c. The following is added to the end of paragraph 7—

Likewise, the auditor's responsibility as it relates to management's quarterly certifications on internal control over financial reporting is different from the auditor's responsibility as it relates to management's annual assessment of internal control over financial reporting. The auditor should perform limited procedures quarterly to provide a basis for determining whether he or she has become aware of any material modifications that, in the auditor's judgment, should be made to the disclosures about changes in internal control over financial reporting in order for the certifications to be accurate and to comply with the requirements of Section 302 of the Act.

Note: The auditor's responsibilities for evaluating management's certification disclosures about internal control over financial reporting take effect beginning with the first quarter after the company's first annual assessment of internal control over financial reporting as described in Item 308(a)(3) of Regulations S–B and S–K.

d. The following lettered section is added to the end of paragraph 18—

g. Evaluating management's quarterly certifications about internal control over financial reporting by performing the following procedures—

- Inquiring of management about significant changes in the design or operation of internal control over financial reporting as it relates to the preparation of annual as well as interim financial information that could have occurred subsequent to the preceding annual audit or prior review of interim financial information;
- Evaluating the implications of misstatements identified by the auditor as part of the auditor's other interim review procedures as they relate to effective internal control over financial reporting; and
- Determining, through a combination of observation and inquiry, whether any change in internal control over financial reporting has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting.

e. Paragraph 29 is replaced with—

As a result of conducting a review of interim financial information, the accountant may become aware of matters that cause him or her to believe that—

a. Material modification should be made to the interim financial information for it to conform with generally accepted accounting principles;

b. Modification to the disclosures about changes in internal control over financial reporting is necessary for the certifications to be accurate and to comply with the requirements of Section 302 of the Act and Securities Exchange Act Rule 13a–14(a) or 15d–14(a), whichever applies; and

c. The entity filed the Form 10-Q or Form 10-QSB before the completion of the review.

In such circumstances, the accountant should communicate the matter(s) to the appropriate level of management as soon as practicable.

f. Paragraph 32 is replaced with—

If the auditor becomes aware of information indicating that fraud or an illegal act has or may have occurred, the auditor must also determine his or her responsibilities under AU sec. 316, *Consideration of Fraud in a Financial Statement Audit*, AU sec. 317, *Illegal Acts by Clients*, and Section 10A of the Securities Exchange Act of 1934.[1]

[1] *See* 15 U.S.C. 78j–1

g. Within paragraph 33, the third sentence is replaced with—

A significant deficiency is a deficiency, or a combination of deficiencies, in internal control over financial reporting, that is less severe than a material weakness yet important enough to merit attention by those responsible for oversight of the company's financial reporting.

Auditing Standard No. 3, Audit Documentation

Auditing Standard No. 3, *Audit Documentation* is amended as follows—

Within footnote 2 to paragraph 6, the reference to paragraphs 68–70 of Auditing Standard No. 2 is replaced with a reference to paragraphs 28–33 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

Auditing Standard No. 4, Reporting on Whether a Previously Reported Material Weakness Continues to Exist

Auditing Standard No. 4, *Reporting on Whether a Previously Reported Material Weakness Continues to Exist* is amended as follows—

a. Within note 1 to paragraph 1, the reference to Auditing Standard No. 2 is replaced with a reference to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

b. Within paragraph 2, the two references to Auditing Standard No. 2 are replaced with references to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

c. Within the note to paragraph 2, the reference to Auditing Standard No. 2 is replaced with a reference to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

d. Within paragraph 4, the reference to Auditing Standard No. 2 is replaced with a reference to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*.

e. Paragraph 9 is replaced with—

The terms *internal control over financial reporting, deficiency, significant deficiency,* and *material weakness* have the same meanings as the definitions of those terms in Appendix A, *Definitions,* of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

f. The first sentence of paragraph 10 is replaced with—

Paragraph 5 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* states ''[t]he auditor should use the same suitable, recognized control framework to perform his or her audit of internal control over financial reporting as management uses for its annual evaluation of the effectiveness of the company's internal control over financial reporting.''

g. Within the note to paragraph 10, the reference to Auditing Standard No. 2 in the first sentence is replaced with a reference to Auditing Standard No. 5, *An Audit of*

Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements, and the last sentence is amended as follows—

More information about the COSO framework is included within the COSO report.

h. Paragraph 11 is replaced with—

The terms *relevant assertion* and *control objective* have the same meaning as the definitions of those terms in Appendix A, *Definitions,* of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

i. Paragraph 13 is replaced with—

In an audit of internal control over financial reporting, the auditor should test the design effectiveness of controls by determining whether the company's controls, if they are operated as prescribed by persons possessing the necessary authority and competence to perform the control effectively, satisfy the company's control objectives and can effectively prevent or detect errors or fraud that could result in material misstatements in the financial statements.[2]

[2] *See* paragraph 42 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

j. Within the note to paragraph 17, the reference to Auditing Standard No. 2 is replaced with a reference to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

k. Within note 2 to paragraph 18, the reference to Auditing Standard No. 2 is replaced with a reference to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

l. Within paragraph 21, the last sentence is deleted.

m. Within paragraph 23, the reference to paragraphs 22 and 23 of Auditing Standard No. 2 is replaced with a reference to paragraph 20 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.* Additionally, the second sentence is deleted.

n. Within paragraph 24, the reference to paragraph 39 of Auditing Standard No. 2 is replaced with a reference to paragraph 9 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

o. Within paragraph 25, the reference to Auditing Standard No. 2 is replaced with a reference to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

p. Within the note to paragraph 25, the two references to Auditing Standard No. 2 are replaced with references to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

q. Within subparagraph a. of paragraph 26, the reference to paragraphs 47 through 51 of Auditing Standard No. 2 is replaced with a reference to paragraphs 22–27 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

r. Subparagraph b. of paragraph 26 is replaced with—

Perform the procedures described in paragraphs 34–38 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* for those transactions that are directly affected by controls specifically identified by management as addressing the material weakness.

s. The note to subparagraph b. of paragraph 26 is deleted.

t. Within paragraph 27, the reference to Auditing Standard No. 2 is replaced with a reference to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

u. The note to paragraph 28 is deleted.

v. Within paragraph 31, the reference to paragraphs 88 through 91 of Auditing Standard No. 2 is replaced with a reference to paragraphs 42–43 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

w. Paragraph 32 is replaced with—

Consistent with the direction in paragraphs 44–45 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* the auditor should test the operating effectiveness of a specified control by determining whether the specified control operated as designed and whether the person performing the control possesses the necessary authority and qualifications to perform the control effectively. In determining the nature, timing, and extent of tests of controls, the auditor should apply paragraphs 50–54 of Auditing Standard No. 5.

x. Paragraph 33 is replaced with—

The auditor should perform tests of the specified controls over a period of time that is adequate to determine whether, as of the date specified in management's assertion, the controls necessary for achieving the stated control objective are operating effectively. The timing of the auditor's tests should vary with the risk associated with the control being tested. For example, a transaction-based, daily reconciliation generally would permit the auditor to obtain sufficient evidence as to its operating effectiveness in a shorter period of time than a pervasive, entity-level control, such as any of those described in paragraphs 22–24 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.* Additionally, the auditor typically will be able to obtain sufficient evidence as to the operating effectiveness of controls over the company's period-end financial reporting process only by testing those controls in connection with a period-end.

y. Within paragraph 35, the reference to paragraphs B1 through B13 of Appendix B of Auditing Standard No. 2 is replaced with a reference to paragraphs B10–B16 of Appendix B, *Special Topics,* of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

z. Within paragraph 36, the reference to paragraphs 109 through 115 and 117 through 125 of Auditing Standard No. 2 is replaced with a reference to paragraphs 16–19 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

aa. The second sentence of paragraph 37 is replaced with—

Therefore, if the auditor has been engaged to report on more than one material weakness or on more than one stated control objective, the auditor must evaluate whether he or she has obtained sufficient evidence that the control objectives related to each of the material weaknesses identified in management's assertion are achieved.

bb. The first two sentences of paragraph 38 are replaced with—

Paragraphs 18–19 of Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* should be applied in the context of the engagement to report on whether a previously reported material weakness continues to exist.

cc. The note to paragraph 38 is deleted.

dd. The note to paragraph 39 is deleted.

ee. Paragraph 42 is replaced with—

Management may conclude that a previously reported material weakness no longer exists because its severity has been sufficiently reduced such that it is no longer a material weakness.

ff. Subparagraph f. of paragraph 44 is replaced with—

Describing any fraud resulting in a material misstatement to the company's financial statements and any other fraud that does not result in a misstatement in the company's financial statements but involves senior management or management or other employees who have a significant role in the company's internal control over financial reporting and that has occurred or come to management's attention since the date of management's most recent annual assessment of internal control over financial reporting.

gg. Within the note to subparagraph b. of paragraph 51, the reference to Auditing Standard No. 2 is replaced with a reference to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

hh. Within the note to subparagraph l. of paragraph 51, the reference to Auditing Standard No. 2 is replaced with a reference to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

ii. Within the note to the second bullet point of subparagraph o. of paragraph 51, the reference to Auditing Standard No. 2 is replaced with a reference to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

jj. Within paragraph 52, the reference to Auditing Standard No. 2 is replaced with a

reference to Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements.*

kk. Within paragraph 63, the reference to paragraphs 202 through 206 of Auditing Standard No. 2 is replaced with a reference to paragraphs 7 and 29–32 of AU sec. 722, *Interim Financial Information.*

ll. Within paragraph 64, the reference to paragraphs 202 through 206 of Auditing Standard No. 2 is replaced with a reference to paragraphs 7 and 29–32 of AU sec. 722, *Interim Financial Information.*

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rule and discussed any comments it received on the proposed rule. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

(a) Purpose

In 2002, Congress passed the Act, which, among other things, established new provisions related to internal control over financial reporting. Section 404 of the Act requires company management to assess and report on the effectiveness of the company's internal control. It also requires a company's independent auditor, registered with the Board, to attest to management's disclosures regarding the effectiveness of its internal control. As directed by Sections 103 and 404 of the Act, the Board established a standard to govern the newly required audit by adopting Auditing Standard No. 2, *An Audit of Internal Control Over Financial Reporting Performed in Conjunction with an Audit of Financial Statements* (''Auditing Standard No. 2''). The SEC approved Auditing Standard No. 2 on June 17, 2004.

Since Auditing Standard No. 2 became effective, the Board has closely monitored the progress registered firms have made in implementing its requirements. The PCAOB's monitoring has included gathering information during inspections of registered public accounting firms; participating, along with the SEC, in two roundtable discussions with representatives of issuers, auditors, investor groups, and others; meeting with its Standing Advisory Group; receiving feedback from participants in the Board's Forums on Auditing in the Small Business Environment; and reviewing academic, government, and other reports and studies.

As a result of this monitoring, two basic propositions emerged. First, the audit of internal control over financial reporting has produced significant benefits, including an enhanced focus on corporate governance and controls and higher quality financial reporting. Second, these benefits have come at a significant cost. Costs have been greater than expected and, at times, the related effort has appeared greater than necessary to conduct an effective audit of internal control over financial reporting.

As part of a four-point plan to improve implementation of the internal control requirements, the Board determined to amend Auditing Standard No. 2. On December 19, 2006, the Board proposed for comment a new standard on auditing internal control, *An Audit of Internal Control Over Financial Reporting That Is Integrated with an Audit of Financial Statements,* that would replace Auditing Standard No. 2. After careful consideration of the comments it received and the input from the SEC, the Board has refined its proposals to provide additional clarity and further help auditors to focus on the most important matters. The Board adopted the revised standard on auditing internal control as Auditing Standard No. 5, to supersede Auditing Standard No. 2.

Under Section 10A(i) of the Exchange Act, as amended by Section 202 of the Act, all non-audit services that the auditor proposes to perform for an issuer client ''shall be pre-approved by the audit committee of the issuer.'' Rule 3525 would further implement the Act's pre-approval requirement by requiring auditors to take certain steps as part of seeking audit committee pre-approval of internal control related non-audit services. These steps are intended to ensure that audit committees are provided relevant information for them to make an informed decision on how the performance of internal control-related services may affect independence. Rule 3525 requires a registered public accounting firm that seeks pre-approval of an issuer audit client's audit committee to perform internal control-related non-audit services that are not otherwise prohibited by the Act or the rules of the SEC or the Board to: Describe, in writing, to the audit committee the scope of the proposed service; discuss with the audit committee the potential effects of the proposed service on the firm's independence; and document the substance of the firm's discussion with the audit committee.

The conforming amendments update the Board's other auditing standards in light of Auditing Standard No. 5, move information contained in Auditing Standard No. 2 to the Board's interim standards, and change the existing requirement that ''generally, the date of completion of the field work should be used as the date of the independent auditor's report'' to ''the auditor should date the audit report no earlier than the date on which the auditor has obtained sufficient competent evidence to support the auditor's opinion.'' This change is consistent with a recent change adopted by both the International Auditing and Assurance Standards Board and the AICPA Auditing Standards Board.

(b) Statutory Basis

The statutory basis for the proposed rule is Title I and II and Section 404 of the Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rule will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rules would apply equally to all registered public accounting firms and their associated persons. Moreover, Auditing Standard No. 5 explains how to tailor internal control audits to fit the size and complexity of the company being audited.

C. Board's Statement on Comments on the Proposed Rule Received From Members, Participants or Others

The Board released the proposed rules for public comment in Release No. 2006–007 (December 19, 2006). A copy of Release No. 2006–007 and the comment letters received in response to the PCAOB's request for comment are available on the PCAOB's Web site at *http://www.pcaobus.org.* The Board received 175 written comments. The Board also discussed the proposals with its Standing Advisory Group on February 22, 2007.[1] The Board has clarified and modified certain aspects of the proposed rules in response to the comments it received, as discussed below.

The Board issued these proposals with the primary objectives of focusing auditors on the most important matters in the audit of internal control over financial reporting and eliminating procedures that the Board believes are unnecessary to an effective audit of internal control. The proposals were designed to both increase the likelihood that material weaknesses in companies' internal control will be found before they cause material misstatement of the financial statements and steer the auditor away from procedures that are not necessary to achieve the intended benefits. The Board also sought to make the internal control audit more clearly scalable for smaller and less complex public companies and to make the text of the standard easier to understand. In formulating these proposals, the Board re-evaluated every significant aspect of Auditing Standard No. 2.

A large majority of commenters were generally supportive of the Board's proposals, particularly the top-down, risk-based approach and focus on the most important matters. Based on the comments received, the Board believes that the proposal achieves, in large part, the objectives the Board set out when deciding to amend Auditing Standard No. 2. Many commenters also offered suggestions to improve the final standard, which the Board has carefully analyzed.

In considering the comments received and formulating a final standard, the Board closely coordinated its work with the SEC, which proposed guidance for management on evaluating internal control at the same time that the Board issued its proposals.[2] In addition to its role in implementing Section 404(a) of the Act, the SEC must approve new PCAOB auditing standards before they can become effective.[3] On April 4, 2007, the Commission held a public meeting to discuss the Board's proposals and the coordination of those proposals with the Commission's

[1] A transcript of the portion of the meeting that related to the proposals and an archived web cast of the entire meeting are available on the Board's Web site at *http://www.pcaobus.org/Standards/Standing_Advisory_Group/Meetings/2007/02-22/SAG_Transcript.pdf.*

[2] *See* Securities Exchange Act Release No. 54976 (Dec. 20, 2006).

[3] *See* Section 107 of the Act.

proposed management guidance. At the meeting, the SEC staff provided the Commission its analysis of the public comments on the PCAOB's proposal and the proposed management guidance. The Commission endorsed the recommendations of its staff and directed its staff to focus its remaining work in four areas:

- ''Aligning the PCAOB's new auditing standard * * * with the SEC's proposed new management guidance under Section 404, particularly with regard to prescriptive requirements, definitions, and terms'';
- ''Scaling the 404 audit to account for the particular facts and circumstances of companies, particularly smaller companies'';
- ''Encouraging auditors to use professional judgment in the 404 process, particularly in using risk-assessment''; and
- ''Following a principles-based approach to determining when and to what extent the auditor can use the work of others.'' [4]

After careful consideration of the comments it received and the input from the SEC, the Board has refined its proposals to provide additional clarity and further help auditors to focus on the most important matters. The Board has decided to adopt the revised standard on auditing internal control as Auditing Standard No. 5, to supersede Auditing Standard No. 2. The Board has also decided to adopt the independence rule and conforming amendments to the auditing standards.[5]

Notable Areas of Change in the Final Standard

The Board believes that the changes made to the proposal reflect refinements, rather than significant shifts in approach. This section describes the areas of change to the proposals that are most notable. Additional discussion of comments received on the proposals and the Board's response is included below.

Alignment With Management Guidance

On December 20, 2006, the SEC issued proposed guidance to help management evaluate internal control for purposes of its annual assessment. In formulating a new standard on auditing internal control, the Board sought to describe an audit process that would be coordinated with management's evaluation process. Many commenters suggested, however, that the SEC's management guidance and the Board's standard should be more closely aligned.

After considering the comments in this area, the Board has decided to make changes that will improve the coordination between the SEC's management guidance and the Board's standard. In doing so, the Board has been mindful of the inherent differences in the roles of management and the auditor. Management's daily involvement with its internal control system provides it with knowledge and information that may influence its judgments about how best to evaluate internal control and the sufficiency of the evidence it needs for its annual assessment. Management also should be able to rely on self-assessment and, more generally, the monitoring component of internal control, provided the monitoring component is properly designed and operates effectively.

The auditor is required to provide an independent opinion on the effectiveness of the company's internal control over financial reporting. The auditor does not have the familiarity with the company's controls that management has and does not interact with or observe these controls with the same frequency as management. Therefore, the auditor cannot obtain sufficient evidence to support an opinion on the effectiveness of internal control based solely on observation of or interaction with the company's controls. Rather, the auditor needs to perform procedures such as inquiry, observation, and inspection of documents, or walkthroughs, which consist of a combination of those procedures, in order to fully understand and identify the likely sources of potential misstatements, while management might be aware of those risk areas on an on-going basis.

The Board believes, however, that the general concepts necessary to an understanding of internal control should be described in the same way in the Board's standard and in the SEC's guidance. Accordingly, the Board has decided to use the same definition of material weakness in its standard that the SEC uses in its final management guidance and related rules. In addition, the Board is adopting the definition of significant deficiencies that the SEC has proposed. The final standard and final management guidance also describe the same indicators of a material weakness. In addition, as described more fully below, the final standard on auditing internal control uses the term ''entity-level controls'' instead of ''company-level controls,'' which was used in the proposed standard, in order to use the same term as the SEC uses in its final management guidance.[6] Auditing Standard No. 5's discussion of the effect of these controls is also consistent with the discussion of the same topic in the SEC's final guidance.

The Top-Down Approach

The proposed standard on auditing internal control was structured around the top-down approach to identifying the most important controls to test. This approach follows the same principles that apply to the financial statement audit—the auditor determines the areas of focus through the identification of significant accounts and disclosures and relevant assertions. Under the proposed standard, the auditor would specifically identify major classes of transactions and significant processes before identifying the controls to test.

In response to comments about the level of detail in the requirements of the proposed standard, the Board has reconsidered whether the final standard should include the identification of major classes of transactions and significant processes as a specifically required step in the top-down approach. As a practical matter, the auditor will generally need to understand the company's processes to appropriately identify the correct controls to test. The Board believes, however, that specific requirements directing the auditor how to obtain that understanding are unnecessary and could contribute to a ''checklist approach'' to compliance, particularly for auditors who have a longstanding familiarity with the company. Accordingly, the Board has removed the requirements to identify major classes of transactions and significant processes from the final standard. While this should allow auditors to apply more professional judgment as they work through the top-down approach, the end point is the same as in the proposed standard—the requirement to test those controls that address the assessed risk of misstatement to each relevant assertion.[7]

Emphasis on Fraud Controls

The proposed standard on auditing internal control discussed fraud controls and the auditor's procedures related to these controls among the testing concepts included near the end of the standard. Commenters suggested that the placement of the discussion, or the lack of specificity regarding the controls that should be deemed fraud controls, failed to properly emphasize these controls or provide auditors with sufficient direction on how to test fraud controls. In response, the Board has made several changes in the final standard.

First, the discussion of fraud risk and anti-fraud controls has been moved closer to the beginning of the standard to emphasize to auditors the relative importance of these matters in assessing risk throughout the top-down approach.[8] Incorporating the auditor's fraud risk assessment—required in the financial statement audit—into the auditor's planning process for the audit of internal control should promote audit quality as well as better integration. While internal control cannot provide absolute assurance that fraud will be prevented or detected, these controls should help to reduce instances of fraud, and, therefore, a concerted focus on fraud controls in the internal control audit should enhance investor protection. Second, management fraud has also been identified in the final standard as an area of higher risk; accordingly, the auditor should focus more of his or her attention on this area.[9] Finally, the standard, as adopted, provides additional guidance on the types of controls that might address fraud risk.[10]

Entity-Level Controls

The proposed standard on auditing internal control emphasized entity-level controls because of their importance both to the auditor's ability to appropriately tailor the audit through a top-down approach—

[4] *See* SEC Press Release, ''SEC Commissioners Endorse Improved Sarbanes-Oxley Implementation To Ease Smaller Company Burdens, Focusing Effort On 'What Truly Matters' '' (Apr. 4, 2007).

[5] As discussed below, the Board has determined not to adopt the proposed auditing standard on considering and using the work of others.

[6] These terms were used interchangeably in the proposed standard and SEC's proposed management guidance and, for these purposes, they mean the same thing. *See* Securities Exchange Act Release No. 54976 (Dec. 20, 2006), at 12 fn. 29.

[7] *See* paragraph 21.

[8] *See* paragraphs 14 and 15.

[9] *See* paragraph 11.

[10] *See* paragraph 14.

specifically by identifying and testing the most important controls—and to effective internal control. Additionally, the proposed standard emphasized that these controls might, depending on the circumstances, allow the auditor to reduce the testing of controls at the process level. Commenters suggested that the proposed standard did not provide enough direction on how entity-level controls can significantly reduce testing, and some suggested that controls that operate at the level of precision necessary to do so are uncommon. Many commenters suggested incorporating in the final standard the discussion of direct versus indirect entity-level controls that was included in the SEC's proposed management guidance.

The Board continues to believe that entity-level controls, depending on how they are designed and operate, can reduce the testing of other controls related to a relevant assertion. This is either because the entity-level control sufficiently addresses the risk related to the relevant assertion, or because the entity-level controls provide some assurance so that the testing of other controls related to that assertion can be reduced. In response to comments and in order to clarify these concepts, the Board included in the final standard a discussion of three broad categories of entity-level controls, which vary in nature and precision, along with an explanation of how each category might have a different effect on the performance of tests of other controls.[11]

The final standard explains that some controls, such as certain control environment controls, have an important, but indirect effect, on the likelihood that a misstatement will be detected or prevented on a timely basis. These controls might affect the other controls the auditor selects for testing and the nature, timing, and extent of procedures the auditor performs on other controls.

The final standard explains that other entity-level controls may not operate at the level of precision necessary to eliminate the need for testing of other controls, but can reduce the required level of testing of other controls, sometimes substantially. This is because the auditor obtains some of the supporting evidence related to a control from an entity-level control and the remaining necessary evidence from the testing of the control at the process level. Controls that monitor the operation of other controls are the best example of these types of controls. These monitoring controls help provide assurance that the controls that address a particular risk are effective and, therefore, they can provide some evidence about the effectiveness of those lower-level controls, reducing the testing of those controls that otherwise would be necessary.

Lastly, the final standard explains that some entity-level controls might operate at a level of precision that, without the need for other controls, sufficiently addresses the risk of misstatement to a relevant assertion. If a control sufficiently addresses the risk in this manner, the auditor does not need to test other controls related to that risk.

Walkthroughs

The proposed standard on auditing internal control would have required auditors to perform a walkthrough of each significant process each year. This proposed requirement represented a change from Auditing Standard No. 2, which required a walkthrough of each major class of transactions within a significant process. Commenters were split on the question of whether the re-calibration from major class of transactions to significant process in the proposed standard would result in a reduction of effort. Some issuers and auditors suggested that walkthroughs are already being performed on significant processes, while other issuers and auditors commented that this proposed requirement would make a difference. A few commenters suggested that a walkthrough of each significant process was insufficient and would negatively affect audit quality, but many others stated that walkthroughs should not be required at all.

In evaluating these comments, the Board focused principally on the objectives it believes are achieved through a properly performed walkthrough. The Board firmly believes that those objectives should be met for the auditor to verify that he or she has a sufficient understanding of the points within the processes where misstatements could occur and to properly identify the controls to test.[12] Procedures that fulfill those objectives also play an important role in the evaluation of the effectiveness of the design of the controls. The Board believes that, in some instances, the requirement to perform a walkthrough may have overshadowed the objectives it was meant to achieve. This may have resulted in some walkthroughs being performed to meet the requirement but failing to achieve the intended purpose.

The final standard, therefore, focuses specifically on achieving certain important objectives, and the performance requirement is based on fulfilling those objectives as they relate to the understanding of likely sources of misstatement and the selection of controls to test.[13] While a walkthrough will frequently be the best way of attaining these goals, the auditor's focus should be on the objectives, not on the mechanics of the walkthrough. In some cases, other procedures may be equally or more effective means of achieving them.

Evaluation and Communication of Deficiencies

The proposed standard on auditing internal control required the auditor to evaluate the severity of identified control deficiencies to determine whether they are significant deficiencies or material weaknesses. It then required the auditor to communicate, in writing, to management and the audit committee all significant deficiencies and material weaknesses identified during the audit. The proposed standard defined ''significant deficiency'' as ''a control deficiency, or combination of control deficiencies, such that there is a reasonable possibility that a significant misstatement of the company's annual or interim financial statements will not be prevented or detected.'' The term ''significant misstatement'' was defined, in turn, to mean ''a misstatement that is less than material yet important enough to merit attention by those responsible for oversight of the company's financial reporting.''

Commenters generally supported the proposed definition of the term ''significant misstatement,'' though some were concerned that it was too subjective. Other commenters questioned whether the standard should include a definition of significant deficiency and a requirement to communicate significant deficiencies to the audit committee. At least one commenter suggested that the term be removed from the standard.

After considering these comments, the Board has determined to make changes to the definition of significant deficiency and related requirements.[14] The Board continues to believe that the standard should require auditors to provide relevant information about important control deficiencies—even those less severe than a material weakness—to management and to the audit committee. The final standard, therefore, requires the auditor to consider and communicate any identified significant deficiencies to the audit committee. In order to emphasize that the auditor need not scope the audit to identify all significant deficiencies, however, the Board placed these provisions in the section of the final standard that describes communications requirements.[15]

The relatively minor changes that the Board made to the definition of significant deficiency are also intended to focus the auditor on the communication requirement and away from scoping issues. The final definition is based on the proposed definition of ''significant misstatement,'' which commenters generally supported, and is aligned with the SEC's proposed definition of the same term. Under the final standard, a significant deficiency is ''a deficiency, or a

[11] *See* paragraph 23. The Board believes that expertise of auditors and companies in the area of entity-level controls will continue to evolve. For example, the Committee of Sponsoring Organizations of the Treadway Commission has begun a project on the monitoring component of internal control that may provide some guidance in this area.

[12] *See* paragraph 34, which describes these objectives.

[13] *See* paragraph 34.

[14] The Board also made minor changes to the definition of material weakness in order to use the same definition in the SEC's management guidance and related rule. In the final standard, material weakness is defined as ''a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis.''

[15] *See* paragraph 80. The final standard also includes the proposed requirement for the auditor to communicate, in writing, to management, all deficiencies in internal control identified during the audit and inform the audit committee when such a communication has been made, and the proposed requirement to inform, when applicable, the board of directors of the auditor's conclusion that the audit committee's oversight is ineffective. *See* paragraphs 79 and 81. Some commenters believed that the requirement to communicate all identified deficiencies to management would result in an unnecessary administrative exercise. The Board continues to believe, however, that auditors should provide information about identified control deficiencies to management.

combination of deficiencies, in internal control over financial reporting that is less severe than a material weakness yet important enough to merit attention by those responsible for oversight of the company's financial reporting.''

Scaling the Audit

The proposed standard on auditing internal control indicated that a company's size and complexity are important considerations and that the procedures an auditor should perform depend upon where along the size and complexity continuum a company falls. The proposed standard included a section on scaling the audit for smaller, less complex companies and would have required auditors to evaluate and document the effect of the company's size and complexity on the audit. This documentation requirement applied to audits of companies of all sizes. The proposed standard also included a list of the attributes of smaller, less complex companies and a description of how the auditor might tailor his or her procedures when these attributes are present. In general, commenters were supportive of the proposed standard's general approach to scalability, but had several recommendations for change.

Some commenters suggested that scalability should not be covered as a stand-alone discussion applicable only to smaller companies and that other companies, regardless of size, might have areas that are less complex. The Board agrees that the direction on scaling will be most effective if it is a natural extension of the risk-based approach and applicable to all companies. Consequently, the Board shortened the separate section on ''scaling the audit,'' and incorporated a discussion of scaling concepts, similar to what was proposed, throughout the final standard. Specifically, notes to relevant paragraphs describe how to tailor the audit to the particular circumstances of a smaller, less complex company or unit. The Board also retained the list of attributes of smaller, less complex companies and acknowledged that, even within larger companies, some business units or processes may be less complex than others. Discussion of these attributes has been incorporated in the section on the auditor's planning procedures in the final standard.[16] As described in the proposing release, the provisions on scalability in the final standard will form the basis for guidance on auditing internal control in smaller companies to be issued this year.

Several commenters, mostly auditors, suggested that the performance requirements that applied to all companies, including large, complex companies, would lead to unnecessary and costly documentation requirements. These commenters were particularly concerned about the requirement to document the effects of size and complexity on all aspects of the audit, even if a particular engagement could not be tailored as a result of these factors. After considering these comments, the Board agreed that this documentation requirement is not necessary to promote audit quality and, therefore, has not included it in the final standard.

Use of the Work of Others in an Integrated Audit

At the time the Board proposed Auditing Standard No. 5 for public comment, the Board also proposed an auditing standard entitled *Considering and Using the Work of Others in an Audit* that would have superseded the Board's interim standard AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements* (''AU sec. 322''), and replaced the direction on using the work of others in an audit of internal control in Auditing Standard No. 2. As discussed in the proposing release, the Board had several objectives in proposing this standard. The first was to better integrate the financial statement audit and the audit of internal control by having only one framework for using the work of others in both audits. Additionally, the Board wanted to encourage auditors to use the work of others to a greater extent when the work is performed by sufficiently competent and objective persons. Among other things, under the proposed standard, auditors would have been able to use the work of sufficiently competent and objective company personnel—not just internal auditors—and third parties working under the direction of management or the audit committee for purposes of the financial statement audit as well as the audit of internal control.

The Board received numerous comments on the proposed standard on using the work of others. Commenters generally indicated support for a single framework regarding the auditor's use of the work of others in an integrated audit. Some, however, suggested retaining existing AU sec. 322 as the basis for that single framework. They expressed the view that the objective of removing barriers to integration and using the work of others to the fullest extent appropriate could be achieved by retaining AU sec. 322 and going forward with the proposed removal of the ''principal evidence'' provision. At the same time, some other commenters suggested that the proposed standard did not go far enough in encouraging auditors to use the work of others.

After considering these comments, the Board continues to believe that a single framework for the auditor's use of the work of others is preferable to separate frameworks for the audit of internal control and the audit of financial statements. The factors used to determine whether and to what extent it is appropriate to use the work of others should be the same for both audits. At the same time, the Board agreed with those commenters who suggested that better integration of the audits could be achieved without replacing the existing auditing standard. The Board therefore has decided to retain AU sec. 322 for both audits and incorporate language into Auditing Standard No. 5 that establishes these integration concepts rather than adopt the proposed standard on considering and using the work of others.

Consistent with the proposal, however, Auditing Standard No. 5 allows the auditor to use the work of others to obtain evidence about the design and operating effectiveness of controls and eliminates the principal evidence provision. Recognizing that issuers might employ personnel other than internal auditors to perform activities relevant to management's assessment of internal control over financial reporting, the final standard allows the auditor to use the work of company personnel other than internal auditors, as well as third parties working under the direction of management or the audit committee.[17]

In line with the overall risk-based approach to the audit of internal control over financial reporting, the extent to which the auditor may use the work of others depends, in part, on the risk associated with the control being tested. As the risk decreases, so does the need for the auditor to perform the work him or herself. The impact of the work of others on the auditor's work also depends on the relationship between the risk and the competence and objectivity of those who performed the work. As the risk decreases, the necessary level of competence and objectivity decreases as well.[18] Likewise, in higher risk areas (for example, controls that address specific fraud risks), use of the work of others would be limited, if it could be used at all.

Finally, the Board understands that some of the work performed by others for the purposes of management's assessment of internal controls can be relevant to the audit of financial statements. Therefore, in an integrated audit, the final standard allows the auditor to use the work of these sufficiently competent and objective others—not just internal auditors—to obtain evidence supporting the auditor's assessment of control risk for purposes of the audit of financial statements.[19] The Board believes that this provision will promote better integration of the audit of internal control with the audit of financial statements.

Rule 3525—Audit Committee Pre-Approval of Non-Audit Services Related to Internal Control Over Financial Reporting

The Board also proposed a new rule related to the auditor's responsibilities when seeking audit committee pre-approval of internal control related non-audit services. As proposed, the rule required a registered public accounting firm that seeks pre-approval of an issuer audit client's audit committee to perform internal control-related non-audit services that are not otherwise prohibited by the Act or the rules of the SEC or the Board to: describe, in writing, to the audit committee the scope of the proposed service; discuss with the audit committee the potential effects of the proposed service on the firm's independence; and document the substance of the firm's discussion with the audit committee. These requirements parallel the auditor's responsibility in seeking audit committee pre-approval to perform tax services for an audit client under PCAOB Rule 3524. Most commenters were supportive of the rule as proposed, though some offered suggestions about what should

[16] *See* paragraph 9.

[17] *See* paragraph 17.

[18] *See* paragraph 18.

[19] *See* paragraph 17.

be included in the required communication. After considering the comments on the proposed rule, the Board has adopted it without change.

Conforming Amendments

As part of the proposal issued for public comment, the Board proposed amendments to certain of the Board's other auditing standards. Only one comment letter specifically addressed the proposed amendments. That letter expressed support for the amendments and suggested a few additional amendments that might be necessary. The Board has considered this comment and added these additional amendments, as well as others, as necessary based on the final standard.

Effective Date

The proposing release solicited commenters' feedback on how the Board could structure the effective date of the final requirements so as to best minimize disruption to ongoing audits, but make greater flexibility available to auditors as early as possible. Most commenters on this topic suggested making the final standard on auditing internal control effective as soon as possible in order to be available for 2007 audits.

The Board agrees that the improvements in Auditing Standard No. 5 should be available as soon as possible. Accordingly, the Board has determined that Auditing Standard No. 5, Rule 3525, and the conforming amendments will be effective, subject to approval by the SEC, for audits of fiscal years ending on or after November 15, 2007. Earlier adoption is permitted, however, at any point after SEC approval. Auditors who elect to comply with Auditing Standard No. 5 after SEC approval but before its effective date must also comply, at the same time, with Rule 3525 and other PCAOB standards as amended by this release.

Auditing Standard No. 2 will be superseded when Auditing Standard No. 5 becomes effective. Auditors who do not elect to comply with Auditing Standard No. 5 before that date (but after SEC approval) must continue to comply with Auditing Standard No. 2 until it is superseded. Such auditors should, however, apply the definition of ''material weakness'' contained in Auditing Standard No. 5, rather than the one contained in Auditing Standard No. 2. The SEC has adopted a rule to define the term ''material weakness,'' and the definition in Auditing Standard No. 5 parallels the new SEC definition.

Additional Discussion of Comments and the Board's Response Alignment of Board's Internal Control Auditing Standard and the SEC's Guidance to Management

Many commenters suggested that the SEC's guidance to management and the Board's auditing standard should be more closely aligned. The commenters appeared to hold different opinions, however, about what alignment should mean in this context. Some commenters suggested that the most important issue was the need to use the same definitions of important terms in both documents. Some focused on perceived differences in scope, testing, and documentation requirements, while others suggested that the tone of the two documents was different and that the Board's proposals were more prescriptive. A few commenters suggested that the standard on auditing internal control should merely refer to the SEC management guidance without providing additional direction to the auditor.

As discussed above, in formulating a new standard on auditing internal control, the Board intended to describe an audit process that would be coordinated with management's evaluation process. After considering the comments in this area, the Board made several changes, described above, that improve coordination while recognizing the inherent differences in the roles of management and the independent auditor under Section 404. The Board also adopted, as proposed, the final standard without a requirement for the auditor to perform an evaluation of management's assessment process. Commenters generally supported this aspect of the proposal, which was intended to respond to concerns that the requirements of Auditing Standard No. 2 had become de facto guidance for management's process. The absence of this requirement in the final standard should also allow for improved coordination between management and the auditor.

Level of Prescriptive Detail

Some commenters suggested that there remained too many instances of the use of the terms ''should'' and ''must'' in the proposed standard and that this might drive excessive documentation and possibly unnecessary work. The Board's Rule 3101 describes the level of responsibility that these imperatives impose on auditors when used in PCAOB standards, and the Board uses these terms in its standards to clearly convey its expectations. In response to these comments, the Board analyzed each requirement in the proposed standard to determine whether more reliance could be placed on general principles rather than detailed requirements. Where appropriate, the Board made modifications to make the final standard more principles-based. As discussed more fully above, areas in which changes were made include the focus on fulfilling the objectives of a walkthrough and in the description of the top-down approach. Some of these changes also contributed to better coordination with the SEC's guidance for management.

In addition, several commenters expressed concern over the creation of presumptively mandatory responsibilities related to efficiency concepts. The example cited most often was the note to paragraph 3 of the proposed standard on auditing internal control, which stated—

Note: The auditor should select for testing only those controls that are important to the auditor's conclusion about whether the company's controls sufficiently address the assessed risk of misstatement to a given relevant assertion that could result in a material misstatement to the company's financial statements.

Commenters suggested that because of this requirement for the auditor to select ''only those controls that are important'' for testing, an auditor would have violated the Board's standards if he or she tested even one control that was later shown to be not important. Commenters believed that this would undermine audit effectiveness and recommended removal of such statements.

One of the objectives of the revised standard is to encourage auditors to focus on those areas that present the greatest risk of allowing a material misstatement in the financial statements. However, the Board agrees that its standards should not define a ceiling or maximum amount of work which the auditor may not exceed. While this statement (and others like it) in the proposed standard was not intended to imply that the Board would, with hindsight, suggest that an auditor violated the standard through testing of a control that was later determined to be not important to the audit, the Board has removed the note to paragraph 3 in response to these comments. Similar statements throughout the standard have also either been removed or modified.

Walkthroughs

The proposed standard required that the auditor perform a walkthrough of each significant process each year and allowed the auditor to use others, such as management personnel and internal auditors, to directly assist the auditor in this work. The proposed standard also indicated that the walkthrough provides audit evidence but did not prescribe further requirements regarding the circumstances in which a walkthrough might provide the auditor with sufficient evidence of operating effectiveness for a particular control. The proposing release, however, noted that a walkthrough could be sufficient for some low-risk controls in subsequent years.

As discussed above, the Board received a significant number of comments on this topic. While several commenters expressed support for the importance of the walkthrough to audit quality, many commenters suggested that the proposed provisions in this area were more prescriptive than necessary, and suggested risk concepts as a way to add flexibility. While these commenters acknowledged the value of a walkthrough and its importance to the evaluation of design effectiveness, many stated that the requirement to perform a walkthrough in an area that is either low-risk, not complex, or unchanged appears inconsistent with the other areas in the proposed standard that rely upon auditor judgment to a much greater extent.

Use of Others in Achieving the Objectives of a Walkthrough

Commenters supported allowing the auditor to use others to provide the auditor with direct assistance, particularly in low-risk areas, with only a few commenters believing that this change could jeopardize the quality of the audit. In addition, many commenters believed that the standard should allow full use of the work of others in performing walkthroughs, although some commenters strongly disagreed with this point.

As discussed above, the final standard focuses the auditor on achieving four objectives related to the identification of

where within the company's processes misstatements could arise, rather than specifically on performing walkthroughs. Due to the importance of achieving these objectives to the auditor's conclusion about internal control, the Board believes that allowing the use of the work of others to a greater extent than what was proposed would not provide the auditor with an adequate understanding of the relevant risks and the related controls. Therefore, similar to the proposed standard, Auditing Standard No. 5 allows the auditor to use the work of others in achieving the objectives of a walkthrough, but only as direct assistance. That is, the auditor will be required to supervise, review, evaluate, and test the work performed by others.[20]

Using Walkthroughs To Test Operating Effectiveness

On the subject of using walkthroughs to test operating effectiveness, commenters suggested that walkthroughs can provide sufficient evidence of operating effectiveness, but held different views about situations in which this would be the case. Some commenters supported the use of walkthroughs in low-risk areas, while others focused on whether the control itself should be low-risk. Several commenters suggested that a walkthrough could provide sufficient evidence of operating effectiveness for lower-risk controls but only when entity-level controls are strong. Almost all commenters agreed that the proposed standard focused on the appropriate conditions for using such an approach—specifically, when risk is low, when past audits indicate effective design and operation of the control, and when no changes have been made to the control or process in which the control resides.

After considering these comments, the Board has decided that the risk-based approach that is described in the final standard is the appropriate framework for determining the evidence necessary to support the auditor's opinion. Therefore, Auditing Standard No. 5 articulates the principle that performance of a walkthrough might provide sufficient evidence of operating effectiveness, depending on the risk associated with the control being tested, the specific procedures performed as part of the walkthroughs and the results of the procedures performed.[21] The Board believes that establishing more detailed requirements in this area is not necessary, because application of the general principle in the standard will depend on the particular facts and circumstances presented.

Assessing Risk

The Board's May 16, 2005 guidance emphasized the importance of risk assessment in the audit of internal control, and that element of the guidance was incorporated and enhanced in the proposed standard. The proposed standard required risk assessment at each of the decision points in a top-down approach, including the auditor's identification of significant accounts and disclosures and their relevant assertions. The proposed standard also required an assessment of risk at the individual control level, and required that the auditor determine the evidence necessary for a given control based on this risk assessment.

The Board received many comments on the risk assessment provisions in the proposed standard. Comments on the proposed risk assessment approach were generally supportive, with some commenters suggesting ways for improving the risk assessment emphasis in the standard. Many commenters discussed the requirement in the proposed standard for the auditor to assess the risk that the control might not be effective and, if not effective, the risk that a material weakness would result for each control the auditor selected for testing. Commenters suggested that this requirement conflicted with both current practice and the requirements within the interim standards for the financial statement audit, which involve risk assessment at the financial statement assertion level. These commenters believed that this requirement would result in risk assessments at both the assertion level and the individual control level and suggested that assessing (and documenting) risk at the relevant assertion level is sufficiently precise to drive appropriate audits. Furthermore, they believed that a specific requirement to assess risk at the individual control level and its associated documentation requirement would be unnecessary.

After considering these comments, the Board continues to believe that the auditor may vary the nature, timing, and extent of testing based on the assessed risk related to a control. Making this assessment a presumptively mandatory requirement, as it was in the proposed standard, however, does not appear necessary to achieve the intended benefits of varied testing based on the risk associated with a control. Auditing Standard No. 5, therefore, requires the auditor to assess the risk related to the relevant assertion, but not the risk at the individual control level. The standard permits the auditor to consider the risk at the control level, however, and alter the nature, timing, and extent of testing accordingly.

Several commenters expressed concern about the advisability of taking a risk-based approach and the adequacy of the Board's interim standards regarding risk assessment. These commenters suggested that auditors have frequently been unsuccessful at applying a risk-based approach to the financial statement audit in the past.

The Board has found the arguments for a more principles-based approach to internal control auditing convincing, and the principle that the auditor should vary the testing to respond to the risk is one of the most important in the standard. Early implementation of Auditing Standard No. 2 demonstrated that, when internal control is audited without adequate consideration of risk, the areas that pose the greatest danger of material misstatement may be obscured or lost. The emphasis on risk, therefore, drives an audit that is more effective and focused. While the Board believes that auditors can appropriately assess risk based on the interim auditing standards, it has committed to examining the existing standards in this area to see where improvements can be made. This is currently one of the Board's standard setting priorities.

Evaluation of Deficiencies

The Board received a substantial number of comments on the topic of evaluating deficiencies, including comments on the proposed definitions of material weakness and significant deficiency, the ''strong indicators'' of a material weakness, and the requirement to evaluate all identified deficiencies. While a number of commenters stated that auditors do identify material weaknesses in the absence of an actual material misstatement, some noted that, in many cases, material weaknesses are identified only when material misstatements are discovered. Several commenters suggested that the proposed standard, with its focus on using a top-down approach and scoping to identify material weaknesses, would allow auditors to do a more thorough review of the most important controls with less effort expended on reviewing lower risk controls. These commenters often stated that this approach should increase the likelihood of the auditor detecting material weaknesses before a material misstatement occurs.

Definition of a Material Weakness

The proposed standard retained the basic framework in Auditing Standard No. 2 that described material weaknesses by reference to the likelihood and magnitude of a potential misstatement. While the Board believed that framework to be sound, it made an effort to clarify the definition in the proposed standard by replacing the reference to ''more than remote likelihood'' with ''reasonable possibility.'' Financial Accounting Standards Board (''FASB'') Statement No. 5 describes the likelihood of a future event occurring as ''probable,'' ''reasonably possible,'' or ''remote.'' The definition in Auditing Standard No. 2 referred to a ''more than remote'' likelihood of a misstatement occurring. In accordance with FASB Statement No. 5, the likelihood of an event is ''more than remote'' when it is either ''reasonably possible'' or ''probable.''

As the Board noted in the proposing release, however, some auditors and issuers have misunderstood the term ''more than remote'' to mean something significantly less likely than a reasonable possibility. This, in turn, could have caused these issuers and auditors to evaluate the likelihood of a misstatement at a much lower threshold than the Board intended. Because the term ''more than remote'' could have resulted in auditors and issuers evaluating likelihood at a more stringent level than originally intended, the Board proposed changing the definition to refer to a ''reasonable possibility.''

Commenters on this change were split between those that felt the change would reduce unnecessary effort spent on identifying and analyzing deficiencies, and those who believed it would not. Several commenters noted that the replacement of the term ''more than remote likelihood'' with the term ''reasonable possibility'' does not raise the auditor's threshold for classifying

[20] *See* paragraph 27 of AU sec. 322, *The Auditor's Consideration of the Internal Audit Function in an Audit of Financial Statements.*

[21] *See* paragraph 49.

deficiencies. According to those commenters, the change simply attempts to align the description of the threshold for identifying deficiencies with previous guidance issued by the PCAOB. The Board continues to believe that the proposed definition—as well as Auditing Standard No. 2—established an appropriate threshold for the likelihood part of the definition of material weakness. While the Board agrees that, as a definitional matter, ''reasonable possibility'' and ''more than remote'' describe the same threshold, it believes that ''reasonable possibility'' describes that threshold more appropriately and clearly, and will therefore avoid the misunderstanding of the threshold created by the way it was described in Auditing Standard No. 2. As a result, it retained that term in the final definition in the standard.

In addition, some commenters noted that the definitions of material weakness and significant deficiency in the proposed standard, like the definitions in Auditing Standard No. 2, referred to the likelihood of a material misstatement in both the interim and annual financial statements. Most of these commenters suggested that the Board remove the term ''interim'' from the definitions of material weakness and significant deficiency because, according to the commenters, it causes confusion when scoping the audit of internal control and unnecessarily complicates the evaluation of deficiencies, particularly in the absence of guidance from the SEC and FASB regarding interim materiality. Some commenters, however, said that the Board should not remove the term ''interim'' from the definitions because the evaluation of deficiencies should be performed to consider the effectiveness of internal control for both the interim and annual financial statements. After carefully considering these comments, and in order to use the same definition that the SEC uses in its guidance to management, the Board determined to retain the reference to interim financial statements in the final definition of material weakness.[22]

Indicators of a Material Weakness

The proposed standard described circumstances that should be regarded as strong indicators of a material weakness in internal control. The proposing release noted that the identification of one of these strong indicators should bias the auditor toward a conclusion that a material weakness exists but does not require the auditor to reach that conclusion. Under the proposal, the auditor could determine that these circumstances do not rise to the level of a material weakness, and in some cases, are not deficiencies at all.

Many commenters supported the proposed changes from Auditing Standard No. 2 relating to strong indicators, agreeing that, by allowing greater use of professional judgment in this area, practice will improve. A few commenters stated that these changes may lead to some inconsistency in practice, but consistent with other commenters, they still supported the use of greater professional judgment in the evaluation of deficiencies. At least one commenter suggested that several of the strong indicators were not indicators of a material weakness but should be, under all circumstances, a material weakness. A few commenters also suggested that the list of strong indicators in Auditing Standard No. 2 actually stifles the auditor's judgment to the point that auditors fail to identify material weaknesses that exist because the deficiency is not on the list of strong indicators. These commenters suggested that removing the list of strong indicators entirely would be best.

The Board believes that auditor judgment is imperative in determining whether a deficiency is a material weakness and that the standard should encourage auditors to use that judgment. At the same time, the Board continues to believe that highlighting certain circumstances that are indicative of a material weakness provides practical information about the application of the standard. As a result, the Board has included this information in the final standard but has taken a more principles-based approach. Additionally, the Board has coordinated with the SEC so that the indicators in the auditing standard parallel those in the SEC's management guidance.

Rather than referring to ''strong indicators,'' the final standard refers simply to ''indicators'' of material weakness.[23] The standard also makes clear that the list of indicators is not exhaustive and should not be used as a checklist. Specifically, under the final standard, the presence of one of the indicators does not mandate a conclusion that a material weakness exists. At the same time, a deficiency that is not a listed indicator may be a material weakness.

The Board did not adopt as indicators in the final standard certain proposed strong indicators. The Board believes, as at least one commenter suggested, that some of these proposed strong indicators are better characterized as material weaknesses rather than as indicators of a material weakness.[24] Including them in the list of indicators, as adopted, would therefore be inconsistent with the degree of judgment required to evaluate whether an indicator of a material weakness is, under particular facts and circumstances, a material weakness.

Requirement To Evaluate All Identified Deficiencies

The proposed standard required the auditor to evaluate the severity of each control deficiency that comes to his or her attention. The same provision in the proposed standard made clear, however, that the auditor need not scope the audit to find control deficiencies that are less severe than material weaknesses. A few commenters believed that this requirement is not necessary and suggested that an acceptable alternative would be for the auditor to verify that management has evaluated all deficiencies.

The Board continues to believe that the auditor needs to evaluate all deficiencies that come to his or her attention. Without such an evaluation, there would not be a sufficient basis for the auditor's opinion.

Additional Scoping and Materiality Issues

The proposed standard clarified that the auditor should plan and perform the audit of internal control using the same materiality measures used to plan and perform the audit of the annual financial statements. This direction was intended to address concerns that auditors have interpreted Auditing Standard No. 2 as directing them to search for potential defects in internal control at a lower materiality level than that used in the audit of the annual financial statements.

The Board received many comments on materiality and scoping, and a large portion of the commenters expressed support for the proposed standard's approach. Some commenters, however, recommended providing clear quantitative guidelines for calculating materiality. Other commenters expressed concern about such an approach, fearing that material areas would be inappropriately excluded from the audit scope. Finally, some commenters suggested that the Board should provide additional guidance on scoping and extent of control testing decisions, such as guidance on sample sizes related to testing of high-risk controls versus low-risk controls or more specific guidance on the scope of the internal control audit for entities with multiple locations.[25]

After considering these comments, the Board has determined to adopt its discussion of materiality in the internal control audit as proposed. The Board believes that the auditing standard on internal control is an inappropriate place to redefine or refine the

[22] The provisions in the final standard relating to significant deficiencies are discussed above. As discussed above, the Board also made minor wording changes to the definition of material weakness in order to use the same definition as the SEC in its guidance to management and related rules.

[23] The Board included as an indicator the proposed standard's requirement to determine the level of assurance that would satisfy prudent officials in the conduct of their own affairs that they have reasonable assurance that transactions are recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles. In the proposal, if the auditor determined that a deficiency would prevent prudent officials from concluding that they have such reasonable assurance, the auditor was required to deem the deficiency to be at least a significant deficiency. Under the final standard, if the auditor determines that a deficiency might prevent prudent officials from concluding that they have such reasonable assurance, this circumstance is an indicator of material weakness.

[24] One such proposed strong indicator was an ineffective control environment. Under the proposal, indicators of an ineffective control environment included identification of fraud on the part of senior management and significant deficiencies that have been communicated to management and the audit committee and remain uncorrected after some reasonable period of time. The final standard includes the identification of fraud on the part of senior management as an indicator of a material weakness. In order to simplify the list and make it more principles-based, as well as to align it with the SEC management guidance, however, the Board did not include significant deficiencies that remain uncorrected as an indicator in the final standard.

[25] The proposed standard focused on the auditor's assessment of risk of material misstatement and how the auditor could carry that assessment process into the scoping of a multi-location audit. Commenters were very supportive of the Board's approach in this area and, consequently, the Board has determined to adopt these provisions as proposed.

meaning of materiality, which is a long-established concept in the federal securities laws. With respect to requests for more specific guidance on scoping or extent of testing issues, the Board has, as discussed above, endeavored to adopt a standard that relies more on general principles than detailed requirements. Accordingly, the Board believes that auditors should make specific determinations of how to comply with the general scoping and testing requirements in the standard using professional judgment in the particular circumstances presented.

Scaling the Audit for Smaller Companies

As discussed above, the Board received many comments on the proposed section on scaling the audit from commenters with a variety of perspectives. The comments covered a wide range of issues. In addition to the matters discussed above, commenters suggested:

- That the proposed section on scalability should be focused more closely on how complexity relates to a risk-based audit;
- That the proposed standard did not provide sufficient flexibility for smaller companies and that the standard should provide for more ''credit'' for control testing based on work done as part of the financial statement audit;
- That the resulting costs of these proposed changes would need to be studied for several years to determine if they are appropriate;
- That the attributes of smaller, less complex companies that were included in the proposed standard were appropriate and that the tailoring directions for auditors were adequate;
- That some of the attributes of smaller, less complex companies that might allow the auditor to tailor the audit might be, instead, risk factors that require more testing;
- That the emphasis on entity-level controls might not be appropriate; and
- That the Board's project to develop guidance on auditing internal control in smaller public companies is necessary.

As discussed above, the Board made several changes in response to comments in the final standard. The new standard provides direction on how to tailor internal control audits to fit the size and complexity of the company being audited. It does so by including notes throughout the standard on how to apply the principles in the standard to smaller, less complex companies, and by including a discussion of the relevant attributes of smaller, less complex companies as well as less complex units of larger companies. The Board believes that the final standard appropriately considers the circumstances of smaller and less complex public companies (and other companies with less complex business units) while requiring a high-quality audit regardless of company size or complexity. The planned guidance on this topic will provide additional practical information for auditors of smaller companies.

Information Technology Principles

In gaining an understanding of the effect of information technology (''IT'') on internal control over financial reporting and the risks the auditor should assess, the proposed standard directed the auditor to apply guidance in AU sec. 319, *Consideration of Internal Control in a Financial Statement Audit*. Additionally, the proposed standard included a discussion of IT operations at smaller and less complex companies. A number of commenters discussed the importance of IT risks to determining the scope of the audit and recommended that the final standard include additional guidance on how the risk assessment related to IT is incorporated in the audit of internal control.

In response to these comments, the Board included in Auditing Standard No. 5 a note to paragraph 36 that clarifies that the identification of risks and controls within IT should not be a separate evaluation but, rather, an integral part of the auditor's top-down risk assessment, including identification of significant accounts and disclosures and their relevant assertions, as well as the controls to test.

Roll-forward Procedures

The proposed standard discussed the procedures the auditor should perform to obtain additional evidence concerning the operation of the control when the auditor reports on the effectiveness of the control ''as of'' a specific date, but has tested the effectiveness of the control at an interim date. The Board received a few comments on this topic, mainly from auditors. The comments were consistent in their view that the proposed standard improperly implies, by using the expression ''if any'' in relation to additional evidence the auditor is required to obtain, that the auditor may not need to do any roll-forward work. Commenters suggested that such an approach would be inconsistent with paragraph .99 of AU sec. 319 and suggested that the words ''if any'' be removed from the final standard. The Board believes that its standard should be consistent with AU sec. 319.99 in that the auditor should perform some level of roll-forward procedures. Consequently, the Board removed the words ''if any'' from the relevant paragraphs of Auditing Standard No. 5 to correct the inconsistency. The Board also noted that, in some circumstances, inquiry alone might be a sufficient roll-forward procedure.

Cumulative Knowledge and Rotation

The proposed standard on auditing internal control allowed the auditor to incorporate knowledge from previous years' audits into his or her decision making process for determining the nature, timing, and extent of testing necessary. The section in the proposed standard on special considerations for subsequent years' audits built upon the risk-based framework in the proposed standard for determining the nature, timing, and extent of testing by describing certain additional factors for the auditor to evaluate in subsequent years. These factors included the results of prior years' testing and any change that may have taken place in the controls or the business since that testing was performed. This section retained the requirement in Auditing Standard No. 2 that each control deemed important to the auditor's conclusion be tested every year, but allowed for a reduction in testing when the additional risk factors indicated that the risk was lower than in the past.

Many commenters strongly supported these provisions as proposed. Many investors, in particular, stated that while they supported the proposed approach, they would not be supportive of rotation of control testing over a multiple-year period. These commenters were generally concerned that rotation of control testing would negatively affect audit quality. Among supporters of the approach in the proposed standard, several requested further clarification in the standard or additional guidance on how this approach should affect the level of testing.

Many issuers suggested that the standard should allow for full rotation—which exempts some important controls from testing each year—of at least controls in low-risk areas. Other commenters recommended that all controls should be tested on a multi-year rotating basis. These comments often focused on the fact that while the proposed standard required the auditor to evaluate whether there had been any relevant changes since the control was tested, it still required testing at some level even when there had been no change. These commenters considered this requirement to be unnecessary.

The Board shares the concern that multi-year rotation of control testing would not provide sufficient evidence for the auditor's opinion on internal control effectiveness, which is required by the Act to be issued each year. In the financial statement audit, control testing plays a supporting role—to the extent that controls have been tested and are effective, the auditor can reduce the level of (but not eliminate) the necessary substantive testing. In contrast, in the internal control audit, control testing does not play a supporting role but is the sole basis for the auditor's opinion. Additionally, even if the design of the control and its related process does not change from the prior year, it is not possible to assess the control's operating effectiveness without performing some level of testing. For these reasons, rotation is not a viable option in the audit of internal control. Instead, the approach described in the proposed standard has been clarified in the final standard and continues to focus the auditor on relevant changes since a particular control was last tested, as many commenters suggested. Under this approach, the auditor would consider, in addition to the risk factors described in the standard that are always relevant to determining the nature, timing, and extent of testing, whether there has been a change in the controls or in the business that might necessitate a change in controls; the nature, timing, and extent of procedures performed in previous audits; and the results of the previous years' testing of the control.[26] After taking into account these additional factors, the additional information in subsequent years' audits might permit the auditor to assess risk as lower than in the

[26] *See* paragraph 55.

initial year and, thus, might permit the auditor to reduce testing.

This treatment of cumulative knowledge is analogous to the roll-forward provisions in the final standard. In the case of subsequent years, the auditor, in essence, rolls forward the prior years' testing when the control was found to be effective in the past and no change has occurred (or would have been expected to occur due to changes in the environment or process that contains the control). Because the auditor might be able to assess the risk lower in the subsequent years, a walkthrough, or equivalent procedures, might be sufficient for low-risk controls. This approach appropriately factors in the effect of cumulative knowledge, while maintaining audit quality and providing a sufficient basis for the auditor's opinion.

Reporting the Results of the Audit

In the proposed standard, the Board attempted to address concerns that the separate opinion on management's assessment required by Auditing Standard No. 2 contributed to the complexity of the standard and caused confusion regarding the scope of the auditor's work.[27] Accordingly, to emphasize the proper scope of the audit and to simplify the reporting, the proposed standard required that the auditor express only one opinion on internal control—a statement of the auditor's opinion on the effectiveness of the company's internal control over financial reporting. The proposal eliminated the separate opinion on management's assessment because it was redundant of the opinion on internal control itself and because the opinion on the effectiveness of controls more clearly conveys the same information—specifically, whether the company's internal control is effective.

Many commenters agreed with the Board that eliminating the separate opinion on management's assessment would reduce confusion and clarify the reporting. Some commenters, however, suggested that the Board should instead require only an opinion on management's assessment. These commenters expressed their belief that the Act requires only that the auditor review management's assessment process and not the company's internal control. Additionally, a few commenters expressed confusion about why the proposed standard continued to reference an audit of management's assessment in paragraph 1 of the proposed standard and the auditor's report.

The Board has determined, after considering these comments, to adopt the provision requiring only an opinion on internal control.[28] The Board continues to believe that the overall scope of the audit that was described by Auditing Standard No. 2 and the proposed standard is correct; that is, to attest to and report on management's assessment, as required by Section 404(b) of the Act, the auditor must test controls directly to determine whether they are effective.[29] Accordingly, paragraphs 1 and 2 of the proposed standard provided that the auditor audits management's assessment—the statement in management's annual report about whether internal control is effective—by auditing whether that statement is correct—that is, whether internal control is, in fact, effective. The final standard similarly makes this clear. In response to commenters, however, the Board has clarified the auditor's report so that it will consistently refer to the required audit as the audit of internal control.

Implementation

Some commenters urged the Board to focus on implementation issues after it adopts a final standard, and noted that effective implementation by the Board is crucial to the internal control reporting process. Some of these commenters focused on the inspections process, which they suggested is key to promoting audit efficiency. Some stated that auditors would be unlikely to change their audit approach until they are confident that the inspections will be similarly focused. The Board is committed to effective monitoring of firms' compliance with the new standard and will continue to promote proper implementation through other means, including the Board's Forums on Auditing in the Small Business Environment and guidance for auditors of smaller companies.

III. Date of Effectiveness of the Proposed Rules and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents, the Commission will:

(a) By order approve such proposed rule; or

(b) Institute proceedings to determine whether the proposed rule should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rules are 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*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number PCAOB–2007–02 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 No. PCAOB–2007–02. This file number should be included on the subject line if e-mail is used. To help 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*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549. All comments received will be posted without change; we do 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 PCAOB–2007–02. In light of the significant public interest in the implementation of section 404 of the Sarbanes-Oxley Act, the Commission is providing a 30-day comment period. Comments should be submitted on or before July 12, 2007. The Commission intends to act on the proposed rule no later than 45 days after publication in the **Federal Register**.

By the Commission.

Florence E. Harmon,

Deputy Secretary.

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[27] Although Auditing Standard No. 2 requires the auditor to evaluate management's process, the auditor's opinion on management's assessment is not an opinion on management's internal control evaluation process. Rather, it is the auditor's opinion on whether management's statements about the effectiveness of the company's internal controls are fairly stated.

[28] The SEC has adopted changes to its rules that require the auditor to express an opinion directly on internal control.

[29] In addition, Section 103 of the Act requires the Board's standard on auditing internal control to include ''testing of the internal control structure and procedures of the issuer * * *.'' Under Section 103, the Board's standard also must require the auditor to present in the audit report, among other things, ''an evaluation of whether such internal control structure and procedures * * * provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles * * *.''

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55865; File No. SR–Amex–2007–51]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Backup Trading Arrangements

June 6, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 21, 2007, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Exchange filed the proposed rule change as a ''noncontroversial'' rule change under Rule 19b–4(f)(6) under the Act,[3] 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

The Exchange seeks to adopt new rules authorizing the Amex to enter into arrangements with one or more other exchanges which would provide for backup trading facilities for Amex listed options on another exchange if the Amex's facility becomes disabled and is unavailable for trading. The proposed rules further provide for the availability of Amex trading facilities to another exchange to trade its listed options if that exchange's facility becomes disabled.

The text of the proposed rule change is available on the Amex's Web site (*http://www.amex.com*), at Amex's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Amex 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

The Amex proposes to adopt new Amex Rule 62 governing Backup Trading Arrangements. Proposed new Rule 62 sets forth procedures whereby Amex members and associated persons may use a Backup Exchange's facilities to conduct the trading of some or all of its Exclusively and Singly Listed Options for the duration of a disabling event. The Amex will provide for another exchange (a ''Disabled Exchange'') to trade its Exclusively and Singly Listed Options in the event they are unable to do so because of an emergency or extraordinary set of circumstances that severely and adversely affects its ability to trade (a ''Disabling Event'').

The Amex Is the Disabled Exchange

Proposed Rule 62(a)(i) governs the trading of Exclusively Listed Options (''Exclusively Listed Options'' or ''ELOs'') if the Amex is the Disabled Exchange. The term ''exclusively listed option'' is defined as an option that is listed exclusively by an exchange (because such exchange has an exclusive license to use, or has proprietary rights in, the interest underlying the option). Proposed Rule 62(a)(i)(B) provides that the Amex may enter into arrangements with one or more other exchanges (each a ''Backup Exchange'') to permit the Amex and its members and associated persons and other personnel to use a portion of the Backup Exchange's facilities to conduct the trading of some or all of the Amex's Exclusively Listed Options if there were a Disabling Event. Such options shall trade as listings of Amex and the facility of the Backup Exchange used by the Amex for this purpose will be deemed to be a facility of the Amex.

The Exchange's proposal further provides that the trading of Amex Exclusively Listed Options shall be conducted in accordance with the rules of the Backup Exchange. In addition, the Amex and the Backup Exchange may agree that other rules of the Amex will apply to such trading. The Backup Exchange rules that govern trading on Amex's facility at the Backup Exchange shall be deemed to be Amex rules for purposes of such trading.

According to the Exchange's proposal, the Backup Exchange shall perform the related regulatory functions with respect to trading of Amex Exclusively Listed Options on the Amex's facility at the Backup Exchange, except as the Amex and the Backup Exchange may specifically agree otherwise. The Backup Exchange and the Amex shall coordinate with each other regarding surveillance and enforcement respecting trading of the Exclusively Listed Options on the Amex's facility at the Backup Exchange.

If the Backup Exchange is unable to accommodate all Amex members that desire to trade on Amex's facility at the Backup Exchange, the Amex may determine which members shall be eligible to trade at that facility. Factors the Amex shall consider in making such determinations may include, but are not limited to, any one or more of the following: Whether the member is a specialist in the applicable product, the number of contracts traded by the member or member organization in the applicable product, market performance, and other factors relating to a member's contribution to the market in the applicable product or products during a specific period.

The Exchange's proposal further provides that the members of the Backup Exchange shall not be authorized to trade in any Amex Exclusively Listed Options, except that the Amex may deputize willing floor brokers of the Backup Exchange as temporary Amex members to permit them to execute orders as brokers in the Amex Exclusively Listed Options traded on the Amex's facility at the Backup Exchange. Furthermore, the Backup Exchange has agreed that it will, at the instruction of Amex, select members of the Backup Exchange that are willing to be deputized by the Amex as temporary Amex members authorized to trade Amex Exclusively Listed Options on the Amex's facility at the Backup Exchange for a period of time following a Disabling Event as the Amex determines to be appropriate, and the Amex may deputize such members of the Backup Exchange as temporary Amex members for that purpose.

The Exchange's proposal further provides that options listed by the Backup Exchange that do not satisfy the standard listing and maintenance criteria of the Backup Exchange will be subject, upon listing by the Backup Exchange, to delisting (and, thus, restrictions on opening new series, and engaging in opening transactions in those series with open interest, as may be provided in the rules of the Backup Exchange).

Proposed Rule 62(a)(ii) governs the trading of singly listed options (a ''Singly Listed Option'' or ''SLO''). A Singly Listed Option is defined as an option that is not an Exclusively Listed Option, but that is listed by an exchange and not by any other national securities exchange. Proposed Rule 62(a)(ii) provides that the Amex may enter into arrangements with a Backup Exchange under which the Backup Exchange will agree, in the event of a Disabling Event, to list for trading Singly Listed Options that are then singly listed only by the Amex and not by the Backup Exchange. The proposed Rule further provides that any such options listed by the Backup Exchange shall trade on the Backup Exchange and in accordance with the rules of the Backup Exchange. Such options shall be traded by members of the Backup Exchange and by Amex members selected by the Amex to the

[3] 17 CFR 240.19b–4(f)(6).

extent the Backup Exchange can accommodate Amex members in the capacity of temporary members of the Backup Exchange. If the Backup Exchange is unable to accommodate all Amex members that desire to trade at the Backup Exchange, the Amex may determine which of its members shall be eligible to trade at the Backup Exchange.

Any Amex member who is granted temporary access to the Backup Exchange pursuant to this paragraph shall only be permitted to act in those Backup Exchange capacities that are authorized by the Backup Exchange and that are comparable to capacities in which the temporary member has been authorized to act on the Amex, and to trade in those options in which the temporary member is authorized to trade on the Amex. Finally, Singly Listed Options listed by the Backup Exchange that do not satisfy the standard listing and maintenance criteria of the Backup Exchange will be subject, upon listing by the Backup Exchange, to delisting (and, thus, restrictions on opening new series, and engaging in opening transactions in those series with open interest, as may be provided in the rules of the Backup Exchange).

The Amex Is the Backup Exchange

Proposed Rule 62(b)(i) provides that the Amex may enter into arrangements with one or more other Disabled Exchanges to allow the Disabled Exchange and its members to use a portion of the Amex's facilities to conduct the trading of some or all of the Disabled Exchange's Exclusively Listed Options in the event of a Disabling Event.

Proposed paragraph (B) provides that the trading of the Disabled Exchange's Exclusively Listed Options on the Disabled Exchange's facility at the Amex shall be conducted in accordance with Amex rules. The members of the Disabled Exchange that are trading on the Disabled Exchange's facility at the Amex (not including Amex members who become temporary members of the Disabled Exchange) will be subject to the rules of the Disabled Exchange governing or applying to the maintenance of a person's or a firm's status as a member of the Disabled Exchange. In addition, the Disabled Exchange and the Amex may agree that other Disabled Exchange rules will apply to such trading. The Disabled Exchange and the Amex have agreed to communicate to their respective members which rules apply in advance of trading.

Proposed paragraph (C) provides that the Amex will perform the related regulatory functions with respect to trading of the Disabled Exchange's Exclusively Listed Options on the Disabled Exchange's facility at the Amex, in each case except as the Disabled Exchange and the Amex may specifically agree otherwise. The Amex and the Disabled Exchange have agreed to coordinate with each other regarding surveillance and enforcement respecting trading of the Disabled Exchange's Exclusively Listed Options on the Disabled Exchange's facility at the Amex. The Disabled Exchange has agreed that it shall retain the ultimate legal responsibility for the performance of its self-regulatory obligations with respect to the Disabled Exchange's facility at the Amex.

Proposed paragraph (D) provides the Amex members shall not be authorized to trade in any Exclusively Listed Options of the Disabled Exchange, except that: (1) The Disabled Exchange may deputize willing Amex floor brokers as temporary members of the Disabled Exchange to permit them to execute orders as brokers in Exclusively Listed Options of the Disabled Exchange traded on the facility of the Disabled Exchange at the Amex; and (2) at the instruction of the Disabled Exchange, the Amex shall select Amex members that are willing to be deputized by the Disabled Exchange as temporary members of the Disabled Exchange authorized to trade the Disabled Exchange's Exclusively Listed Options on the facility of the Disabled Exchange at the Amex for such period of time following a Disabling Event as the Disabled Exchange determines to be appropriate, and the Disabled Exchange may deputize such Amex members as temporary members of the Disabled Exchange for that purpose.

Proposed paragraph (b)(ii) provides that the Amex may enter into arrangements with a Disabled Exchange under which the Amex will agree, in the event of a Disabling Event, to list for trading options that are then singly listed only by the Disabled Exchange and not by the Amex. Singly Listed Options listed by the Amex shall trade on the Amex and in accordance with Amex rules. Such options shall be traded by Amex members and by members of the Disabled Exchange selected by the Disabled Exchange to the extent the Amex can accommodate members of the Disabled Exchange in the capacity of temporary members of Amex. Any member of a Disabled Exchange granted temporary access to conduct business on the Amex under this paragraph shall only be permitted to act in those Amex capacities that are authorized by the Amex, and that are comparable to capacities in which the temporary member has been authorized to act on the Disabled Exchange and to trade in those options in which the temporary member is authorized to trade on the Disabled Exchange.

Classes of options listed by the Amex that does not satisfy Amex listing and maintenance criteria will be subject, upon listing by the Amex, t delisting (and, thus, restrictions on opening new series, and engaging in opening transactions in those series with open interest, as may be provided in Amex rules.)

Temporary Members of the Disabled Exchange and the Backup Exchange

Paragraph (c) of proposed Rule 62 governs the member obligations of both the temporary members of the Disabled Exchange and the temporary members of the Backup Exchange. Proposed paragraph (A) provides that an Amex member acting as a temporary member of the Disabled Exchange shall be subject to, and obligated to comply with, the rules that govern the operation of the facility of the Disabled Exchange at the Amex to the extent applicable during the period of such trading. Such Amex member shall have none of the rights of a member of the Disabled Exchange except the right to conduct business on the facility of the Disabled Exchange at the Amex as described in the Exchange's proposal herein. Additionally, the member organization associated with such Amex member, if any, shall be responsible for all obligations arising out of that Amex member's activities on or relating to the Disabled Exchange. Finally, the proposed rule provides that the clearing member of such Amex member shall guarantee and clear the transactions of such Amex member on the Disabled Exchange.

Similarly, the Exchange's proposal provides that a member of the Backup Exchange acting in the capacity of a temporary member of the Amex pursuant to proposed paragraph (a)(i)(F) shall be subject to, and obligated to comply with, the rules that govern the operation of the facility of the Amex at the Backup Exchange, including Amex rules to the extent applicable during the period of such trading. The proposed rule further provides that temporary members shall have none of the rights of an Amex member except the right to conduct business on the facility of Amex at the Backup Exchange as described herein. In addition, the member organization associated with such temporary member, if any, shall be responsible for all obligations arising out of that temporary member's

activities on or relating to the Amex and the clearing member of such temporary member shall guarantee and clear the transactions on the Amex of such temporary member.

Proposed paragraph (c)(ii)(A) provides that an Amex member acting in the capacity of a temporary member of the Backup Exchange pursuant to paragraph (a)(ii)(B) shall be subject to, and obligated to comply with, the rules of the Backup Exchange that are applicable to the Backup Exchange's own members. Such Amex member shall have none of the rights of a member of the Backup Exchange except the right to conduct business on the Backup Exchange to the extent described in the proposed Rule. The member organization associated with such Amex member, if any, shall be responsible for all obligations arising out of that Amex member's activities on or relating to the Backup Exchange. Furthermore, the clearing member of such Amex member shall guarantee and clear the transactions of such Amex member on the Backup Exchange. Finally, such Amex member shall only be permitted to act in those capacities on the Backup Exchange that are authorized by the Backup Exchange and that are comparable to capacities in which the Amex member has been authorized to act on the Amex, and to trade in those options in which the Amex member is authorized to trade on the Amex.

A member of Disabled Exchange acting in the capacity of a temporary member of the Amex pursuant to paragraph (b)(ii)(A) shall be subject to, and obligated to comply with, Amex rules that are applicable to Amex's own members. Such temporary member shall have none of the rights of an Amex member except the right to conduct business on the Amex to the extent described in the proposed Rule. The member organization associated with such temporary member, if any, shall be responsible for all obligations arising out of that temporary member's activities on or relating to the Amex. The clearing member of such temporary member shall guarantee and clear the transactions of such temporary member on the Amex and such temporary member shall only be permitted to act in those Amex capacities that are authorized by the Amex and that are comparable to capacities in which the temporary member has been authorized to act on the Disabled Exchange, and to trade in those option classes in which the temporary member is authorized to trade on the Disabled Exchange.

Member Proceedings

Proposed paragraph (d) governs member proceedings that may take place regarding trading during a backup period. Proposed paragraph (d)(i) provides that if the Amex initiates an enforcement proceeding with respect to the trading during a backup period of the Singly Listed Options of the Disabled Exchange by a temporary member of the Amex or the Exclusively Listed Options of the Disabled Exchange by a member of the Disabled Exchange (other than an Amex member who is a temporary member of the Disabled Exchange), and such proceeding is in process upon the conclusion of the backup period, the Amex may transfer responsibility for such proceeding to the Disabled Exchange following the conclusion of the backup period. Moreover, arbitration of any disputes with respect to any trading during a backup period of Singly Listed Options of the Disabled Exchange or of Exclusively Listed Options of the Disabled Exchange on the Disabled Exchange's facility at the Amex will be conducted in accordance with Amex rules, unless the parties to an arbitration agree that it shall be conducted in accordance with the rules of the Disabled Exchange.

Proposed Rule 62(d)(ii) provides that if the Backup Exchange initiates an enforcement proceeding with respect to the trading during a backup period of Amex Singly Listed Options by a temporary member of the Backup Exchange or Amex Exclusively Listed Options by an Amex member (other than a member of the Backup Exchange who is a temporary member of the Amex), and such proceeding is in process upon the conclusion of the backup period, the Backup Exchange may transfer responsibility for such proceeding to the Amex following the conclusion of the backup period. Furthermore, arbitration of any disputes with respect to any trading during a backup period of Amex Singly Listed Options on the Backup Exchange or of Amex Exclusively Listed Options on the facility of the Amex at the Backup Exchange will be conducted in accordance with the rules of the Backup Exchange, unless the parties to an arbitration agree that it shall be conducted in accordance with Amex rules.

Finally, the proposed rule provides that Amex members are required to take appropriate actions as instructed by the Exchange to accommodate the Amex's backup trading arrangements.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[4] of the Act in general and furthers the objectives of Section 6(b)(5)[5] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purpose of the Act or the administration of the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

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

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of filing, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and subparagraph (f)(6) of Rule 19b–4 thereunder.[7] As required under Rule 19b–4(f)(6)(iii),[8] the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of the filing of the proposed rule change.

[4] 15 U.S.C. 78f(b).
[5] 15 U.S.C. 78f(b)(5).
[6] 15 U.S.C. 78s(b)(3)(A).
[7] 17 CFR 240.19b–4(f)(6).
[8] 17 CFR 240.19b–4(f)(6)(iii).

Amex has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[9] The Commission notes that the proposed rule change is modeled on a recently approved Philadelphia Stock Exchange proposal.[10] Amex's proposal does not appear to raise any novel regulatory issues and will allow Amex without undue delay to implement backup trading arrangements for options—particularly exclusively listed options—in the event of a Disabling Event.

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 the 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–2007–51 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–2007–51. 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 such filing also will be available for inspection and copying at the principal offices of the Exchange. 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–2007–51 and should be submitted on or before July 3, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–11265 Filed 6–11–07; 8:45 am]

BILLING CODE 8010–01–P

[9] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] *See* Exchange Act Release No. 51926 (June 27, 2005), 70 FR 38232 (July 1, 2005) (SR–PHLX–2004–65).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55871; File No. SR–CBOE–2006–84]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Amendment No. 5 to a Proposed Rule Change To List and Trade Credit Default Options; and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment Nos. 3, 4, and 5, and Designating Credit Default Options as Standardized Options Under Rule 9b–1 of the Securities Exchange Act of 1934

June 6, 2007.

I. Introduction

On October 26, 2006, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] to permit CBOE to list and trade cash-settled, binary call options based on credit events in one or more debt securities of an issuer, referred to as credit default options. On December 21, 2006, CBOE filed Amendment No. 1 to the proposed rule change; on January 16, 2007, CBOE filed Amendment No. 2 to the proposed rule change; on February 2, 2007, CBOE filed Amendment No. 3 to the proposed rule change;[3] and on February 7, 2007, CBOE filed Amendment No. 4 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on February 14, 2007.[4] The Commission received no comments on the proposal. On March 28, 2007, CBOE filed Amendment No. 5 to the proposed rule change (''Amendment No. 5''). This notice and order notices Amendment No. 5; solicits comments from interested persons on Amendment No. 5; approves the proposed rule change, as amended, on an accelerated basis; and designates credit default options as ''standardized options'' pursuant to Rule 9b–1 under the Act.[5]

II. Description of the CBOE Proposal

A. Generally

CBOE proposes to list and trade credit default options, which are cash-settled, binary options[6] that are automatically exercised upon the occurrence of specified credit events or expire worthless. A credit default option would be referenced to the debt securities issued by a specified public company (''Reference Entity'')[7] and would either have a fixed payout or expire worthless, depending upon whether or not a credit event (as described below) occurs during the life of the option. Upon confirmation of a credit event prior to the last day of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 3 replaced the original filing, as modified by Amendment Nos. 1 and 2, in its entirety.

[4] *See* Securities Exchange Act Release No. 55251 (February 7, 2007) (SR–CBOE–2006–84), 72 FR 7091 (''CBOE Proposal'').

[5] *See* 17 CFR 240.9b–1. Pursuant to Rule 9b–1(a)(4) under the Act, the Commission may, by order, designate as ''standardized options'' securities that do not otherwise meet the definition for ''standardized options.'' Standardized options are defined in Rule 9b–1(a)(4) as: ''[O]ptions contracts trading on a national securities exchange, an automated quotations system of a registered securities association, or a foreign securities exchange which relate to options classes the terms of which are limited to specific expiration dates and exercise prices, or such other securities as the Commission may, by order, designate.'' 17 CFR 240.9b–1(a)(4).

[6] A binary option is a style of option having only two possible payoff outcomes: Either a fixed amount or nothing at all.

[7] Proposed CBOE Rule 29.1(f) also includes as a ''Reference Entity'' the guarantor of the debt security underlying the credit default option.

trading of a credit default option series,[8] the options positions existing as of that time would be automatically exercised and the holders of long options positions would receive a fixed cash payment of $100,000 per contract.[9] If no credit event is confirmed during the life of the option, the final settlement price would be $0.

Credit events that would trigger automatic exercise include a failure to make payment pursuant to the terms of the underlying debt security and any other event of default specified by CBOE at the time the Exchange initially lists a particular class of credit default options. The events of default that CBOE may specify must be defined in accordance with the terms of the debt security underlying the credit default option (''Reference Obligation'') or any other debt security of the Reference Entity (collectively with the Reference Obligation, ''Relevant Obligations'').[10]

B. Listing Standards

A credit default option must conform to the initial and continued listing standards under proposed CBOE Chapter XXIX. CBOE may list and trade a credit default option that overlies a debt security of a Reference Entity, provided that such issuer or guarantor, or its parent if a wholly owned subsidiary, has at least one class of securities that is registered under the Act and is an ''NMS stock'' [11] as defined in Rule 600 of Regulation NMS under the Act.[12] The registered equity securities issued by the Reference Entity also would have to satisfy the requirements of CBOE Rule 5.4 for continued options trading, which requires, among other things, that an equity security underlying an option be itself widely held and actively traded.[13] The requirement that the equity securities of an issuer of a debt security underlying a credit default option meet the criteria of Rule 5.4 is designed to ensure that the issuer's securities enjoy widespread investor interest. The requirement that the Reference Entity be an issuer of a registered NMS stock will help ensure that investors have access to comprehensive public information about the issuer, including the registration statement filed under the Securities Act of 1933 (''Securities Act'') and other periodic reports.[14]

A credit default option could not be exercised at the discretion of the investor, but instead would have an automatic payout only upon the occurrence of a credit event. The expiration date would be the fourth business day after the last day of trading of the series, which would be the third Friday of the expiration month.[15] A credit default option generally would expire up to 123 months from the time it is listed, and the Exchange usually would open one to four series for each year up to 10.25 years from the current expiration.[16]

C. Trading

Credit default options will trade on CBOE's Hybrid Trading System from 8:30 a.m. to 3 p.m. (Central Time) [17] in a manner similar to the trading of equity options. With limited distinctions, as described more fully in the proposal, CBOE's equity option trading rules will apply to credit default options.[18] Also, credit default options will be eligible for trading as Flexible Exchange Options (''FLEX Options''). A FLEX Option that is a credit default option would be cash-settled and the exercise-by-exception provisions of OCC Rule 805 [19] would not apply. Market-makers shall be appointed to credit default options pursuant to CBOE's existing requirements,[20] as supplemented by proposed CBOE Rule 29.17. Additionally, CBOE represents that there will be a maximum of one series per quarterly expiration in a given credit default option class, and that it, and the Options Price Reporting Authority (''OPRA''), have the necessary systems capacity to handle the additional quote volume anticipated to be associated with credit default options.

Once a particular credit default option class has been approved for listing and trading, the Exchange would, from time to time, open for trading a series of that class. If a credit default option initially approved for trading no longer meets the Exchange's requirements for continued approval, the Exchange would not open for trading any additional series of options and, as provided in CBOE Rule 5.4, could prohibit any opening purchase transactions in such series. The proposed trading rules for credit default options are designed to create an environment that takes into account the small number of transactions likely to occur, while providing price improvement and the transparency benefits of competitive Exchange floor bidding, as compared to the over-the-counter (''OTC'') market.

Upon the confirmation of a credit event or the redemption of all Relevant Obligations, the applicable credit default option class would cease trading and all outstanding contracts in that class would be subject to automatic exercise. In addition, the CBOE's trading halt procedures applicable to equity options shall apply to credit default options.[21] When determining whether to institute a trading halt in credit default options, CBOE floor officials would consider whether current quotations for the Relevant Obligation(s) or other securities of the Reference Entity are unavailable or have become unreliable. The Exchange's board of directors shall also have the power to impose restrictions on transactions or exercises in one or more series of credit default options as the board, in its judgment, determines advisable in the interests of maintaining a fair and orderly market or otherwise deems

[8] Proposed CBOE Rule 29.9 requires that CBOE confirm the occurrence of a credit event through at least two sources, which may include announcements published via newswire services or information service companies, the names of which would be announced to the membership via a CBOE regulatory circular, or information contained in any order, decree, or notice of filing, however described, of or filed with the courts, the Commission, an exchange, an association, the Options Clearing Corporation (''OCC''), or another regulatory agency or similar authority.

[9] The settlement amount would be $100,000 per contract unless adjusted pursuant to proposed CBOE Rule 29.4, as discussed below.

[10] *See* proposed CBOE Rule 29.1(c).

[11] ''NMS stock'' means any security, or class of securities, other than an option for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transaction in listed options. *See* 17 CFR 242.600(b)(46) and (47).

[12] *See* proposed CBOE Rule 5.3.11.

[13] CBOE Rule 5.4 provides that, absent exceptional circumstances, an underlying security will not be deemed to meet the Exchange's requirements for continued approval when: (a) There are fewer than 6,300,000 shares of the underlying security held by persons other than those who are required to report their security holdings under Section 16(a) of the Act (15 U.S.C. 78p); (b) there are fewer than 1,600 holders of the underlying security; (c) the trading volume (in all markets in which the underlying security is traded) was less than 1,800,000 shares in the preceding twelve months; (d) the market price per share of the underlying security closed below $3 on the previous trading day as measured by the closing price reported in the primary market in which the underlying security traded; or (e) the underlying security ceases to be an NMS stock.

[14] Section 13 of the Act, 15 U.S.C. 78m, requires that any issuer of a security registered pursuant to Section 12 of the Act, 15 U.S.C. 78*l*, would file with the Commission annual reports and information and documents necessary to keep reasonably current the information in its Section 12 registration statement.

[15] If a credit event is confirmed, the expiration date would be the second business day after the confirmation of a credit event. *See* proposed CBOE Rule 29.1(d) and (e).

[16] *See* proposed CBOE Rule 29.2(b)(1) and (2).

[17] *See* proposed CBOE Rule 29.11.

[18] *See* proposed CBOE Rules 29.11–29.17 and 29.19.

[19] OCC Rule 805 sets forth the expiration date exercise procedures for options cleared and settled by the OCC.

[20] *See* Chapter VIII of CBOE's Rules.

[21] *See* CBOE Rules 6.3 and 6.3B; proposed CBOE Rule 29.13.

advisable in the public interest or for the protection of investors.[22]

D. Clearance and Settlement

Because credit default options do not have an exercise price, they do not, by their terms, meet the definition of ''standardized options'' for purposes of Rule 9b–1 under the Act.[23] However, as discussed herein, the Commission today is using its authority pursuant to Rule 9b–1 to designate credit default options as ''standardized options'' under Rule 9b–1. Consequently, credit default option transactions would be eligible for clearance and settlement by the OCC in accordance with procedures that are substantially similar to existing systems and procedures for the clearance and settlement of exchange-traded options.[24]

E. Adjustments

Credit default options will be subject to adjustments in two circumstances.[25] First, if the original Reference Entity is succeeded by another entity in accordance with the terms of the underlying debt security, the related credit default options would be replaced by one or more credit default options derived from the debt securities of the successor entity or entities. To the extent necessary and appropriate for the protection of investors and the public interest, all other terms and conditions of the successor options would be the same as the original credit default options.

Second, if the specific debt security (the Reference Obligation) is redeemed during the life of the credit default option, another debt security of the Reference Entity would be specified as the new Reference Obligation. In the event that all debt securities of the Reference Entity (*i.e.*, all Relevant Obligations) are redeemed during the life of the credit default option, the option would cease trading and, assuming that CBOE has not confirmed a credit event, the contract payout would be $0.

F. Position Limits

Pursuant to proposed CBOE Rule 29.5, credit default options will be subject to a position limit equal to 5,000 contracts on the same side of the market. Credit default options shall not be aggregated with option contracts on the same underlying security and will not be subject to the hedge exemption to CBOE's standard position limits. Instead, the following hedge exemption strategies and positions shall be exempt from CBOE's position limits: (i) A credit default option position ''hedged'' or ''covered'' by an appropriate amount of cash to meet the cash settlement amount obligation (*e.g.*, $100,000 for a credit default option with an exercise settlement value of $100 multiplied by a contract multiplier of 1,000); and (ii) a credit default option position ''hedged'' or ''covered'' by an amount of an underlying debt security(ies) that serves as a Relevant Obligation(s) or other securities, instruments, or interests related to the Reference Entity that is sufficient to meet the cash settlement amount obligation.[26] Also, CBOE's market-maker and firm facilitation exemptions to position limits will apply.[27]

G. Margin

The margin (both initial and maintenance) required for writing short and long positions in credit default options will be as follows: [28]

- For a qualified customer [29] carrying a long position in credit default options, the margin requirement will be 20% of the current market value of the credit default option.
- For a non-qualified customer carrying a long position in a credit default option, the margin requirement will be 100% of the current market value of the credit default option.
- For a non-qualified customer carrying a short position in a credit default option, the margin requirement will be the cash settlement amount, *i.e.*, $100,000 per contract.
- For a qualified customer carrying a short position in a credit default option, the margin requirement will be the lesser of the current market value plus 20% of the cash settlement amount or the cash settlement amount.

These requirements may be satisfied by a deposit of cash or marginable securities. These requirements may not be satisfied by presentation to the member organization carrying the customer's account of a letter of credit meeting the requirements of proposed CBOE Rule 12.3(*l*)(1)(iii).[30]

A credit default option carried short in a customer's account will be deemed a covered position, and eligible for the cash account, provided any one of the following is either held in the account at the time the option is written or is received into the account promptly thereafter: (i) Cash or cash equivalents equal to 100% of the cash settlement amount or (ii) an escrow agreement. The Exchange believes that these requirements strike the appropriate balance and adequately address concerns that a member or its customer may try to maintain an inordinately large unhedged position in credit default options. In addition, in Amendment No. 5, the Exchange notes that, in accordance with CBOE Rule 12.3(a)(3), an escrow agreement must be issued in a form acceptable to the Exchange, and that it has traditionally recognized as acceptable the escrow agreement forms of the OCC and the New York Stock Exchange.

In Amendment No. 5, the Exchange also represents the following:

''As part of its regulatory oversight of member organizations, the Exchange generally reviews member organizations' compliance with margin requirements applicable to customer accounts. In the future, the Exchange will include [c]redit [d]efault [o]ption margin requirements as part of this review. Additionally, the Exchange will review member organizations' internal procedures for managing credit risk associated with extending margin to customers trading [c]redit [d]efault [o]ptions. The Exchange also notes that, pursuant to CBOE Rule 12.10, the Exchange may at any time impose higher margin requirements when it deems such higher margin requirements advisable.''

Lastly, in Amendment No. 5, the Exchange makes non-substantive changes to the text of CBOE Rule 12.5, to clarify that a credit default option that is carried for the account of a qualified investor may be deemed to

[22] *See* proposed CBOE Rule 29.8.

[23] *See* 17 CFR 240.9b–1.

[24] On February 13, 2007, the OCC filed with the Commission pursuant to Section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1), and Rule 19b–4 thereunder, 17 CFR 240.19b–4, a proposed rule change to enable it to clear and settle credit default options proposed to be listed by CBOE. The proposed rule change was published for comment in the **Federal Register** on February 27, 2007. Securities Exchange Act Release No. 55362, 72 FR 9826 (March 5, 2007). On March 7, 2007, the OCC filed Amendment No. 1 to the proposed rule change. *See* SR–OCC–2007–01 (as amended, the ''OCC Proposal''). The Commission has not yet taken action on the OCC proposal.

[25] *See* CBOE Proposed Rule 29.4.

[26] *See* proposed CBOE Rule 29.5.

[27] Proposed CBOE Rule 29.5 requires that for purposes of its market-maker hedge exemption (CBOE Rule 4.11.05) the position must be within 20% of the applicable limit before an exemption would be granted. With respect to CBOE's firm facilitation exemption (CBOE Rule 4.11.06), proposed CBOE Rule 29.5 provides that the aggregate exemption position could not exceed three times the standard limit of 5,000 contracts.

[28] *See* proposed CBOE Rule 12.3(*l*); Amendment No. 5.

[29] Proposed CBOE Rule 12.3(*l*)(1)(i) defines ''qualified customer'' as a person or entity that owns and invests on a discretionary basis no less than $5,000,000 in investments.

[30] In Amendment No. 5, CBOE deletes from proposed rule 12.3(*l*)(1)(iii) the option of using a letter of credit to satisfy margin requirements applicable to credit default options and makes non-substantive corrections to the formatting of proposed CBOE Rule 12.3(*l*)(1)(iii) and the ''Interpretations and Policies'' heading that accompanies CBOE Rule 12.3.

have market value for the purposes of CBOE Rule 12.3(c).

H. Surveillance

The Exchange has represented that it will have in place adequate surveillance procedures to monitor trading in credit default options prior to listing and trading such options.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 5, including whether Amendment No. 5 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–CBOE–2006–84 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to Amendment No. 5 to File Number SR–CBOE–2006–84. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. 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 Amendment No. 5 of File Number SR–CBOE–2006–84 and should be submitted on or before July 3, 2007.

IV. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[31] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[32] which requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general to protect investors and the public interest. The CBOE's proposal, by enabling CBOE to offer a security that will be listed and traded on the Exchange, as opposed to the OTC market, would extend to investors the benefits of a listed exchange market, which include: A centralized market center; an auction market with posted, transparent market quotations and transaction reporting; standardized contract specifications; and the guarantee of the OCC.

As a threshold matter, the Commission finds that the credit default options proposed by CBOE are securities. Section 3(a)(10) of the Act[33] defines security to include, in part, ''any put, call, straddle, option or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof).'' After careful analysis, the Commission finds that credit default options are options[34] based on the value of a security or securities and, therefore, securities under Section 3(a)(10) of the Act;[35] in addition, the Commission finds that credit default options are options on an interest in, or based on the value of an interest in, a security or securities and, therefore, are securities under Section 3(a)(10) of the Act.[36]

The Commission interprets ''based on the value [of a security or securities]'' in Section 3(a)(10) of the Act[37] to include options whose pricing in the secondary market moves in relation to the value of the underlying security or securities of the option in question. Thus the fact that the payout of a cash-settled option will not increase or decrease based on the price movement of the underlying security of that option is not dispositive.[38]

Because credit default options are not currently traded, there is no empirical data regarding their pricing in the secondary market. However, credit default options are essentially exchange-traded equivalents of single-name, OTC credit default swaps.[39] A single-name

[31] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[32] 15 U.S.C. 78f(b)(5).

[33] 15 U.S.C. 78c(a)(10).

[34] Although credit default options do not share every feature of a classic option, the Commission nonetheless finds that credit default options are option contracts. In particular, the Commission notes that the buyer of a credit default option pays to the seller a nonrefundable premium, has rights but no further obligations under the contract, and has no further risk exposure because the seller bears all the risk of the credit event occurring. *See United States* v. *Bein*, 728 F.2d 107, 112 (2d Cir. 1984) (highlighting characteristics that distinguish options from futures contracts).

[35] 15 U.S.C. 78c(a)(10).

[36] 15 U.S.C. 78c(a)(10). In determining whether a derivative is a security, the Commission and the courts have looked to the economic reality of the product. *See Caiola* v. *Citibank, N.A., New York, 295 F.3d 312, 325 (2d Cir. 2002)*, *quoting United Housing Foundation* v. *Foreman*, 421 U.S. 837, 848 (1975) (''In searching for the meaning and scope of the word 'security' * * * the emphasis should be on economic reality''). Construing the definition of a security in this manner permits the Commission and the courts ''sufficient flexibility to ensure that those who market investments are not able to escape the coverage of the Securities Acts by creating new instruments that would not be covered by a more determinate definition.'' *Reves* v. *Ernst & Young*, 494 U.S. 56, 63 n.2 (1990).

[37] *Id.*

[38] In addressing whether a ''digital option'' or a ''binary option'' with a fixed payout is an option based on the value of a security or securities, the court in *Stechler* v. *Sidley, Austin Brown & Wood, L.L.P.*, 382 F.Supp.2d 580, 596–97 (S.D.N.Y. 2005), held that the issue ultimately turned on questions of fact and declined to decide the issue on a motion to dismiss. However, the court's analysis made clear that the existence of a fixed payout that is not tied in a proportionate manner to the price of an underlying security is not a determining factor in deciding whether an instrument is an option on a security. Rather, the court accepted that, in evaluating the economic reality of an instrument, it is appropriate to consider whether the resale value of the instrument moves in relation to the movement of an underlying reference.

[39] Despite the similarities between credit default options and OTC credit default swaps, the Commission wishes to make two things clear. First, because credit default options will be exchange-traded and not individually negotiated (and not necessarily between eligible contract participants), they are not qualifying swap agreements under Section 206A of the Gramm-Leach-Bliley Act (''GLBA''), 15 U.S.C. 78c note, and, therefore, not excluded from the definition of security by Section 3A of the Act, 15 U.S.C. 78c–1. Second, certain OTC credit default swaps are not securities. The finding that credit default options are securities because they are options based on the value of a security might suggest that OTC credit default swaps are also options based on the value of a security or securities and, therefore, excluded from the

Continued

credit default swap is an agreement between a protection buyer and a protection seller whereby the buyer pays a periodic fee in return for a contingent payment by the seller upon the occurrence of a credit event with respect to one or more reference obligations of a reference entity. Credit events typically include one or more of the following: (1) Bankruptcy, (2) obligation acceleration, (3) obligation default, (4) a failure to pay, (5) repudiation or moratorium, or (6) restructuring. Similarly, as explained above, each credit default option shall specify (a) the Reference Entity, (b) the specific debt security or securities that serve as its Reference Obligation or other Relevant Obligations, and (c) the applicable events of default that trigger payout (as determined in accordance with the terms of the Reference Obligation or other Relevant Obligations), which could include such events as a failure to pay, obligation acceleration or default, and restructuring. Hence, credit default options have essentially the same structure as credit default swaps.

In the case of a credit default swap, the amount the buyer pays for protection is based on a quoted spread expressed in basis points on a notional amount specified in the swap agreement. This quoted spread is often referred to as a ''CDS spread'' and is principally based on the probability that the Reference Entity will default (*i.e.*, its creditworthiness). More specifically, the CDS spread represents the price required by a swap counterparty to compensate it for the credit risk associated with the potential default on a particular reference obligation or obligations of an issuer. Similarly, the value of a debt security is a function of the issuer's creditworthiness, which is expressed in terms of a ''yield spread'' (sometimes called ''credit spread''). The yield (or credit) spread is the difference between the yield on the debt instrument and the yield on a debt security of similar maturity whose yield represents pure interest rate risk, such as U.S. Treasuries,[40] and represents the additional yield required by an investor to compensate it for the credit risk associated with the potential default on the particular debt instrument of an issuer.[41] As a consequence of this relationship between debt securities and credit default swaps, the credit default swap market enables more widespread trading in an issuer's creditworthiness than was previously possible.

There is a close empirical correlation between the price of a credit default swap (as expressed in the CDS spread) and the yield (or credit) spread of the specific reference obligation or obligations of that credit default swap.[42] This correlation is to be expected because the valuation of credit default swaps and debt securities are each based on credit risk, and because of the potential for arbitrage between the secondary bond market and the credit default swap market.[43] Similarly, because credit default options are exchange-traded equivalents of credit default swaps, the Commission expects that there will be a close empirical correlation between the pricing of a specific credit default option during the life of the contract and the yield spread of the Reference Obligation or other Relevant Obligations of that credit default option.

We further note, more generally, that credit default options expressly reference in their payout conditions a term of an underlying security that is material to the value of that security. A credit default option will pay out if there is a failure to pay or other default event under the terms of the underlying debt security.

For these reasons, credit default options are options ''based on the value [of a security or securities]'' and, therefore, securities.

In addition, the Commission has determined that credit default options are options on an ''interest in,'' or based on the value of an interest in, a security or securities within the meaning of Section 3(a)(10) of the Act.[44] A security is a collection of rights (and obligations) running between the issuer and the holder of the security. The concept of an ''interest in'' a security plainly includes rights generating a pecuniary interest in a security, such as the right to a dividend payment or bond (coupon) payment. One relevant ''interest in'' a debt security underlying a credit default option is the right to receive (coupon) payments under the terms of that debt security. When a (coupon) payment is not made, impairing the value of that interest, the protection seller must make a payment to the protection buyer. Similarly, a specified default event may trigger other rights of a holder of the debt security. The default events that trigger exercise and payment under the credit default option are meaningful only because they are material terms of a security, essential to the debt holder's rights and interests in that security.[45] The credit default option payout is contingent on these security-dependent events. For these reasons, credit default options are options on an interest in, or based on the value of an interest in, a security or securities.[46]

Moreover, the economic reality of credit default options supports the conclusion that credit default options are securities. Taking a short position (*i.e.*, taking on the role of a protection seller) via credit default options would be akin to purchasing the corporate bond that is the Reference Obligation or other Relevant Obligations of that credit

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definition of swap agreement because Section 206A(b)(1) of the GLBA, 15 U.S.C. 78c note, excludes from the definition of swap agreement ''any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof.'' However, Congress specifically enumerated ''credit default swaps'' (without defining the term) as one example of a qualifying swap agreement. *See* Section 206A(a)(3) of the GLBA, 15 U.S.C. 78c note. The Commission views the specific enumeration of ''credit default swaps'' as reflecting the intention of Congress to exclude certain OTC credit default swaps from the definition of security pursuant to Sections 206B & C of the GLBA, 15 U.S.C. 78c note. Credit default swaps that involve terms similar to credit default options, but that are otherwise excluded from the definition of security because they are qualifying swap agreements, remain subject to the Commission's antifraud jurisdiction (including authority over insider trading) as ''security-based swap agreements'' under Section 206B of the GLBA, 15 U.S.C. 78c note.

[40] Some academics have hypothesized that there may be some deviation between the yield on U.S. Treasuries and pure interest rate risk because bond interest is subject to state tax but U.S. Treasuries are not. *See, e.g.*, Haibin Zhu, *An Empirical Comparison of Credit Spreads between the Bond Market and the Credit Default Swap Market*, BIS Working Papers No. 160 (August 2004) (also noting that transparency and the widespread use of U.S. Treasuries as collateral could explain apparent deviations).

[41] While the terms of both corporate securities and credit default swaps are established when parties enter into the respective contracts, the fair market value of these contracts can vary over the life of the contracts in response to changing perceptions of the creditworthiness of an issuer.

[42] *See, e.g.*, Roberto Blanco, Simon Brennan, and Ian W. Marsh, *An Empirical Analysis of the Dynamic Relation between Investment-Grade Bonds and Credit Default Swaps*, The Journal of Economics, Volume LX, No. 5 (Oct. 2005) (finding credit default swap spreads to be quite close to bond yield spreads).

[43] *See* Zhu, *An Empirical Comparison of Credit Spreads between the Bond Market and the Credit Default Swap Market*, *supra* note 40.

[44] 15 U.S.C. 78c(a)(10).

[45] Although certain default events trigger the exercise and payment of a credit default option, it would not be accurate to describe these options as options on ''an event''. There is no event delivered upon exercise of the option, rather a payment is delivered. The crucial question is what causes the option to be in-the-money and pay out. In the case of credit default options, it is an event that is created by a security.

[46] It is important to note that merely because the option does not transfer ownership of the interest or right in a security—but instead becomes in-the-money and provides a cash payment if certain security rights are triggered—does not mean the option is not on an interest in a security. *Cf. Caiola*, 295 F.3d 312 (2d Cir. 2002) (including within the definition of ''security'' an option that did not deliver an actual security or interest in a security, but merely a cash payment).

default option with the interest rate risk fully hedged. Both give the investor the same risk exposure to creditworthiness of an issuer. Indeed, credit default options may even more closely reflect the financial condition of an SEC-registered issuer because, unlike corporate bonds, which reflect both an issuer's creditworthiness and general interest rate risk, credit default options would only reflect an issuer's creditworthiness. That ability to isolate and transfer credit risk, backed by the guarantee of a central counterparty and the transparency of an exchange, should provide investors with additional opportunities to gain exposure to the public debt market.

For these reasons, the Commission finds that credit default options are options based on the value of, and options on interests in or based on the value of interests in, a security or securities of the Reference Entity and, therefore, securities under Section 3(a)(10) of the Act.[47]

Further, the Commission believes that the listing rules proposed by CBOE for credit default options are reasonable and consistent with the Act. The Commission notes in particular that a credit default option must be based on a Reference Obligation issued by an entity that issues registered equity securities that are NMS stocks and that meet the Exchange's standards for listing an equity option. These requirements are reasonably designed to facilitate investors' access to information about the Reference Entity that may be necessary to price a credit default option appropriately.

The Commission believes that the proposed position limits and margin rules for credit default options are reasonable and consistent with the Act. The proposed position limit of 5,000 contracts in any credit default option class appears to reasonably balance the promotion of a free and open market for these securities with minimization of incentives for market manipulation and insider trading. The proposed margin rules appear reasonably designed to deter a member or its customer from assuming an imprudent position in credit default options.

In support of this proposal, the Exchange made the following representations:

- The Exchange will have in place adequate surveillance procedures to monitor trading in credit default options prior to listing and trading such options, thereby helping to ensure the maintenance of a fair and orderly market for trading in credit default options.
- The Exchange and the OPRA will have the necessary systems capacity to accommodate the additional volume associated with credit default options as proposed.

This approval order is conditioned on CBOE's adherence to these representations.

For the foregoing reasons, the Commission finds that the proposed rule is consistent with the Act.

V. Accelerated Approval

The Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 5, prior to the thirtieth day after publishing notice of Amendment No. 5 in the **Federal Register** pursuant to Section 19(b)(2) of the Act.[48] In Amendment No. 5, CBOE: (1) Modified the text of the proposed margin requirements applicable to credit default options contained in proposed Rules 12.3 and 12.5; (2) made corresponding changes to the discussion sections of the Form 19b–4 and the Exhibit 1 thereto; and (3) inserted information in the discussion sections of the Form 19b–4 and the Exhibit 1 thereto regarding the form of escrow agreements and the Exchange's supervision of member organizations that extend margin to customers trading Credit Default Options.[49] The Commission believes that Amendment No. 5 raises no significant regulatory issues. The Commission therefore finds good cause exists to accelerate approval of the proposed change, as modified by Amendment No. 5, pursuant to Section 19(b)(2) of the Act.

VI. Designation of Credit Default Options Pursuant to Rule 9b–1

Rule 9b–1 establishes a disclosure framework for standardized options that are traded on a national securities exchange and cleared through a registered clearing agency. Under this framework, the exchange on which a standardized option is listed and traded must prepare an Options Disclosure Document (''ODD'') that, among other things, identifies the issuer and describes the uses, mechanics, and risks of options trading, in language that can be easily understood by the general investing public. The ODD is treated as a substitute for the traditional prospectus. A broker-dealer must provide a copy of the ODD to each customer at or before approving of the customer's account for trading any standardized option.[50] Any amendment to the ODD must be distributed to each customer whose account is approved for trading the options class for which the ODD relates.[51]

Under Rule 9b–1, use of the ODD is limited to ''standardized options'' for which there is an effective registration statement on Form S–20 under the Securities Act or that are exempt from registration.[52] The Commission specifically reserved in Rule 9b–1 the ability to designate as standardized options other securities ''that the Commission believes should be included within the options disclosure framework.'' [53]

The Commission hereby designates credit default options, as defined in the OCC Proposal,[54] as standardized options for purposes of Rule 9b–1 under the Act. Credit default options do not meet the definition of ''standardized options,'' because they do not have an exercise price. However, they resemble

[47] 15 U.S.C. 78c(a)(10).

[48] 15 U.S.C. 78s(b)(2). Pursuant to Section 19(b)(2) of the Act, the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission finds good cause for so doing.

[49] The changes pursuant to Amendment No. 5 are discussed more fully in Section II.G, supra.

[50] *See* 17 CFR 240.9b–1(d)(1).

[51] *See* 17 CFR 240.9b–1(d)(2).

[52] *See* 17 CFR 240.9b–1(b)(1) and (c)(8). *See also* 17 CFR 230.238. Rule 238 under the Securities Act provides an exemption from the Securities Act for any standardized option, as defined by Rule 9b–1(a)(4) under the Act, with limited exceptions. Rule 238 does not exempt standardized options from the antifraud provisions of Section 17 of the Securities Act, 15 U.S.C. 77q. Also, offers and sales of standardized options by or on behalf of the issuer of the underlying security or securities, an affiliate of the issuer, or an underwriter, will constitute an offer or sale of the underlying security or securities as defined in Section 2(a)(3) of the Securities Act, 15 U.S.C. 77b(a)(3). *See also* Securities Act Release No. 8171 (December 23, 2002), 68 FR 188 (January 2, 2003) (Exemption for Standardized Options From Provisions of the Securities Act of 1933 and From Registration Requirements of the Exchange Act of 1934).

[53] *See* Securities Exchange Act Release No. 19055 and Securities Act Release No. 6426 (September 16, 1982), 47 FR 41950, 41954 (September 23, 1982).

[54] For purposes of its proposal, OCC would define the term ''credit default option'' as an option that is automatically exercised upon receipt by the OCC of a credit event confirmation with respect to the reference obligation(s) of a reference entity. Credit default options have only two possible payoff outcomes: Either a fixed automatic exercise settlement amount or nothing at all. *See* proposed Section 1.C.(2) of Article XIV of the OCC By-Laws.

- I11''Credit event'' would be as defined in the rules of the exchange on which the credit default options are listed, with respect to a reference obligation for such option. *See* proposed Section 1.C.(3) of Article XIV of the OCC By-Laws.
- I11''Reference entity'' would mean the issuer or guarantor of the reference obligation(s). *See* proposed Section 1.R.(1) of Article XIV of the OCC By-Laws.
- I11''Reference obligations'' would mean one or more debt securities the terms of which define a credit event for a class of credit default options, as provided in the rules of the listing exchange. *See id.*

standardized options in other significant respects. Credit default options have an underlying security and an expiration date. Like other standardized options, credit default options have standardized terms relating to exercise procedures, contract adjustments, time of issuance, effect of closing transactions, restrictions, and other matters pertaining to the rights and obligations of holders and writers. Further, credit default options are designed to provide market participants with the ability to hedge their exposure to an underlying security. The fact that credit default options lack a specified exercise price does not detract from this option-like benefit. The Commission believes that the fact that the OCC, the clearing agency for all standardized options, is willing to serve as issuer of credit default options supports the view that adding credit default options to the standardized option disclosure framework is reasonable.

Therefore, the Commission hereby designates credit default options, such as those proposed by CBOE, as standardized options for purposes of Rule 9b–1 under the Act.

VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[55] that the proposed rule change (SR–CBOE–2006–84) as modified by Amendment Nos. 3, 4, and 5, be, and hereby is approved on an accelerated basis.

It is further ordered, pursuant to Rule 9b–1(a)(4) under the Act, the credit default options, as defined in proposed rule change (SR–OCC–2007–01) are designated as standardized options.

By the Commission.

Florence E. Harmon,

Deputy Secretary.

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[55] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55864; File No. SR–ISE–2007–35]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change to Permanently Extend the Pilot Program for Preferenced Orders

June 5, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 9, 2007, the International Securities Exchange, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to make permanent its pilot program for Preferenced Orders. The text of the proposed rule change is available on ISE's Web site at *http://www.ise.com,* at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to make permanent the Exchange's pilot program for preferenced orders as provided in paragraph .03 of the Supplementary Material to Rule 713. The proposal amends ISE's procedure for allocating trades among market makers and non-customer orders under Rule 713 to provide an enhanced allocation to a ''Preferred Market Maker'' when it is quoting at the national best bid or offer (''NBBO''). Specifically, an Electronic Access Member may designate any market maker appointed to an options class to be a Preferred Market Maker on orders it enters into the Exchange's system (''Preferenced Orders''). If the Preferred Market Maker is not quoting at the NBBO at the time the Preferenced Order is received, the Exchange's existing allocation and execution procedures will be applied to the execution.[3] The proposed rule is subject to a pilot program that is currently set to expire on June 10, 2007.[4]

Under the proposal, if a Preferred Market Maker is quoting at the NBBO at the time a Preferenced Order is received, the allocation procedure is modified so that the Preferred Market Maker will receive an enhanced allocation instead of the Primary Market Maker [5] equal to the greater of: (i) The proportion of the total size at the best price represented by the size of its quote; or (ii) sixty percent of the contracts to be allocated if there is only one other Non-Customer Order or market maker quotation at the best price and forty percent if there are two or more other Non-Customer Orders and/or market maker quotes at the best price.[6] Unexecuted contracts remaining after the Preferred Market Maker's allocation would be allocated pro-rata based on size as described above.

Pursuant to this proposed rule change seeking permanent approval of the pilot program, the Exchange also proposes to delete from the Notes section in its Schedule of Fees a reference to the Preferenced Orders pilot program that was adopted when the Exchange initiated a payment for order flow program for Competitive Market Makers.[7]

The Exchange believes the proposed rule change is a necessary competitive response to the preferencing rules adopted by other options exchanges and will help the ISE attract and retain order flow. This order flow will add depth and liquidity to the Exchange's markets and enable the Exchange to continue to compete effectively with other options exchanges.

[3] Marketable customer orders are not automatically executed at prices inferior to the NBBO. If the ISE best bid or offer is inferior to the NBBO, it is handled by the Primary Market Maker according to Rule 803(c).

[4] *See* Securities Exchange Act Release No. 53921 (June 1, 2006), 71 FR 33019 (June 7, 2006).

[5] A Primary Market Maker may be the Preferenced Market Maker, in which case such market maker would receive the enhanced allocation for Preferenced Market Makers.

[6] All allocations are automatically performed by the Exchange's system.

[7] *See* Securities Exchange Act Release No. 53127 (January 13, 2006), 71 FR 3582 (January 23, 2006) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Payment for Order Flow Fee Changes).

2. Statutory Basis

The basis under the Act for this proposed rule change is found in Section 6(b)(5),[8] in that the proposed rule change is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. 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–ISE–2007–35 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–ISE–2007–35. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. 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–ISE–2007–35 and should be submitted on or before July 3, 2007.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act[9] and the rules and regulations thereunder applicable to a national securities exchange,[10] and, in particular, the requirements of Section 6(b)(5) of the Act.[11] Section 6(b)(5) requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the Exchange's program for Preferenced Orders was approved on a pilot basis approximately two years ago.[12] The Exchange has asked the Commission to approve the Exchange's program on a permanent basis. For the reasons noted by the Commission when it initially approved the Exchange's program for Preferenced Orders on a pilot basis, the Commission continues to believe that the Exchange's program does not jeopardize market integrity or the incentive for market participants to post competitive quotes.[13] Accordingly, the Commission finds that the proposal is consistent with the Act.

The Exchange has requested that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of notice thereof in the **Federal Register**. The Commission believes that granting accelerated approval of the proposed rule change would allow the Exchange's program for Preferenced Orders to continue without disruption beyond the June 10, 2007 expiration date of the current pilot program. Accordingly, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[14] for approving the proposed rule change prior to the thirtieth day after publication of notice thereof in the **Federal Register**.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[15] that the proposed rule change (SR–ISE–2007–35) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

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[8] 15.U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f.

[10] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[11] 15.U.S.C. 78f(b)(5).

[12] The Commission initially approved the Exchange's preferenced order program on a six week pilot basis while the Commission sought comment on the proposed rule change. *See* Securities Exchange Act Release No. 51818 (June 10, 2005), 70 FR 35146 (June 16, 2005). The Commission subsequently extended to the pilot period until June 10, 2006, which was one year from the date the Commission first approved the Exchange's Preferenced Order program on a pilot basis. *See* Securities Exchange Act Release No. 52066 (July 20, 2005), 70 FR 43479 (July 27, 2005). On June 1, 2006, the Commission further extended the pilot period until June 10, 2007. *See* Securities Exchange Act Release No. 53921 (June 1, 2006), 71 FR 33019 (June 7, 2006).

[13] *See* Securities Exchange Act Release No. 51818 (June 10, 2005), 70 FR 35146 (June 16, 2005).

[14] 15 U.S.C. 78s(b)(2).

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55862; File No. SR–NASDAQ–2007–053]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Trading Shares of the PowerShares DB Energy Fund, the PowerShares DB Oil Fund, the PowerShares DB Precious Metals Fund, the PowerShares DB Gold Fund, the PowerShares DB Silver Fund, the PowerShares DB Base Metals Fund, and the PowerShares DB Agriculture Fund Pursuant to Unlisted Trading Privileges

June 5, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 16, 2007, The NASDAQ Stock Market LLC (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by Nasdaq. This order provides notice of the proposed rule change and approves the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to trade, pursuant to unlisted trading privileges (''UTP''), shares (''Shares'') of the PowerShares DB Energy Fund, the PowerShares DB Oil Fund, the PowerShares DB Precious Metals Fund, the PowerShares DB Gold Fund, the PowerShares DB Silver Fund, the PowerShares DB Base Metals Fund, and the PowerShares DB Agriculture Fund (collectively the ''Funds''). The text of the proposed rule change is available from Nasdaq's Web site at *http://nasdaq.complinet.com,* at Nasdaq's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq 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 III below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to trade the Shares on a UTP basis. The Shares are currently trading on Nasdaq on a three-month pilot basis.[3] Approval of this filing will allow the Shares to continue to trade after the expiration of the pilot. The Commission previously approved a proposal to list and trade the Shares of the Funds by the American Stock Exchange LLC (the ''Amex'').[4]

The Shares represent beneficial ownership interests in the corresponding Fund's net assets, consisting solely of the common units of beneficial interests of the DB Energy Master Fund, the DB Oil Master Fund, the DB Precious Metals Master Fund, the DB Gold Master Fund, the DB Silver Master Fund, the DB Base Metals Master Fund, and the DB Agriculture Master Fund, respectively (collectively, the ''Master Funds''). DB Multi-Sector Commodity Master Trust (the ''Master Trust'') is organized as a Delaware statutory trust with each of the Master Funds representing a series of the Master Trust. The Master Funds will hold primarily[5] futures contracts[6] on the commodities comprising the Deutsche Bank Liquid Commodity Index—Optimum Yield Energy Excess Return™, Deutsche Bank Liquid Commodity Index—Optimum Yield Crude Oil Excess Return™, Deutsche Bank Liquid Commodity Index—Optimum Yield Precious Metals Excess Return™, Deutsche Bank Liquid Commodity Index—Optimum Yield Gold Excess Return™, Deutsche Bank Liquid Commodity Index—Optimum Yield Silver Excess Return™, Deutsche Bank Liquid Commodity Index Optimum Yield Industrial Metals Excess Return™, and Deutsche Bank Liquid Commodity Index—Optimum Yield Agriculture Excess Return™ (collectively, the ''Indexes''), as the case may be. The sponsor of the Indexes is Deutsche Bank AG London (the ''Index Sponsor''). Each of the Funds and each of the Master Funds are commodity pools operated by DB Commodity Services LLC (the ''Managing Owner'').[7]

Nasdaq deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Nasdaq's existing rules governing the trading of equity securities, including Rule 4630. The Shares will trade on Nasdaq from 9:30 a.m. until 4:15 p.m. Eastern Time (''ET''), except that shares of the PowerShares DB Base Metals Fund will also trade from 4:15 p.m. until 8 p.m. ET, even if the Indicative Fund Value (''IFV''), as discussed below, is not disseminated from 4:15 p.m. until 8 p.m. ET.[8] Nasdaq has appropriate rules to facilitate transactions in the Shares during these trading sessions.

Like other exchange-traded fund products, each of the Funds issues and redeems its Shares on a continuous basis at a price equal to the NAV per Share next determined after an order is received in proper form. Also, each of the Funds issues and redeem its Shares only in aggregations of 200,000 shares (''Basket Aggregations'') and only through qualified market participants that have entered into agreements with the Managing Owner (each, an ''Authorized Participant''). Additional information about the creation and redemption process is included in the Amex Order. In summary, to create Shares, an Authorized Participant must properly place a creation order and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 55386 (March 2, 2007), 72 FR 10801 (March 9, 2007) (SR–NASDAQ–2007–016) (''Pilot Order'').

[4] *See* Securities Exchange Act Release No. 55029 (December 29, 2006), 72 FR 806 (January 8, 2007) (SR–Amex–2006–76) (the ''Amex Order'').

[5] Other holdings of the Master Fund will include cash and U.S. Treasury securities for deposit with futures commission merchants as margin, and other high-credit-quality short-term fixed income securities.

[6] The following is a list of futures contracts and other commodity interests in which the respective Master Fund may invest and the exchanges on which they trade: Energy Index—sweet light crude (NYMEX), heating oil (NYMEX), brent crude oil (ICE Futures), RBOB gasoline (NYMEX), natural gas (NYMEX); Oil Index—sweet light crude (NYMEX); Precious Metals Index—gold (COMEX), silver (COMEX); Gold Index—gold (COMEX); Silver Index—silver (COMEX); Base Metals Index—aluminum (LME), zinc (LME), copper-grade A (LME); Agriculture Index—corn (CBOT), wheat (CBOT), soybeans (CBOT), sugar (NYBOT).

[7] The Managing Owner is registered as a commodity pool operator (''CPO'') and commodity trading advisor (''CTA'') with the Commodity Futures Trading Commission (''CFTC'') and is a member of the National Futures Association (''NFA''). The Managing Owner will serve as the CPO and CTA of each of the Funds and each of the Master Funds.

[8] Because the LME is closed for floor and electronic trading during Nasdaq's after-hours trading session (from 4:15 p.m. until 8 p.m. ET), an updated IFV for the PowerShares DB Base Metals Fund cannot be calculated during such session. As provided by Rule 4120, Nasdaq may rely on the listing market to monitor dissemination of the IFV during Nasdaq's regular trading session (9:30 a.m. to 4:15 p.m. ET). Currently the Index Sponsor for the PowerShares DB Base Metals Fund's index does not calculate updated index values during Nasdaq's late trading session; however, if the Index Sponsor did so in the future, Nasdaq will not trade shares of the PowerShares DB Base Metals Fund unless such official index value is widely disseminated.

deliver the specified ''cash deposit amount'' [9] and applicable transaction fee to The Bank of New York (the ''Fund Administrator''). The Fund Administrator will issue to the Authorized Participant the appropriate number of Basket Aggregations. To redeem Shares, an Authorized Participant must properly place a redemption order and deliver Shares that in the aggregate constitute one or more Basket Aggregations, plus any applicable transaction fee. The Fund Administrator will deliver the appropriate ''cash redemption amount'' [10] for each Basket Aggregation that an Authorized Participant redeems.

On each business day, the Administrator makes available immediately prior to the opening of trading on Amex, through the facilities of the Consolidated Tape Association (''CTA''), the Basket Amount for the creation of a Basket. According to the Amex Order, Amex disseminates every 15 seconds throughout the trading day, via the facilities of the CTA, an amount representing on a per-Share basis, the current values of the Basket Amounts for each of the Funds.

After 4 p.m. ET each business day, the Administrator determines the NAV for each of the Funds, utilizing the current settlement value of the particular commodity futures contracts. The calculation methodology for the NAV is described in more detail in the Amex Order. After 4 p.m. ET each business day, the Administrator, Amex, and the Managing Owner disseminate the NAVs for the Shares and the Basket Amounts (for orders placed during the day). The Basket Amounts and the NAVs are communicated by the Administrator to all Authorized Participants via facsimile or e-mail, and the NAV is available on the Funds' Web site at *http://www.dbfunds.db.com*.[11]

Quotations for and last-sale information regarding the Shares are disseminated through the Consolidated Tape System (''CTS''). The Index Sponsor publishes the value of each of the Indexes at least once every 15 seconds throughout each trading day on the CTA, Bloomberg, Reuters, and on the Fund's Web site at *http://www.dbfunds.db.com*. The closing Index levels similarly are provided by the Index Sponsor. In addition, any adjustments or changes to the Indexes are provided by the Index Sponsor and Amex on their respective Web sites.

The Web site for the Funds at *http://www.powershares.com*, which is publicly accessible at no charge, contains the following information: (a) The current NAV per Share daily and the prior business day's NAV and the reported closing price; (b) the mid-point of the bid-ask price in relation to the NAV as of the time the NAV is calculated (the ''Bid-Ask Price'');[12] (c) the calculation of the premium or discount of such price against such NAV; (d) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV, within appropriate ranges for each of the four previous calendar quarters; (e) the prospectus; and (f) other applicable quantitative information.

As described above, the respective NAVs for the Funds are calculated and disseminated daily to all market participants at the same time. According to the Amex Order, Amex also intends to disseminate for each of the Funds on a daily basis by means of CTA/CTS High Speed Lines information with respect to the corresponding IFV (as discussed below), recent NAV, and shares outstanding. Amex will also make available on its Web site daily trading volume of the Shares of each of the Funds, closing prices of such Shares, and the corresponding NAV. The closing price and settlement prices of the futures contracts comprising the Indexes and held by the corresponding Master Funds are also readily available from the relevant futures exchanges, automated quotation systems, published or other public sources, or on-line information services such as Bloomberg or Reuters.

Amex has represented that it will disseminate through the facilities of the CTA an updated IFV for each of the Funds. The respective IFVs will be disseminated on a per-Share basis at least every 15 seconds from 9:30 a.m. to 4:15 p.m. ET, according to the Amex Order. The IFVs will be calculated based on the cash required for creations and redemptions for the respective Funds adjusted to reflect the price changes of the corresponding Index commodities through investments held by the Master Funds, *i.e.*, futures contracts. The IFVs will not reflect price changes to the price of an underlying commodity between the close of trading of the futures contract at the relevant futures exchange and 4:15 p.m. ET. While the Shares will trade on Nasdaq from 9:30 a.m. to 4:15 p.m. ET (and until 8 p.m. ET in the case of the shares of the PowerShares DB Base Metals Fund), regular trading hours for each of the Index commodities on the various futures exchanges vary widely, as set forth in detail in the Amex Order. Therefore, the value of a Share may be influenced by non-concurrent trading hours between the Nasdaq and the various futures exchanges on which the futures contracts based on the Index commodities are traded.

Nasdaq will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121. The conditions for a halt include a regulatory halt by the listing market. UTP trading in the Shares will also be governed by provisions of Nasdaq Rule 4120 relating to temporary interruptions in the calculation or wide dissemination of the IFV or the value of the Index. Additionally, Nasdaq may cease trading the Shares if other unusual conditions or circumstances exist which, in the opinion of Nasdaq, make further dealings on Nasdaq detrimental to the maintenance of a fair and orderly market. Nasdaq will also follow any procedures with respect to trading halts as set forth in Nasdaq Rule 4120(c). Finally, Nasdaq will stop trading the Shares if the listing market delists them.

Nasdaq believes that its surveillance procedures are adequate to address any concerns about the trading of the Shares on Nasdaq. Trading of the Shares through Nasdaq facilities is currently subject to NASD's surveillance procedures for equity securities in general and ETFs in particular.[13] Nasdaq is able to obtain information regarding trading in the Shares and the underlying futures contracts through its members in connection with the proprietary or customer trades that such members effect on any relevant market. In addition, Nasdaq may obtain trading information via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members or affiliates of the ISG, including the CBOT and the NYBOT, and Nasdaq has Information Sharing Agreements in place with ICE, NYMEX, and LME. Nasdaq has issued an Information Circular to inform its members of the special characteristics and risks associated with trading the Shares.

[9] The ''cash deposit amount'' equals the NAV per Share of the applicable Fund times 200,000 (*i.e.*, NAV per Basket Aggregation).

[10] The ''cash redemption amount'' equals the NAV per Basket Aggregation.

[11] The Funds also maintain information on a Web site at *http://www.powershares.com*. Nasdaq will provide a link from its Web site at *http://www.nasdaq.com* to the Funds' Web sites.

[12] The Bid-Ask Price of Shares is determined using the highest bid and lowest offer as of the time of calculation of the NAV.

[13] NASD surveils trading pursuant to a regulatory services agreement. Nasdaq is responsible for NASD's performance under this regulatory services agreement.

2. Statutory Basis

Nasdaq believes that the proposal is consistent with Section 6(b) of the Act [14] in general and Section 6(b)(5) of the Act [15] in particular, in that in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest. In addition, Nasdaq believes that the proposal is consistent with Rule 12f–5 under the Act [16] because it deems the Shares to be an equity securities, thus rendering trading in the Shares subject to Nasdaq's existing rules governing the trading of equity securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. 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–NASDAQ–2007–053 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–NASDAQ–2007–053. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. 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–NASDAQ–2007–053 and should be submitted on or before July 3, 2007.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[17] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[18] which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general to protect investors and the public interest. The Commission believes that this proposal should benefit investors by increasing competition among markets that trade the Shares.

In addition, the Commission finds that the proposal is consistent with Section 12(f) of the Act,[19] which permits an exchange to trade, pursuant to UTP, a security that is listed and registered on another exchange.[20] The Commission notes that it previously approved the listing and trading of the Shares on Amex.[21] The Commission also finds that the proposal is consistent with Rule 12f–5 under the Act,[22] which provides that an exchange shall not extend UTP to a security unless the exchange has in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends UTP. The Exchange has represented that it meets this requirement because it deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities.

The Commission further believes that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,[23] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotations for and last-sale information regarding the Shares are disseminated through the facilities of the CTA and the Consolidated Quotation System. Furthermore, the IFV of each Fund is disseminated every 15 seconds throughout the trading day by the national securities exchange on which the Fund is listed or by other information providers or market data vendors.

The Commission also believes that the Exchange's trading halt rules are reasonably designed to prevent trading in an ETF when transparency is impaired. Nasdaq will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121. The conditions for a halt include a regulatory halt by the listing market. UTP trading in the Shares will also be governed by provisions of Nasdaq Rule 4120 relating to temporary interruptions in the calculation or wide dissemination of the IFV or the value of the Index. Additionally, Nasdaq may cease trading the Shares if other unusual conditions

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] 17 CFR 240.12f–5.

[17] In approving this rule change, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78*l*(f).

[20] Section 12(a) of the Act, 15 U.S.C. 78l(a), generally prohibits a broker-dealer from trading a security on a national securities exchange unless the security is registered on that exchange pursuant to Section 12 of the Act. Section 12(f) of the Act excludes from this restriction trading in any security to which an exchange ''extends UTP.'' When an exchange extends UTP to a security, it allows its members to trade the security as if it were listed and registered on the exchange even though it is not so listed and registered.

[21] *See supra* note 4.

[22] 17 CFR 240.12f–5.

[23] 15 U.S.C. 78k–1(a)(1)(C)(iii).

or circumstances exist which, in the opinion of Nasdaq, make further dealings on Nasdaq detrimental to the maintenance of a fair and orderly market. Nasdaq will also follow any procedures with respect to trading halts as set forth in Nasdaq Rule 4120(c).

The Commission notes that, if the Shares should be delisted by the listing exchange, the Exchange would no longer have authority to trade the Shares pursuant to this order.

In support of this proposal, the Exchange has represented that its surveillance procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules. This approval order is conditioned on the Exchange's adherence to this representation.

In addition, the Commission recently approved the trading of the Shares on the Exchange pursuant to UTP for a pilot period of three months.[24] In the Pilot Order, the Commission noted that exchanges that trade commodity-related securities generally have in place surveillance arrangements with markets that trade the underlying securities. In its proposal to trade the Shares for a pilot period, the Exchange represented that it was in the process of completing these surveillance arrangements and expected to do so ''in the near future.'' The Exchange recently provided the Commission with evidence that it has completed these surveillance arrangements.

The Commission finds good cause for approving this proposal before the thirtieth day after the publication of notice thereof in the **Federal Register**. As noted previously, the Commission previously found that the listing and trading of the Shares on Amex is consistent with the Act. The Commission presently is not aware of any regulatory issue that should cause it to revisit that finding or would preclude the trading of the Shares on the Exchange pursuant to UTP. Therefore, accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for the Shares.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[25] that the proposed rule change (SR–NASDAQ–2007–053) thereto, be and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[26]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–11181 Filed 6–11–07; 8:45 am]

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[24] *See supra* note 3.

[25] 15 U.S.C. 78s(b)(2).

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55856; File No. SR–NASDAQ–2007–029]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Require Nasdaq-Listed Issuers To Submit Material News to Nasdaq Using Nasdaq's Electronic Disclosure Submission System

June 4, 2007.

I. Introduction

On March 27, 2007, The NASDAQ Stock Market LLC (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to require Nasdaq-listed issuers to submit material news to Nasdaq through Nasdaq's electronic disclosure submission system, except in emergency situations. Nasdaq filed Amendment No. 1 to the proposal on April 25, 2007. The proposed rule change, as amended, was published for comment in the **Federal Register** on May 2, 2007.[3] The Commission received no comments regarding the proposed rule change, as amended. This order approves the proposed rule change, as amended.

II. Description of the Proposal

Nasdaq Rules 4310(c)(16) and 4320(e)(14) require a Nasdaq-listed issuer, except in unusual circumstances, to make prompt disclosure to the public through any Regulation FD compliant method (or combination of methods) of any material information that would reasonably be expected to affect the value of its securities or to influence investors' decisions. These rules also require the issuer to provide notice of certain disclosures to Nasdaq's MarketWatch Department (''Nasdaq MarketWatch'') prior to the release of the information. Nasdaq reviews these disclosures to determine whether a trading halt is appropriate. Issuers currently provide material news notifications to Nasdaq MarketWatch electronically through Nasdaq's electronic disclosure submission system, or via fax or telephone. Nasdaq does not disseminate this information.

Although Nasdaq introduced the electronic disclosure submission system in 2004, most issuers continue to provide material news notifications to Nasdaq MarketWatch by fax.[4] According to Nasdaq, the material information from fax-delivered documents and telephone notifications must be retyped manually into Nasdaq MarketWatch's database systems, a process that uses staff time, introduces error risk, and results in a less robust audit trail. To reduce this administrative burden, Nasdaq proposes to amend Nasdaq Rule 4120, ''Trading Halts,'' and IM–4120–1, ''Disclosure of Material Information,'' to require issuers to submit material news notifications to Nasdaq through Nasdaq's electronic disclosure submission system, except in emergency situations.[5] In an emergency, an issuer would continue to be required to notify Nasdaq prior to disseminating material news, but Nasdaq would accept notification by telephone or fax.

Under the proposal, Nasdaq may issue a Staff Determination that is a public reprimand letter or, in extreme circumstances, a Staff Determination to delist an issuer's securities, if an issuer repeatedly fails to notify Nasdaq prior to the distribution of material news, or repeatedly fails to use the electronic disclosure submission system in the absence of an emergency.[6] In determining whether to issue a public reprimand letter, Nasdaq will consider whether the issuer has demonstrated a pattern of failures, whether the issuer has been contacted concerning previous violations, and whether the issuer has taken steps to assure that future violations will not occur.[7]

Nasdaq proposes to implement the proposal approximately 90 days after the proposal is approved.

III. Discussion

The Commission finds that the proposed rule change is consistent with

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 55672 (April 26, 2007), 72 FR 24349.

[4] Nasdaq notes, for example, that of approximately 4,200 material news notifications submitted to Nasdaq MarketWatch in January 2007, over 70% were submitted by fax.

[5] Nasdaq defines emergency situations to include: lack of computer or internet access; a technical problem on either the issuer or Nasdaq system, or an incompatibility between those systems; and a material development such that no draft disclosure document exists, but immediate notification to Nasdaq MarketWatch is important based on the event. *See* Nasdaq IM–4120–1.

[6] *See* Nasdaq IM–4120–1.

[7] *See* Nasdaq IM–4120–1.

the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[8] Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[9] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

By requiring issuers to submit material news notifications to Nasdaq through Nasdaq's electronic disclosure submission system, except in emergencies, the Commission believes that the proposal appears to be reasonably designed to reduce the administrative burdens and error risk associated with retyping material news information provided by telephone or fax into Nasdaq's database systems. By reducing the error risk associated with retyping this information into Nasdaq's database systems, the Commission also believes that the proposal appears to be reasonably designed to help to enhance the accuracy and integrity of Nasdaq's audit trail.

Under the proposal, Nasdaq may issue a Staff Determination that is a public reprimand letter or, in extreme circumstances, a determination to delist an issuer's securities, if an issuer fails repeatedly to notify Nasdaq prior to the distribution of material news or fails repeatedly to use the electronic disclosure submission system in the absence of an emergency.[10] The Commission notes that the procedures in the Nasdaq Rule 4800 Series, ''Procedures for Review of Nasdaq Listing Determinations,'' will apply to any such Staff Determinations.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[11] that the proposed rule change (SR–NASDAQ–2007–029), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–11189 Filed 6–11–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55854; File No. SR–NASDAQ–2006–045]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Allow the Use of a Company's Web Site To Distribute an Annual Report and Meet Other Nasdaq Listing Requirements

June 4, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 31, 2006, The NASDAQ Stock Market LLC (''Nasdaq'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by Nasdaq. On April 25, 2007, Nasdaq submitted Amendment No. 1, which replaced the text of the original filing in its entirety. 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 the Substance of the Proposed Rule Change

Nasdaq proposes changes to Rule 4350 to facilitate the use of technology to satisfy Nasdaq listing requirements and to make certain clarifying and technical corrections. Nasdaq will implement the proposed rule immediately upon approval.

The text of the proposed rule change is below. Proposed new language is in *italic*; proposed deletions are in brackets.[3]

* * * * *

4350. Qualitative Listing Requirements for Nasdaq Issuers Except for Limited Partnerships

(a) Applicability

(1) Foreign Private Issuers. A foreign private issuer may follow its home country practice in lieu of the requirements of Rule 4350, provided, however, that such an issuer shall: Comply with Rules 4350(b)(1)(B), 4350(j) and 4350(m), have an audit committee that satisfies Rule 4350(d)(3), and ensure that such audit committee's members meet the independence requirement in Rule 4350(d)(2)(A)(ii). A foreign private issuer that follows a home country practice in lieu of one or more provisions of Rule 4350 shall disclose in its annual reports filed with the Commission *or on its Web site* each requirement of Rule 4350 that it does not follow and describe the home country practice followed by the issuer in lieu of such requirements. In addition, a foreign private issuer making its initial public offering or first U.S. listing on Nasdaq shall make the same disclosures in its registration statement *or on its Web site.*

(2)–(5) No change.

(b) Distribution of Annual and Interim Reports

(1)(A) Each issuer *with common stock or voting preferred stock (or their equivalents) listed on Nasdaq* shall [distribute] *make available* to shareholders *of such securities* [copies of] an annual report containing audited financial statements of the company and its subsidiaries, *which may be on Form 10–K, 20–F, 40–F or N–CSR.* [The report shall be distributed to shareholders a reasonable period of time prior to the company's annual meeting of shareholders and shall be filed with Nasdaq at the time it is distributed to shareholders.] *An issuer may comply with this requirement either: (i) By mailing the report to shareholders, or (ii) by posting the annual report to shareholders on or through the company's Web site (or, in the case of an issuer that is an investment company that does not maintain its own Web site, on a Web site that the issuer is allowed to use to satisfy the Web site posting requirement in Exchange Act Rule 16a–3(k)), along with a prominent undertaking in the English language to provide shareholders, upon request, a hard copy of the company's annual report free of charge. An issuer that chooses to satisfy this requirement via a Web site posting must, simultaneous with this posting, issue a press release stating that its annual report has been filed with the Commission (or other*

[8] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78f(b)(5).

[10] See Nasdaq IM–4120–1.

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Changes are marked to the rule text that appears in the electronic manual of Nasdaq found at *http://www.complinet.com/nasdaq.*

appropriate regulatory authority). This press release must also state that the annual report is available on the company's Web site and include the Web site address and that shareholders may receive a hard copy free of charge upon request. An issuer must provide such hard copies within a reasonable period of time following the request.

(B) An issuer that receives an audit opinion that [contains a going concern qualification] *expresses doubt about the ability of the company to continue as a going concern for a reasonable period of time* must make a public announcement through the news media disclosing the receipt of such [qualification] *opinion.* Prior to the release of the public announcement, the issuer must provide the text of the public announcement to the StockWatch section of Nasdaq's MarketWatch Department (''Nasdaq StockWatch''). The public announcement shall be provided to Nasdaq StockWatch and released to the media not later than seven calendar days following the filing of such audit opinion in a public filing with the Securities and Exchange Commission.

(2)–(4) No change.

(c)–(n) No change.

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IM 4350–6. Applicability

1. Foreign Private Issuer Exception and Disclosure. A foreign private issuer (as defined in Rule 3b–4 under the Act) listed on Nasdaq may follow the practice in such issuer's home country (as defined in General Instruction F of Form 20–F) in lieu of some of the provisions of Rule 4350, subject to several important exceptions. First, such an issuer shall comply with Rule 4350(b)(1)(B) (Disclosure of Going Concern Opinion), Rule 4350(j) (Listing Agreement) and Rule 4350(m) (Notification of Material Noncompliance). Second, such an issuer shall have an audit committee that satisfies Rule 4350(d)(3). Third, members of such audit committee shall meet the criteria for independence referenced in Rule 4350(d)(2)(A)(ii) (the criteria set forth in Rule 10A–3(b)(1), subject to the exemptions provided in Rule 10A–3(c) under the Act). Finally, a foreign private issuer that elects to follow home country practice in lieu of a requirement of Rule 4350 shall submit to Nasdaq a written statement from an independent counsel in such issuer's home country certifying that the issuer's practices are not prohibited by the home country's laws. In the case of new listings, this certification is required at the time of listing. For existing issuers, the certification is required at the time the company seeks to adopt its first non-compliant practice. In the interest of transparency, the rule requires a foreign private issuer to make appropriate disclosures in the issuer's annual filings with the Commission (typically Form 20–F or 40–F), and at the time of the issuer's original listing in the United States, if that listing is on Nasdaq, in its registration statement (typically Form F–1, 20–F, or 40–F); *alternatively, the issuer may provide these disclosures in English on its Web site.* The issuer shall disclose each requirement of Rule 4350 that it does not follow and include a brief statement of the home country practice the issuer follows in lieu of these corporate governance requirement(s). *If the disclosure is only available on the Web site, the annual report and registration statement should so state and provide the Web address at which the information may be obtained.*

(2)–(4) No change.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq 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. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to make changes to its rules to facilitate the use of technology to satisfy Nasdaq listing requirements and to make certain clarifying and technical corrections.

Annual Reports

Pursuant to Nasdaq Rule 4350(b)(1)(A), each Nasdaq issuer is currently required to distribute to shareholders a copy of an annual report containing audited financial statements.[4] Nasdaq proposes to modify its rules to permit a company to distribute its annual report by posting it on a Web site and issuing a press release stating that the annual report has been filed with the Commission (or other appropriate regulatory authority), that such annual report is available on the company's publicly available Web site, and that shareholders can receive a hard-copy free of charge upon request.[5] Nasdaq believes that allowing companies to rely on the Internet to satisfy the requirement to provide shareholders with an annual report containing audited financial statements will allow companies to provide investors with information in a more timely, efficient and cost effective manner. At present, this proposal would only be meaningful to foreign private issuers because they are exempt from the Commission's proxy solicitation rules under Rule 3a12–3(b) of the Act.[6] However, the Commission recently approved rules that will permit issuers to rely on the Internet to deliver proxy materials, effective July 1, 2007,[7] and is considering further expanding those rules to require the use of the Internet to deliver proxy materials.[8]

Nasdaq also proposes to specify that the annual report requirement is applicable only to issuers of common stock and voting preferred stock (and their equivalents) [9] and that the annual report requirement can be satisfied by providing the company's annual filing with the Commission, such as on Form 10–K, 20–F, 40–F, or N–CSR. Further, Nasdaq proposes to remove a provision related to the timing for delivery of the annual report, because the Commission's proxy rules already require that such information be provided before the annual meeting.[10]

In addition, Nasdaq proposes to make a technical correction to Rule 4350(b)(1)(B), relating to the disclosure required when the audit opinion of a company's annual financial statements contains a ''going concern

[4] A foreign private issuer can follow its home country practice regarding distribution of annual reports instead of Nasdaq's rule, if it follows the procedures set forth in Rule 4350(a) regarding disclosure of this non-conforming practice.

[5] This proposal is similar to a recent change by the New York Stock Exchange LLC to Section 203.01 of its Listed Company Manual. *See* Securities Exchange Act Release No. 54344 (August 21, 2006), 71 FR 51260 (August 29, 2006) (approving SR–NYSE–2005–68).

[6] 17 CFR 240.3a12–3(b).

[7] *See* Securities Exchange Act Release No. 55146 (January 22, 2007), 72 FR 4148 (January 29, 2007).

[8] *See* Securities Exchange Act Release No. 55147 (January 22, 2007), 72 FR 4176 (January 29, 2007).

[9] Common stock equivalents include, but are not limited to: Ordinary shares, shares or certificates of beneficial interest of Trust, American depositary receipts and American depositary shares.

[10] Pursuant to Rule 14a–3(b), 17 CFR 240.14a–3(b), the proxy statement for a company's annual meeting must be accompanied or preceded by an annual report. State law requirements also govern the timing that notice of the meeting must be provided. *See, e.g.*, Section 222(b) of the Delaware General Corporation Law, which requires notice of a meeting not less than 10 nor more than 60 days prior to the meeting.

qualification.'' [11] The proposed change removes the term ''going concern qualification,'' which is undefined in the accounting literature, and replaces it with language from Statement on Auditing Standard Number 59, which relates to the auditor's consideration of an entity's ability to continue as a going concern. Nasdaq believes that this clarification will remove confusion as to when the rule applies.

Disclosure of Non-Conforming Governance Practices

Nasdaq requires that foreign private issuers disclose all non-conforming governance practices in their Form F–1, 20–F, or 40–F.[12] Nasdaq proposes to expand the existing Nasdaq rule to allow this disclosure to be made either in the Form F–1, 20–F, or 40–F, as applicable, or, in the alternative, the foreign private issuer may provide these disclosures in English on its Web site. If, however, the disclosure is only available on the foreign private issuer's Web site, the proposal requires that the issuer's annual report and registration statement should state this fact and provide the Web address at which the information may be obtained.[13]

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[14] in general, and with Section 6(b)(5) of the Act,[15] in particular. The proposed rule change would allow additional methods of disclosure for Nasdaq-listed companies, thereby reducing costs for those companies, and allowing them to rely on technology to provide information to investors in a timelier manner. As such, the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

[11] Conversation between Arnold Golub, Associate General Counsel, The Nasdaq Stock Market, Inc., Raymond Lombardo, Special Counsel, Division of Market Regulation (''Division''), Commission, and Molly Kim, Special Counsel, Division, Commission, on April 26, 2007.

[12] Nasdaq Rule 4350(a)(1) and IM–4350–6.

[13] Conversation between Arnold Golub, Associate General Counsel, The Nasdaq Stock Market, Inc., Raymond Lombardo, Special Counsel, Division, Commission, and Molly Kim, Special Counsel, Division, Commission, on May 31, 2007.

[14] 15 U.S.C. 78f.

[15] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. 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–NASDAQ–2006–045 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2006–045. 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 such filing also will be available for inspection and copying at the principal office of Nasdaq. 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–NASDAQ–2006–045 and should be submitted on or before July 3, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–11267 Filed 6–11–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55859; File No. SR–NYSE–2006–28]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 4 to Proposed Rule Change and Order Granting Accelerated Approval of Proposed Rule Change as Modified by Amendment Nos. 2, 3, and 4 Relating to NYSE Rules 134 and 411

June 5, 2007.

I. Introduction

On May 2, 2006, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Rules 134 (Differences and Omissions-Cleared Transactions) and 411 (Erroneous Reports). On September 22, 2006, NYSE filed Amendment No. 1 to the proposed rule change. On February 20, 2007, NYSE filed Amendment No. 2

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

to the proposed rule change. The proposed rule change as modified by Amendment No. 2 was published for comment in the **Federal Register** on March 6, 2007.[3] The Commission received no comments on the proposal. On March 22, 2007, NYSE filed Amendment No. 3 to the proposed rule change.[4] On May 30, 2007, NYSE filed Amendment No. 4 to the proposed rule change.[5] This order approves the proposed rule change, as modified by Amendment Nos. 2, 3, and 4, on an accelerated basis.

II. Description

A. Current Practice

Currently, recognized trading errors fall into two categories. The first category applies to held [6] and not held [7] orders and includes trades that are mistakenly executed outside the written order instructions. These types of errors encompass situations where the transaction was incorrectly executed: (i) In the wrong security; (ii) on the wrong side of the market; (iii) outside of the price instructions; (iv) for a quantity greater than specified in the instructions; or (v) duplicating a prior execution of the same original order. The second category of trading errors currently applies only to held orders and involves situations where a held order was executable in the prevailing market but the Floor broker failed to take advantage of the opportunity to execute the order at that time.

Under the current NYSE rules and interpretations, a Floor broker may use his or her error account to ''assume or acquire'' a position as a result of a recognized trading error so that the customer receives the trade he or she would have received had the recognized trading error not occurred. However, a Floor broker is not permitted to use his or error account in cases involving trading errors that are not recognized by the Exchange. Instead, in such cases, a Floor broker would generally issue a difference check [8] or offer a commission adjustment to resolve any monetary disadvantage suffered by the customer.[9] According to the Exchange, the issuance of the difference check or commission adjustment ultimately is not in the best interest of the customer because the administrative cost associated with the processing of the difference check or commission adjustment ultimately is borne by the customer and thus the remedy does not serve to make the customer whole. In addition, according to the Exchange, many institutional investors do not want the administrative burden of processing a difference check or commission adjustment as a result of the Floor broker's failure to execute a not held order due to administrative mistake or system malfunction.

B. Proposed Amendments to NYSE Rule 134 (Differences and Omissions-Cleared Transactions

The Exchange proposes to amend NYSE Rule 134 to codify the first category of recognized trading errors. Specifically, NYSE Rule 134(g) would define a trading error to include situations when an order is executed outside of a customer's instructions as entered in the electronic order tracking systems [10] of the Exchange. Types of recognized trading errors would include, but are not limited to, the execution of a held or not held order: (i) In the incorrect security; (ii) on the wrong side of the market; (iii) at a price outside the price instructions; (iv) for a quantity of shares greater than the amount of shares specified in the order instructions; or (v) the execution of an order in duplicate.[11] In addition, Rule 134(g)(ii) would expand the type of recognized trading errors to include situations where a member fails to execute a not held order because he or she committed an error as to symbol, side or price in the execution of said order.[12]

The Exchange also proposes to add Rule 134(h)(i) to codify the second category of recognized trading errors covering situations where the Floor broker failed to execute a held order that was executable in the prevailing market.[13]

The Exchange also proposes to add Rule 134(h)(ii) to the second category of recognized trading errors to cover those situations where a Floor broker failed to execute a not held order, in whole or in part, because the order was lost, misplaced or the order remains unexecuted as a result of a system malfunction.[14] In addition to previously sanctioned uses of a Floor broker's error account, a Floor broker would now be allowed utilize his or her error account, under NYSE Rule 134(j)(ii), to execute a customer's not held order in alignment with the Consolidated Tape, when the not held order remains unexecuted as a result of the order being lost or misplaced or as a result of a system malfunction.[15] To prevent abuse of the proposed new rules, the Exchange is also amending NYSE Rule 134(d)(iii) to require a Floor broker to keep contemporaneous records documenting the circumstances surrounding errors. A Floor broker would be required to make and keep a time stamped record [16] of the error including supporting documentation of the error.[17] In addition, the Member Firm Regulation Division of NYSE Regulation, Inc. would include a review of these records during the course of its routine member firm examinations. The burden of proof would be on the Floor broker to substantiate that a legitimate error occurred.[18]

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[3] *See* Securities Exchange Act Release No. 55361 (February 27, 2007), 72 FR 9985 (''Notice'').

[4] In Amendment No. 3, the Exchange made technical changes to the rule text of the proposed rule change to correctly identify the numbering of NYSE Rule 134(g)(i) and (ii) as proposed new text. These technical changes were reflected in the Notice. *See* footnote 5 of the Notice. This is a technical amendment and is not subject to notice and comment.

[5] In Amendment No. 4, the Exchange made changes to the rule text of the proposed rule change to clarify the meaning of the term ''system malfunction'' contained in proposed NYSE Rule 134(h). The text of Amendment No. 4 is available on the Exchange's Web site (*http://www.nyse.com*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

[6] A ''held'' order is a market or limit order that the broker must execute as instructed without discretion as to the time of an execution.

[7] A ''not held'' order is a market or limit order that gives the broker both time and price discretion to attempt to get the best possible execution.

[8] A ''difference check'' is a check issued to the customer by the member to cover the monetary difference between the execution price and the price the customer and the member agree was the proper price.

[9] If, at the time the Floor broker identifies the execution failure, the customer's order can be executed in the market at an equal or better price than the customer could have received had the order been executed in the prevailing market, then the Floor broker will execute the order. In the event the market is adverse to the customer's interest at the time the error is identified, under the current rules and interpretation, the remedy is to have the Floor broker issue a difference check or offer a commission reduction to address any disadvantage to the customer. *See* NYSE Regulation, Information Memorandum 02–19, issued April 17, 2002, clarifying the application of NYSE Rules 134, 411, and 407A.

[10] *See* NYSE Rule 123(e).

[11] *See* proposed NYSE Rule 134(g)(i).

[12] *See* proposed NYSE Rule 134(g)(ii).

[13] *See* proposed NYSE Rule 134(h)(i).

[14] *See* proposed NYSE Rule 134(h)(ii). In Amendment No. 4 the Exchange added language to the proposed rule text to clarify that a system malfunction refers to the failure of physical equipment, devices and/or programming employed by the Floor broker or otherwise provided by the Exchange and used in the execution of orders.

[15] *See* proposed NYSE Rule 134(j)(ii).

[16] *See* proposed NYSE Rule 134(i).

[17] The record must include the date and time of the error, the date and time the error was discovered, the size of the error, the stock in which the error occurred, the original instructions, the names of all involved parties including the client and any upstairs trader, a detailed narrative of how the error occurred, detail narrative of discussions with relevant parties, the steps taken to correct the error and the ultimate resolution of the error. *See* proposed NYSE Rule 134(j)(iii).

[18] *See* proposed NYSE Rule 134(j)(iii).

C. Proposed Amendments to NYSE Rule 411

When a Floor broker commits an error as to security, side or price, there are instances where the Floor broker issues a report to the customer as a result of the execution. Currently, pursuant to NYSE Rule 411, in instances where a Floor broker issued a report to a customer based on a transaction that was made outside of the customer's instructions on a not held order, the Floor broker would be required to rescind the report, thus leaving the customer's order unexecuted and disadvantaging the customer. To allow the Floor broker to utilize his or her error account or the error account of the member organization to alleviate any disadvantage to the customer, the Exchange proposes to amend NYSE Rule 411 to allow a Floor broker to treat ''erroneous reports'' [19] as ''erroneous trades'' when the Floor broker committed an error as to security, side, or price.

Pursuant to the proposed rule change, a Floor broker would be permitted to treat an ''erroneous report'' as an ''erroneous trade'' when the price and size of the order would have been executable in the market at or near the time of the erroneous transaction. Specifically, the erroneous report based on a transaction that was made in error as to security, side or price would stand, provided that the price and size of the erroneous report were within the range of prices and sizes in the specified security reported to the NYSE portion of the Consolidated Tape on the day in which the order was executed.[20] The Floor broker would be required to report the error to the customer, including explaining to the customer whether the error was favorable or unfavorable to the customer.[21] The Floor broker also would be required to document on a trade-by-trade basis, the name of the individual authorized to accept the erroneous report for the customer, the amount of the error and whether the error was favorable to the customer.[22] The Floor broker would then treat the erroneous report as though it was an erroneous trade and his or her error account would become the opposite side to the report.[23] In addition, the Floor broker would assume any loss incurred and any profit that resulted would be paid to the New York Stock Exchange Foundation [24] as currently required by NYSE Rule 411(a)(ii)(5). Thus, any disadvantage would be borne by the Floor broker who was responsible for committing the error, and not by the customer.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[25] In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,[26] which require that the rules of an exchange be designed to promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, protect investors and the public interest. The Commission believes that the proposed rules provide for a fair, transparent, and reasonable process in which NYSE Floor brokers can correct trading errors. In particular, the Commission believes that it is appropriate for the Exchange to codify and thus make transparent its processes regarding the use of a Floor Broker's error account. The Commission notes that the proposed rule change is designed to provide Floor brokers with greater flexibility in using error accounts to correct trading errors in a manner that is less burdensome for customers. The Commission also notes that the proposed rule change includes recordkeeping requirements that will help the Exchange to monitor any potential abuse of the rule.

Pursuant to Section 19(b)(2) of the Act,[27] the Commission finds good cause for approving the proposal prior to the thirtieth day after the publication of the proposal, as modified by Amendment No. 4, in the **Federal Register**. The revision to the proposed rule change made by Amendment No. 4 does not raise any novel or substantive regulatory issues, and simply clarifies the meaning of a term in the proposed rule change. Therefore, the Commission finds good cause for approving the amended proposal on an accelerated basis.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, as modified by Amendment No. 4, 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–NYSE–2006–28 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2006–28. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. 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–NYSE–2006–28 and should be submitted on or before July 3, 2007.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[28] that the proposed rule change (SR–NYSE–2006–28), as modified by Amendment Nos. 2, 3, and 4, is hereby approved on an accelerated basis.

[19] An ''erroneous report'' is a report of an execution that is incorrect as to stock, price or whether an execution actually took place.

[20] *See* proposed NYSE Rule 411(a)(iv)(1).

[21] *See* proposed NYSE Rule 411(a)(iv)(2).

[22] *See* proposed NYSE Rule 411(a)(iv)(3).

[23] *See* proposed NYSE Rule 411(a)(iv)(4).

[24] *See* proposed NYSE Rule 411(a)(iv)(5).

[25] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[26] 15 U.S.C. 78f(b)(5).

[27] 15 U.S.C. 78s(b)(2).

[28] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[29]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–11188 Filed 6–11–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–55846; File No. SR–NYSEArca–2007–48; SR–NYSEArca–2007–49]

Self-Regulatory Organizations; NYSE Arca, Inc. and NYSE Arca Equities, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Changes Relating to an Increase in the Frequency of the Short Interest Reporting Requirements for Equity Trading Permit Holders and Options Trading Permit Holders

June 1, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 24, 2007, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca''), by itself and through its wholly owned subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Exchange filed the proposals as ''non-controversial'' rule changes under Rule 19b–4(f)(6) under the Act,[3] which rendered the proposals effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Changes

A. NYSE Arca Equities Rule 4.5(e)

The Exchange proposes to amend NYSE Arca Equities Rule 4.5(e) to reflect the Commission's adoption of Regulation SHO.[4] By this filing, the Exchange also shall clarify the short interest reporting requirements of Equity Trading Permit (''ETP'') Holders[5] as prescribed by Rule 4.5(e). While the changes to the reporting requirements of ETP Holders pursuant to this proposal will be effective upon filing, the changes will become operative in September 2007, consistent with the requirements of other representative organizations of the Intermarket Surveillance Group (''ISG'').[6] The text of the proposed rule change is available at the Exchange, at the Commission's Public Reference Room, and at *www.nyse.com*.

B. NYSE Arca Rule 4.5(f)

The Exchange also proposes to amend NYSE Arca Rule 4.5(f) to reflect the Commission's adoption of Regulation SHO.[7] By this filing, the Exchange also shall clarify the short interest reporting requirements of Options Trading Permit (''OTP'') Holders[8] and OTP Firms.[9] While the changes to the reporting requirements of OTP Holders and OTP Firms pursuant to this proposal will be effective upon filing, the changes will become operative in September 2007, consistent with the requirements of other representative organizations of the ISG.[10] The text of the proposed rule change is available at the Exchange, at the Commission's Public Reference Room, and at *http://www.nyse.com*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received on the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

1. Purpose

a. NYSE Arca Equities Rule 4.5(e)

The Exchange proposes to make certain minor technical amendments to NYSE Arca Equities Rule 4.5(e), Periodic Reports, as such rule makes references to rules under the Act that are no longer in effect. Specifically, Rule 4.5(e) makes reference to ''short'' sales, as defined by Rule 3b–3 under the Act.[11] In light of the adoption of Regulation SHO, the Exchange shall make the appropriate change to its rule text to remove references to Rule 3b–3 under the Act and correctly identify Rule 200(a) under the Act[12] where such definition of short sales may be found. Further, Rule 4.5(e) exempts ETP Holders from reporting short positions if such a position resulted from a sale specified in clause (9) of paragraph (e) of Rule 10a–1 under the Act. Since clause (9) has been removed from Rule 10a–1(e) under the Act, the exemption to ETP Holders is no longer applicable, and shall be removed as a reference with NYSE Arca Equities Rule 4.5(e).

Additionally, the Exchange proposes to increase the frequency of periodic reports that ETP Holders must submit to the Exchange concerning short positions in securities, as prescribed by NYSE Arca Equities Rule 4.5(e), from monthly to twice per month. This increase in the frequency of such reports is consistent with similar changes recently approved by the Commission for the National Association of Securities Dealers, Inc. (''NASD''), the New York Stock Exchange LLC (''NYSE''), and the American Stock Exchange LLC (''Amex'').[13]

The Exchange shall implement the new periodic reporting requirements for short positions of ETP Holders in September 2007 to be consistent with the increased reporting requirements of other self-regulatory organizations.[14]

b. NYSE Arca Rule 4.5(f)

The Exchange proposes to make certain minor technical amendments to NYSE Arca Equities Rule 4.5(f), Periodic Reports, as such rule makes references to rules under the Act that are no longer in effect. Specifically, Rule 4.5(f) makes reference to ''short'' sales, as defined by Rule 3b–3 under the Act.[15] In light of the adoption of Regulation SHO by the Commission, the Exchange shall make the appropriate change to its rule text to remove references to Rule 3b–3 under the Act and correctly identify Rule

[29] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 34–50103 (July 28, 2004), 69 FR 48008 (August 6, 2004). *See also* 17 CFR 240.200 *et seq.*

[5] *See* NYSE Arca Equities Rule 1.1(n).

[6] *See* ISG Notice to Members 2007–01 (March 15, 2007), and American Stock Exchange Notice REG 2007–19 (March 16, 2007).

[7] *See* Securities Exchange Act Release No. 34–50103 (July 28, 2004), 69 FR 48008 (August 6, 2004). *See also* 17 CFR 240.200 *et seq.*

[8] *See* NYSE Arca Rule 1.1(q).

[9] *See* NYSE Arca Rule 1.1(r).

[10] *See* ISG Notice to Members 2007–01 (March 15, 2007), and American Stock Exchange Notice REG 2007–19 (March 16, 2007).

[11] *See* 17 CFR 240.3b–3.

[12] *See* 17 CFR 240.200(a).

[13] *See* Securities Exchange Act Release No. 34–55406 (March 6, 2007), 72 FR 11071 (March 12, 2007) (SR–NASD–2006–131; SR–NYSE–2006–111; SR–Amex–2007–05).

[14] *See* supra note 6.

[15] *See* 17 CFR 240.3b–3.

200(a) under the Act [16] where such definition of short sales may be found. Further, Rule 4.5(f) exempts OTP Holders and OTP Firms from reporting short positions if such a position resulted from a sale specified in clause (9) of paragraph (e) of Rule 10a–1 under the Act. Since clause (9) has been removed from Rule 10a–1(e) under the Act, the exemption to OTP Holders and OTP Firms is no longer applicable, and shall be removed as a reference with NYSE Arca Rule 4.5(f).

Additionally, the Exchange proposes to increase the frequency of periodic reports that OTP Holders and OTP Firms must submit to the Exchange concerning short positions in securities, as prescribed by NYSE Arca Rule 4.5(f), from monthly to twice per month. This increase in the frequency of such reports is consistent with similar changes recently approved by the Commission for the NASD, NYSE, and the Amex.[17]

The Exchange shall implement the new periodic reporting requirements for short positions of OTP Holders and OTP Firms in September 2007 to be consistent with the increased reporting requirements of other self-regulatory organizations.[18]

2. Statutory Basis

The Exchange believes the proposed rule changes are consistent with Section 6(b) of the Act [19] in general and further the objectives of Section 6(b)(5) [20] in particular in that they are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[16] *See* 17 CFR 240.200(a).

[17] *See* Securities Exchange Act Release No. 34–55406 (March 6, 2007), 72 FR 11071 (March 12, 2007) (SR–NASD–2006–131; SR–NYSE–2006–111; SR–Amex–2007–05).

[18] *See* supra note 10.

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Changes Received From Members, Participants or Others

Written comments on the proposed rule changes were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

Because the foregoing proposed rule changes do not (i) Significantly affect the protection of investors or the public interest, (ii) impose any significant burden on competition, or (iii) become operative within 30 days after the date of the filing, they have become effective upon filing pursuant to Section 19(b)(3)(A) of the Act [21] and Rule 19b–4(f)(6) [22] thereunder.

At any time within 60 days of the filing of the proposed rule changes, the Commission may summarily abrogate such rule changes 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.[23]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule changes are 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 No. SR–NYSEArca–2007–48 or SR–NYSEArca–2007–49 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 No. SR–NYSEArca–2007–48 or SR–NYSEArca–2007–49. 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 changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. 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 No. SR–NYSEArca–2007–48 or SR–NYSEArca–2007–49 and should be submitted on or before July 3, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[24]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–11266 Filed 6–11–07; 8:45 am]

BILLING CODE 8010–01–P

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 19b–4(f)(6).

[23] *See* 15 U.S.C. 78s(b)(3)(C).

[24] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Rulemaking Advisory Committee—New Task

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of new task assignment for the Aviation Rulemaking Advisory Committee (ARAC).

SUMMARY: The FAA assigned the Aviation Rulemaking Advisory Committee a new task to: Review and recommend revisions to certain requirements for operation of aviation maintenance technician schools. This notice is to inform the public of this ARAC activity.

FOR FURTHER INFORMATION CONTACT: Ferrin Moore, Aircraft Maintenance Division, AFS–301, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3809, e-mail *ferrin.c.moore@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA established the Aviation Rulemaking Advisory Committee to provide advice and recommendations to the FAA Administrator on the FAA's rulemaking activities with respect to aviation-related issues. This includes obtaining advice and recommendations on 14 CFR Part 147—Aviation Maintenance Technician Schools.

In order to develop such advice and recommendations, the ARAC may choose to establish working groups to which specific tasks are assigned. Such working groups are comprised of experts from those organizations having an interest in the assigned tasks. A working group member need not be representative of the full committee. The Aviation Maintenance Technician Schools Curriculum and Operating Requirements Working Group is a new working group that is being established by the ARAC.

A review of General Accounting Office Report GAO–03–317, dated March 2003, indicates a need to update the curriculum requirements for aviation mechanics. Currently, FAA certificated Aviation Maintenance Technician Schools must offer a curriculum that addresses each of the subject areas described in 14 CFR, Part 147, Appendices B, C, and D. Each subject area must be taught to the level prescribed, and as defined in 14 CFR, Part 147, Appendix A. In addition, § 147.21(b) of Part 147 mandates the number of teaching hours devoted to each group of subject areas (General, Airframe, and Powerplant). These hours are: General—400, Airframe—750, Powerplant—750. A total of 1,900 hours is needed for a combined Airframe and Powerplant curriculum. In addition, the FAA has issued exemptions to aviation maintenance technician schools enabling the schools to substitute experience required in § 65.77 for subject hours. Section 65.75(a) prescribes, in pertinent part, that applicants must pass a written test after meeting the experience requirements of § 65. 77. Section 65.77 also requires applicants to complete training and present an appropriate graduation certificate or certificate of completion from a certificated aviation maintenance technician school before being eligible to take the written test for a certificate or rating.

Task

(1) The working group is tasked to evaluate §§ 147.21 and 147.31 and appendices A through D of 14 CFR Part 147, and make recommendations to ARAC that would enable the AMT schools to meet the needs of their clientele more effectively. The working group is tasked to recommend revisions to 14 CFR Part 147 to contain some basic, consistent, requirements. The objective is to provide an easier means to keep current training curricula, training criteria, and hours of training, while remaining within the minimum requirements outlined in §§ 147.21 and 147.31, and appendices A through D of 14 CFR Part 147.

As part of its task, the working group will review available information about general curriculum requirements and specific operating rules for attendance and enrollment, tests, and credit for prior instruction or experience that could be applicable to meeting the requirements of §§ 147.21 and 147.31 and appendices A through D of 14 CFR Part 147.

(2) In addition, the working group is tasked to evaluate and incorporate, as appropriate, revisions granted by exemption to §§ 65.75(a) and 65.77 of 14 CFR Part 65. The working group should consider the appropriateness of modifying § 65.75(a) to allow students enrolled in Part 147 Aviation Maintenance Technician Schools to take the Aviation Mechanic written tests after completing the corresponding portion of the curriculum, but before meeting the experience requirements of § 65.77. Section 65.77 prescribes, in pertinent part, that each applicant for a mechanic certificate or rating must present either an appropriate graduation certificate or a certificate of completion from a certificated aviation maintenance technician school or documented evidence, satisfactory to the Administrator before certification. The FAA has issued grants of exemption to allow students to take equivalency tests for the aviation maintenance airframe and aviation maintenance powerplant ratings certification. The FAA agreed with the petitioners that testing immediately after completing a course is academically sound. ARAC will make recommendations to the FAA, as appropriate, for revising these requirements and associated guidance material.

Schedule: Required completion is no later than 9 months after the first working group meeting or June 30, 2008, whichever occurs first.

ARAC Acceptance of Task

ARAC accepted the task and assigned the task to the Aviation Maintenance Technician Schools Curriculum and Operating Requirements Working Group, which is being formed and will be managed by the Executive Committee of ARAC. The working group serves as staff to ARAC and assists in the analysis of assigned tasks. ARAC must review and approve the working group's recommendations. If ARAC accepts the working group's recommendations, it will forward them to the FAA. The FAA will submit the recommendations it receives to the agency's Rulemaking Management Council to address the availability of resources and priority within its rulemaking program.

Working Group Activity

The Aviation Maintenance Technician Schools Curriculum and Operating Requirements Working Group must comply with the procedures adopted by ARAC. As part of the procedures, the working group must:

1. Recommend a work plan for completion of the task, including the rationale supporting such a plan for consideration at the next Executive Committee meeting of ARAC held following publication of this notice.

2. Give a detailed conceptual presentation of the proposed recommendations before proceeding with the work stated in item 3 below.

3. If proposed rule changes are recommended, provide supporting economic and other required analyses. If new or revised requirements or compliance methods are not recommended, a draft report stating the rationale for not making such recommendations; and

4. Provide a status report at each Executive Committee meeting of the ARAC.

Participation in the Working Group

The Aviation Maintenance Technician Schools Curriculum and Operating Requirements Working Group will be composed of technical experts having an interest in the assigned task. A working group member need not be a representative or a member of the Aviation Rulemaking Advisory Committee. Membership of the working group will have broad experience in developing curriculum and operating requirements for maintenance technician schools. The working group may organize, oversee, guide and monitor activities and progress of subject matter experts as needed to accomplish the task assigned. The working group chair and the FAA representative will select the membership for the working group, with concurrence of the Executive Committee of ARAC and the FAA. Subject matter experts will address individual issues and will be invited to present their views and positions for consideration by the working group. This allows for an optimum working group size with

appropriate representation to achieve informed consensus and foster successful completion of the task. This may also allow the participation of a large number of cross-functional subject matter experts. The working group members should have the appropriate subject matter knowledge, broad maintenance curriculum development experience and responsibility within their organization and authority to represent their respective part of the aviation community.

If you have expertise in the subject matter and wish to become a member of the working group, write to the person listed under the caption **FOR FURTHER INFORMATION CONTACT** expressing that desire. Describe your interest in the task and state the expertise you would bring to the working group. We must receive all requests by July 17, 2007. The Executive Committee and the FAA will review the requests and advise you whether or not your request is approved.

If you are chosen for membership on the working group, you must represent your aviation community segment and actively participate in the working group by attending all meetings, and providing written comments when requested to do so. You must devote the resources necessary to support the working group in meeting any assigned deadlines. You must keep your management chain and those you may represent advised of working group activities and decisions to ensure that the proposed technical solutions don't conflict with your sponsoring organization's position when the subject is presented to the Executive Committee for approval. Once the working group has begun deliberations, members will not be added or substituted without the approval of the Executive Committee, FAA and the working group chair.

The Secretary of Transportation determined that the formation and use of the ARAC is necessary and in the public interest in connection with the performance of duties imposed on the FAA by law.

Meetings of the Executive Committee of ARAC are open to the public. Meetings of the Aviation Maintenance Technician Schools Curriculum and Operating Requirements Working Group will not be open to the public, except to the extent individuals with an interest and expertise are selected to participate. The FAA will make no public announcement of working group meetings.

Issued in Washington, DC, on June 1, 2007.

Pamela Hamilton-Powell,

Executive Director, Aviation Rulemaking Advisory Committee.

[FR Doc. E7–11260 Filed 6–11–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2007–28430, Notice 1]

Mosler Automotive; Receipt of Application for a Temporary Exemption From the Advanced Air Bag Requirements of FMVSS No. 208

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of receipt of petition for temporary exemption from provisions of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant Crash Protection*.

SUMMARY: In accordance with the procedures in 49 CFR Part 555, Mosler Automotive has petitioned the agency for a temporary exemption from certain advanced air bag requirements of FMVSS No. 208. The basis for the application is that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard.[1]

This notice of receipt of an application for temporary exemption is published in accordance with the statutory provisions of 49 U.S.C. 30113(b)(2). NHTSA has made no judgment on the merits of the application.

DATES: You should submit your comments not later than July 12, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. Ed Glancy or Ms. Rebecca Schade, Office of the Chief Counsel, NCC–112, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building 4th Floor, Room W41–326, Washington, DC 20590. Telephone: (202) 366–2992; Fax: (202) 366–3820.

Comments: We invite you to submit comments on the application described above. You may submit comments identified by docket number at the heading of this notice by any of the following methods:

- *Web Site: http://dms.dot.gov*. Follow the instructions for submitting comments on the DOT electronic docket site by clicking on ''Help and Information'' or ''Help/Info.''
- *Fax:* 1–202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, 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. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov*, including any personal information provided. Please see the Privacy Act discussion under the Public Participation heading.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. Telephone: (202) 366–9826.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our 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 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*.

We shall consider all comments received before the close of business on the comment closing date indicated above. To the extent possible, we shall also consider comments filed after the closing date.

I. Advanced Air Bag Requirements and Small Volume Manufacturers

In 2000, NHTSA upgraded the requirements for air bags in passenger cars and light trucks, requiring what are commonly known as ''advanced air

[1] To view the application, go to: *http://dms.dot.gov/search/searchFormSimple.cfm* and enter the docket number set forth in the heading of this document.

bags.'' [2] The upgrade was designed to meet the goals of improving protection for occupants of all sizes, belted and unbelted, in moderate-to-high-speed crashes, and of minimizing the risks posed by air bags to infants, children, and other occupants, especially in low-speed crashes.

The advanced air bag requirements were a culmination of a comprehensive plan that the agency announced in 1996 to address the adverse effects of air bags. This plan also included an extensive consumer education program to encourage the placement of children in rear seats. The new requirements were phased in beginning with the 2004 model year.

Small volume manufacturers were not subject to the advanced air bag requirements until September 1, 2006, but their efforts to bring their respective vehicles into compliance with these requirements began several years before that. However, because the new requirements were challenging, major air bag suppliers have concentrated their efforts on working with large volume manufacturers, and thus, until recently, small volume manufacturers had limited access to advanced air bag technology. Because of the nature of the requirements for protecting out-of-position occupants, ''off-the-shelf'' systems could not be readily adopted. Further complicating matters, because small volume manufacturers build so few vehicles, the costs of developing custom advanced air bag systems compared to potential profits discouraged some air bag suppliers from working with small volume manufacturers.

The agency has carefully tracked occupant fatalities resulting from air bag deployment. Our data indicate that the agency's efforts in the area of consumer education and manufacturers' providing depowered air bags were successful in reducing air bag fatalities even before advanced air bag requirements were implemented.

As always, we are concerned about the potential safety implication of any temporary exemptions granted by this agency. In the present case, we are seeking comments on a petition for a temporary exemption from the advanced air bag requirements submitted by a manufacturer of very expensive, low volume, exotic sports cars.

II. Overview of Petition for Economic Hardship Exemption

In accordance with 49 U.S.C. 30113 and the procedures in 49 CFR part 555, Mosler Automotive has petitioned the agency for a temporary exemption from certain advanced air bag requirements of FMVSS No. 208. The basis for the application is that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard. A copy of the petition [3] is available for review and has been placed in the docket for this notice.

III. Statutory Background for Economic Hardship Exemptions

A manufacturer is eligible to apply for a hardship exemption if its total motor vehicle production in its most recent year of production did not exceed 10,000 vehicles, as determined by the NHTSA Administrator (49 U.S.C. 30113).

In determining whether a manufacturer of a vehicle meets that criterion, NHTSA considers whether a second vehicle manufacturer also might be deemed the manufacturer of that vehicle. The statutory provisions governing motor vehicle safety (49 U.S.C. Chapter 301) do not include any provision indicating that a manufacturer might have substantial responsibility as a manufacturer of a vehicle simply because it owns or controls a second manufacturer that assembled that vehicle. However, the agency considers the statutory definition of ''manufacturer'' (49 U.S.C. 30102) to be sufficiently broad to include sponsors, depending on the circumstances. Thus, NHTSA has stated that a manufacturer may be deemed to be a sponsor and thus a manufacturer of a vehicle assembled by a second manufacturer if the first manufacturer had a substantial role in the development and manufacturing process of that vehicle.

IV. Petition of Mosler Automotive

Background. Mosler Automotive is a U.S. company, organized as a Florida corporation in 1987 and owned by a single American shareholder. Mosler began production in 1998 of high performance sports cars based on an aluminum honeycomb monocoque chassis. This application concerns the MT900 (MY 2004, currently the company's only model), which is expected to retail for $189,900. To date, the MT900 has been in and out of production, with the following numbers of vehicles being produced over the past three years: 12 vehicles in 2004; 8 vehicles in 2005; and 13 vehicles in 2006. Worldwide sales, as of the time of the petition, were 10 race cars, 3 U.S. street cars, and 8 European specification cars.

According to the petition, the company has determined that it cannot finance the work necessary to develop and install advanced air bags in its vehicles unless U.S. sales continue. It argued that NHTSA has previously ''confirmed the appropriateness of an exemption when the sales of exempted vehicles generate income to fund air bag development expenditures in order to comply with Standard 208 at the end of the exemption period. 64 FR 6736.'' Mosler Automotive stated that it ''therefore needs USA exempted-vehicle sales to 'bridge the gap.' '' The petitioner further stated that it ''will suffer a significant market loss—the U.S.—in the event it does not receive the exemption.''

The petitioner argued that it tried in good faith, but could not bring the vehicle into compliance with the advanced air bag requirements, and would incur substantial economic hardship if it cannot sell vehicles in the U.S. Mosler Automotive has an extremely long product cycle (for the MT900, the company estimates a lifespan of 11 years), which has thus far prevented it from recouping its $600,000 investment in its current standard air bag occupant restraint system. The petitioner states that significant engineering and funding will be necessary to upgrade to an advanced air bag system, and that the projected overall cost of approximately $2.0 to $2.5 million is beyond the company's current capabilities.

Eligibility. As discussed in the petition, Mosler Automotive is independently owned by a single American shareholder. The entire organization currently employs 25 people in the U.S. No other vehicle manufacturer has an ownership interest in Mosler Automotive. Stated another way, Mosler Automotive is an independent automobile manufacturer which does not have any common control nor is otherwise affiliated with any other vehicle manufacturer.

The company is a small volume manufacturer whose total production has ranged from 8 to 13 vehicles per year over the period from 2004 to 2006. According to its current forecasts, Mosler Automotive anticipates that approximately 75 vehicles would be sold in the U.S. during the three-year period for its requested exemption, if such request were granted.

Requested exemption. Mosler Automotive is requesting an exemption

[2] See 65 FR 30680 (May 12, 2000).

[3] The company requested confidential treatment under 49 CFR Part 512 for certain business and financial information submitted as part of its petition for temporary exemption. Accordingly, the information placed in the docket does not contain information subject to a claim of confidentiality.

for the MT900 from all of the advanced air bag requirements in S14 of FMVSS No. 208, the rigid barrier test requirement using the 5th percentile adult female test dummy (belted and unbelted, S15), the offset deformable barrier test requirement using the 5th percentile adult female test dummy (S17), the requirements to provide protection for infants and children (S19, S21, and S23) and the requirement using an out-of-position 5th percentile adult female test dummy at the driver position (S25).

Mosler Automotive stated its intention to have its advanced air bag system ready in 2009. Accordingly, the company seeks an exemption from the above-specified requirements of FMVSS No. 208 from June 1, 2007 to December 31, 2009.

Economic hardship. Publicly available information and also the financial documents submitted to NHTSA by the petitioner indicate that the MT900 project will result in financial losses unless Mosler Automotive obtains a temporary exemption.

Over the period 2004–2006, Mosler Automotive has had net operational losses totaling over $3 million, and the retained deficit of the company exceeds over $23 million. The costs associated with development of an advanced air bag system for the vehicle have been estimated at about $2.0 to $2.5 million. The company has stated that it cannot hope to attain profitability if it incurs additional research and development expenses at this time.

Mosler Automotive stated that the estimated $2.0 to $2.5 million in costs associated with advanced air bag engineering and development included research and development, testing, tooling, and test vehicles, as well as internal costs. In its petition, Mosler Automotive reasoned that sales in the U.S. market must commence in order to finance this work and that non-U.S. sales alone cannot generate sufficient income for this purpose. In essence, Mosler Automotive argued that the exemption is necessary to allow the company to ''bridge the gap'' until fully compliant vehicles can be funded, developed, tooled, and introduced for the U.S. market.

If the exemption is denied, Mosler Automotive projects a net loss of over $3 million during the period from 2007–2009. However, if the petition is granted, the company anticipates a profit of nearly $6.4 million during that same period. The petitioner argued that a denial of this petition could preclude financing of the project for U.S.-compliant vehicles, a development which would have a highly adverse impact on the company.

Good faith efforts to comply. Mosler Automotive began production of the latest version of the MT900 in 2004, at which time it was certified for U.S. road use. The company has invested over $23 million on research and development and tooling for the MT900 program. In that time, the company was able to bring the vehicle into compliance with all applicable NHTSA regulations, except for the advanced air bag provisions of FMVSS No. 208.

In light of limited resources, the petitioner stated that it was necessary to first develop the vehicle with a standard U.S. air bag system. The company has spent $600,000 to re-engineer the MT900 to include a standard air bag system, which it stated will then be developed into an advanced air bag system.

According to its petition, even though advanced air bags are beyond its current capabilities, Mosler Automotive is nonetheless planning for the introduction of these devices. The company stated that Siemens Restraint Systems will spearhead this effort, and current plans estimate a cost of between $2.0 and $2.5 million (excluding internal costs) and a minimum lead time of 24 months for the advanced air bag project. Mosler Automotive stated that the following engineering efforts are needed to upgrade the MT900's standard air bag system to an advanced air bag system: (1) Tooling for prototypes and production vehicles; (2) contractor engineering; (3) air bag system materials; (4) cost of test vehicles; (5) integration of air bag electronics; (6) radio frequency interference/electromagnetic compatibility testing; (7) significant design and development of interior components including seats and dashboard; (8) crash testing; and (9) system validation. NHTSA notes that this estimate is based on a quotation from Siemens that appears to have expired, and has requested updated information from the petitioner to ensure that the estimate is still accurate.

In addition, Mosler Automotive emphasized that finding suppliers willing to work with a manufacturer with very low production volumes has proven extremely difficult, and as a result, the company must wait for technology to ''trickle down'' from larger manufacturers and suppliers. Mosler Automotive further stated that, as a small volume manufacturer, the company simply does not have the internal resources to do full U.S. homologation projects without reliance on outside suppliers of advanced engineering technologies.

In short, Mosler Automotive argued that, despite good faith efforts, limited resources prevent it from bringing the vehicle into compliance with all applicable requirements, and it is beyond the company's current capabilities to bring the vehicle into full compliance until such time as additional resources become available as a result of U.S. sales. Mosler Automotive stated in its petition that it expects its advanced air bag system to be ready in 2009, and that an exemption would allow it to maintain continued operations until then.

Mosler Automotive argues that an exemption would be in the public interest. The petitioner put forth several arguments in favor of a finding that the requested exemption is consistent with the public interest and would not have a significant adverse impact on safety. Specifically, Mosler Automotive argued that the vehicle would be equipped with a fully-compliant standard U.S. air bag system (*i.e.*, one meeting all requirements of FMVSS No. 208 prior to implementation of S14). Furthermore, the company emphasized that the MT900 will comply with all other applicable FMVSSs.

The company asserted that granting the exemption will benefit U.S. employment, companies, and citizens, because Mosler Automotive is a U.S. company and employs 25 people at its Florida facility. Mosler Automotive also argued that denial of the exemption request would have an adverse impact on consumer choice. The company also argued that an exemption is unlikely to have a significant safety impact because these vehicles are not expected to be used extensively by their owners, due to their ''second vehicle'' nature, extreme design and high cost. The company also reasoned that given the nature of the vehicle, it is less likely to be used to transport young children than most other vehicles.

As an additional basis for showing that its requested exemption would be in the public interest, Mosler Automotive stated that the MT900 has an extremely strong chassis, which is composed of aluminum tubes and composite structural parts. According to Mosler Automotive, the vehicle design is such that occupants are effectively placed in a ''protective 'cell' '' with the chassis structure built around them.

V. Issuance of Notice of Final Action

We are providing a 30-day comment period. After considering public comments and other available information, we will publish a notice of

final action on the application in the **Federal Register**.

Issued on: June 5, 2007.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E7–11259 Filed 6–11–07; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF VETERANS AFFAIRS

Health Outcomes Not Associated With Exposure to Certain Herbicide Agents

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: As required by law, the Department of Veterans Affairs (VA) hereby gives notice that the Secretary of Veterans Affairs, under authority of the Veterans Education and Benefits Expansion Act of 2001, Public Law 107–103, Section 201(d), has determined that a presumption of service connection is not warranted based on exposure to herbicides used in the Republic of Vietnam during the Vietnam Era for the following health outcomes: Hepatobiliary cancers; oral, nasal, and pharyngeal cancer; bone and joint cancer; skin cancers (melanoma, basal, and squamous cell); breast cancer; female reproductive cancer (cervix, uterus, and ovary); testicular cancer; urinary bladder cancer; renal cancer; leukemia (other than chronic lymphocytic leukemia (CLL)); abnormal sperm characteristics and infertility; spontaneous abortion; neonatal or infant death and stillbirth in offspring of exposed individuals; low birthweight in offspring of exposed individuals; neurobehavioral disorders (cognitive and neuropsychiatric); movement disorders including Parkinson's disease and amyotrophic lateral sclerosis (ALS); chronic peripheral nervous system disorders; respiratory disorders; gastrointestinal, metabolic, and digestive disorders (changes in liver enzymes, lipid abnormalities, ulcers); immune system disorders (immune suppression, autoimmunity); circulatory disorders; amyloid light-chain (AL) amyloidosis; endometriosis; effects on thyroid homeostasis; gastrointestinal tumors (esophagus, stomach, pancreas, colon, rectum; brain tumors; and any other condition for which the Secretary has not specifically determined a presumption of service connection is warranted.

The Secretary's determinations regarding individual diseases are based on all available evidence in a 2004 report of the National Academy of Sciences (NAS) and prior NAS reports. This notice generally states specific information only with respect to significant additional studies that were first reviewed by NAS in its 2004 report. Information regarding additional relevant studies is stated in VA's prior notices following earlier NAS reports, and will not be repeated here.

FOR FURTHER INFORMATION CONTACT: Rhonda F. Ford, Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–7210.

SUPPLEMENTARY INFORMATION: Section 3 of the Agent Orange Act of 1991, Public Law 102–4, 105 Stat. 11, directed the Secretary to seek to enter into an agreement with the National Academy of Sciences (NAS) to review and summarize the scientific evidence concerning the association between exposure to herbicides used in support of military operations in the Republic of Vietnam during the Vietnam Era and each disease suspected to be associated with such exposure. Congress mandated that NAS determine, to the extent possible: (1) Whether there is a statistical association between the suspect diseases and herbicide exposure, taking into account the strength of the scientific evidence and the appropriateness of the methods used to detect the association; (2) the increased risk of disease among individuals exposed to herbicides during service in the Republic of Vietnam during the Vietnam Era; and (3) whether there is a plausible biological mechanism or other evidence of a causal relationship between herbicide exposure and the health outcome. Section 3 of Public Law 102–4 also required that NAS submit reports on its activities every two years (as measured from the date of the first report) for a ten-year period.

Section 2 of Public Law 102–4, codified in pertinent part at 38 U.S.C. 1116(b) and (c), provides that whenever the Secretary determines, based on sound medical and scientific evidence, that a positive association (i.e. the credible evidence for the association is equal to or outweighs the credible evidence against the association) exists between exposure of humans to an herbicide agent (i.e. a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the Vietnam Era) and a disease, the Secretary will publish regulations establishing presumptive service connection for that disease. If the Secretary determines that a presumption of service connection is not warranted, he is to publish a notice of that determination, including an explanation of the scientific basis for that determination. The Secretary's determination must be based on consideration of the NAS reports and all other sound medical and scientific information and analysis available to the Secretary.

Section 2 of the Agent Orange Act of 1991 provided that the Secretary's authority and duties under that section would expire 10 years after the first day of the fiscal year in which NAS transmitted its first report to VA. The first NAS report was transmitted to VA in July 1993, during the fiscal year that began on October 1, 1992. Accordingly, VA's authority under section 2 of the Agent Orange Act of 1991 expired on September 30, 2002. In December 2001, however, Congress enacted the Veterans Education and Benefits Expansion Act of 2001, Public Law 107–103. Section 201(d) of that Act extended VA's authority under 38 U.S.C. 1116(b)–(d) through September 30, 2015.

Although 38 U.S.C. 1116 does not define ''credible,'' it does instruct the Secretary to ''take into consideration whether the results [of any study] are statistically significant, are capable of replication, and withstand peer review.'' The Secretary reviews studies that report a positive relative risk and studies that report a negative relative risk of a particular health outcome. He then determines whether the weight of evidence supports a finding that there is or is not a positive association between herbicide exposure and the subsequent health outcome.

The Secretary does this by taking into account the statistical significance, capability of replication, and whether that study will withstand peer review. Because of differences in statistical significance, confidence levels, control for confounding factors, bias, and other pertinent characteristics, some studies are more credible than others. The Secretary gives weight to more credible studies in evaluating the overall evidence concerning specific health outcomes.

Chronology

NAS issued its initial report, entitled ''Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam,'' (VAO) on July 27, 1993. The Secretary subsequently determined that a positive association exists between exposure to herbicides used in the Republic of Vietnam and the subsequent development of Hodgkin's disease, porphyria cutanea tarda, multiple

myeloma, and certain respiratory cancers. The Secretary also determined that there was no positive association between herbicide exposure and any other health outcome, other than chloracne, non-Hodgkin's lymphoma, and soft-tissue sarcomas, for which presumptions already existed. A notice of the health outcomes that the Secretary determined were not associated with exposure to herbicides was published on January 4, 1994. (See 59 FR 341 (1994)).

NAS issued its second report, entitled ''Veterans and Agent Orange: Update 1996'' (Update 1996), on March 14, 1996. The Secretary subsequently determined that a positive association exists between exposure to herbicides used in the Republic of Vietnam and the subsequent development of prostate cancer and acute and subacute peripheral neuropathy in exposed persons. The Secretary further determined that there was no positive association between herbicide exposure and any other condition, other than those for which presumptions already existed. A notice of the diseases that the Secretary determined were not associated with exposure to herbicide agents was published on August 8, 1996. (See 61 FR 41442 (1996)).

NAS issued a third report, entitled ''Veterans and Agent Orange: Update 1998'' (Update 1998), on February 11, 1999. The focus of this update was new scientific studies published since the release of Update 1996 and updates of scientific studies previously reviewed. After NAS issued Update 1998, the Secretary determined that there was no positive association between herbicide exposure and any other condition, other than those for which presumptions already existed. A notice of the health outcomes that the Secretary determined were not associated with exposure to herbicide agents was published on November 2, 1999. (See 64 FR 59232 (1999)).

At VA's request, NAS issued a special interim report, ''Veterans and Agent Orange: Herbicide/Dioxin Exposure and Type 2 Diabetes'' (VAO: Diabetes) on October 11, 2000. NAS concluded that: ''there is limited/suggestive evidence of an association between exposure to the herbicides used in Vietnam or the contaminant dioxin and Type 2 diabetes.'' NAS based its conclusion on the conglomeration of scientific evidence, not one particular study. (VAO: Diabetes.) After considering all of the evidence, the Secretary determined that there is a positive association between exposure to herbicides and Type 2 diabetes and, therefore, a presumption of service connection was warranted. (See 66 FR 2376 (2001)).

NAS issued a fourth report, entitled ''Veterans and Agent Orange: Update 2000'' (Update 2000), on April 19, 2001. The focus of this update was the new scientific studies published since the release of Update 1998 and updates of scientific studies previously reviewed. After NAS issued Update 2000, the Secretary determined that there was no positive association between herbicide exposure and any other condition, other than those for which presumptions already existed. A notice of the health outcomes that the Secretary determined were not associated with exposure to herbicide agents was published in June 24, 2002 (See 67 FR 42600 (2002)).

NAS issued its fifth report, entitled ''Veterans and Agent Orange: Update 2002'' (Update 2002) on January 23, 2003. The focus of this update was the new scientific studies published since the release of Update 2000 and review of the studies previously reviewed along with the newest scientific evidence. The Secretary subsequently determined that a positive association exists between exposure to herbicides used in the Republic of Vietnam and the subsequent development of chronic lymphocytic leukemia (CLL) in exposed persons. After NAS issued Update 2002, the Secretary determined that there was no positive association between herbicide exposure and any other condition, other than those for which presumptions already existed. A notice of the health outcomes the Secretary determined were not associated with exposure to herbicide agents was published on May 20, 2003 (See 68 FR 27630 (2003)).

Update 2004

NAS issued its sixth report entitled ''Veterans and Agent Orange: Update 2004'' (Update 2004) on March 4, 2005. Consistent with its prior reports, NAS in Update 2004 found that there was ''sufficient evidence of an association'' between herbicide exposure and five categories of diseases in veterans and ''limited/suggestive evidence'' of an association between herbicide exposure and six other categories of diseases in veterans. VA has previously established presumptions of service connection for each of these diseases. NAS, in Update 2004, categorized certain health outcomes to have ''inadequate/insufficient'' evidence to determine whether an association exists. This category is defined to mean that the available studies are of insufficient quality, consistency, or statistical power to permit a conclusion regarding the presence or absence of an association with herbicide exposure. Health outcomes that met the inadequate/insufficient category include: Hepatobiliary cancers; oral, nasal, and pharyngeal cancer; bone and joint cancer; skin cancers (melanoma, basal, and squamous cell); breast cancer; female reproductive system cancer (cervix, uterus, ovary); testicular cancer; urinary bladder cancer; renal cancer; leukemia (other than chronic lymphocytic leukemia (CLL)); abnormal sperm characteristics and infertility; spontaneous abortion; neonatal or infant death and stillbirth in offspring of exposed individuals; low birthweight in offspring of exposed individuals; birth defects (other than spina bifida) in offspring of exposed individuals; childhood cancer (including acute myelogenous leukemia) in offspring of exposed individuals; neurobehavioral disorders (cognitive and neuropsychiatric); movement disorders, including Parkinson's disease and amyotrophic lateral sclerosis (ALS); chronic peripheral nervous system disorders; respiratory disorders; gastrointestinal, metabolic, and digestive disorders (changes in liver enzymes, lipid abnormalities, ulcers); immune system disorders (immune suppression, autoimmunity); circulatory disorders; AL amyloidosis; endometriosis; and effects of thyroid homeostasis.

In this same report, NAS found two health outcomes that fell into the ''limited or suggestive evidence of no association category. These health outcomes were deemed consistent in not showing a positive association between them and any magnitude of exposure to herbicides. Those health outcomes that met the ''no association'' category were: gastrointestinal tumors (esophagus, stomach, pancreas, colon, rectum), and brain tumors.

The Secretary's determinations regarding individual diseases are based on all available evidence in Update 2004 and prior NAS reports. This notice generally states specific information only with respect to significant additional studies that were first reviewed by NAS in Update 2004. Information regarding additional relevant studies has been stated in VA's prior notices following earlier NAS reports, and will not be repeated here.

Hepatobiliary Cancers

Hepatobiliary cancers are cancers of the liver and intrahepatic bile ducts. There are a variety of known risk factors, including chronic infections with hepatitis B or C, exposure to aflatoxin, vinyl chloride and polychlorinated biphenyl (PCB), and

smoking, which should be considered by a credible study.

NAS noted in VAO and subsequent reports that there were relatively few occupational, environmental, or veteran studies of hepatobiliary cancer. It also noted that most of the few existing studies addressing hepatobiliary cancer contain methodological difficulties such as small study size and inadequate control for life-style-related risk factors, or do not support an association with herbicide exposure.

An occupational study by Swaen *et al.* (2004) examined cancer mortality in herbicide appliers in the Netherlands, and no deaths from liver or biliary cancer were observed in the cohort.

NAS found that there was no information contained in the research reviewed for Update 2004 to change the conclusion that there is inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and hepatobiliary cancer.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and hepatobiliary cancer outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Oral, Nasal, and Pharyngeal Cancer

Oral, nasal, and pharyngeal cancers are relatively rare in the United States and thus difficult to study epidemiologically. Reported risk factors for nasal cancer include occupational exposure to nickel and chromium compounds, wood dust, and formaldehyde. Studies reported associations with the consumption of salt-preserved foods, cigarette smoking, and Epstein-Barr virus. NAS noted in VAO and subsequent reports that there was inadequate or insufficient evidence to determine whether an association exists between herbicide exposure and oral, nasal, and pharyngeal cancer.

An occupational study by Swaen *et al.* (2004) examined cancer mortality in herbicide appliers in the Netherlands. No deaths from nasal, oral, or pharynx cancers were observed in that cohort.

In a Vietnam-veteran study, cancers of the cavity between the jaw and cheek were examined in Operation Ranch Hand veterans who were involved in the aerial spraying of herbicides. No significant difference was reported between Ranch Hand veterans and a comparison group of veterans who did not spray herbicides. (Akhtar *et al.*, 2004).

NAS found there was no information contained in the research reviewed for Update 2004 to change the conclusion that there is inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and oral, nasal, and pharyngeal cancer.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and oral, nasal, and pharyngeal cancers outweighs the credible evidence for such an association, and has determined that a positive association does not exist.

Bone and Joint Cancer

Primary bone cancers are among the least common malignancies. The bones are a frequent site of secondary tumors of other cancers that have metastasized. NAS studied only primary bone cancer in Update 2004. Bone cancer is most common among teenagers, and is very rare among people in the age groups of most Vietnam veterans. Among the risk factors for adults are exposure to ionizing radiation from treatment for other cancers and a history of certain non-cancerous bone diseases.

NAS found in VAO and subsequent reports that there is inadequate or insufficient information to determine whether an association exists between exposure to herbicides and bone and joint cancer.

NAS reviewed one occupational study that examined cancer mortality in 1,341 licensed herbicide appliers in the Netherlands. No deaths from bone cancers were observed. (Swaen *et al.*, 2004.) No other relevant environmental or Vietnam-veteran studies were published since Update 2002.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and bone and joint cancer outweighs the credible evidence for such an association, and has determined that a positive association does not exist.

Skin Cancers—Melanoma, Basal, and Squamous Cell

NAS noted in VAO and subsequent reports that there was inadequate or insufficient information to determine whether an association exists between exposure to herbicides and skin cancer. NAS examined two categories of skin cancer: melanoma and nonmelanoma (basal-cell and squamous-cell).

Melanomas occur more frequently in fair-skinned people. Incidence also increases with age, though more so in males than in females. Other risk factors can include moles on the skin, suppressed immune system, and excessive exposure to ultraviolet radiation, usually from the sun. Family history of melanoma is also a risk factor, though it is unclear whether that is the result of genetic factors or attributable to similarities in skin type and sun exposure.

NAS reviewed an occupational study conducted on licensed herbicide applicators in the Netherlands. No data was available on any risk factor for skin cancer, other than age. Five deaths from skin cancer were recorded for the cohort of 1,341 people. Only 1.4 deaths would be expected. (Swaen *et al.*, 2004). NAS noted that a significant limitation of this study was its inability to discern whether, or to what extent, the increased incidence of skin cancer was attributable to herbicide exposure rather than to exposure to UV radiation, which is a significant and well-known risk factor for skin cancer. NAS concluded that herbicide applicators are likely to have had significant exposure to UV radiation, but that limitations of the study design made it impossible to separate the effect of the two occupational exposures.

No environmental studies of melanoma have been published since Update 2002.

In 2004, a study on the incidence of cancer in Operation Ranch Hand veterans compared with both a group of Air Force veterans not involved in herbicide spraying and a sample of the general population, showed that melanoma was more common among the Ranch Hand veterans and the Air Force veterans than in the general population. NAS noted significant limitations concerning the comparison with the general population, including the lack of control for the confounding factor of sun exposure and the possibility that rates of detection among the study population may be higher than the general population due to the heightened detection methods employed in the study. In the analyses limited to Ranch Hand and comparison Air Force veterans, the associations with melanoma were restricted to the stratum of veterans with no more than 2 years of service in Southeast Asia and to a stratum created by the subset of Ranch Hand veterans who served only in Vietnam and comparison veterans who served elsewhere in Southeast Asia.

NAS found that no satisfactory rationale was given to support why the analysis was limited to veterans with less than 2 years of service or to a definition that confounds Ranch Hand status with service in Vietnam. NAS

stated that, if the classifications employed in the study somehow captured a confounding factor, the proper analysis would have been to combine information from each stratum (more than 2 years of service and 2 years or less) to produce an adjusted relative risk. In view of these limitations, NAS decided that the overall association between exposure to herbicides and the incidence of melanoma in this study was not definitive. (Akhtar *et al.*, 2004).

NAS concluded that there is inadequate or insufficient evidence to determine an association between exposure to herbicides and melanoma.

Although some recent studies reported findings suggestive of an association, the weight of those findings is limited by the methodological concerns discussed in the NAS report. Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and melanoma outweighs the credible evidence for such an association, and has determined that a positive association does not exist.

Excessive exposure to ultraviolet radiation is the most important risk factor for non-melanocytic skin cancer, though some skin diseases and exposure to chemicals such as inorganic arsenic have also been identified as possible risk factors.

NAS noted in VAO and subsequent updates that there was inadequate or insufficient information to determine an association between exposure to herbicides and basal-cell or squamous-cell cancers.

There were no relevant environmental or Vietnam-veteran studies published regarding basal-cell and squamous-cell (non melanoma) skin cancers.

NAS concluded that there is no information contained in the research reviewed for Update 2004 to change the conclusion that there is inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and basal-cell and squamous-cell skin cancers.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and basal-cell and squamous-cell skin cancers outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Breast Cancer

NAS noted that breast cancer is the second most common cancer among women in the U.S. Breast cancer incidence generally increases with age. Risk factors other than aging include a personal or family history of breast cancer and certain reproductive characteristics; specifically, early onset of menarche, late onset of menopause, and either no pregnancies or first full-term pregnancy after age 30. NAS noted in VAO and subsequent reports that there is inadequate or insufficient information to determine whether an association exists between exposure to herbicides and breast cancer.

No studies published since Update 2002 have investigated breast cancer. Previously published studies support the conclusion that the evidence is inadequate or insufficient to determine an association between exposure to herbicides and breast cancer.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and breast cancer outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Female Reproductive Cancer (cervix, uterus, ovary)

NAS noted that the cancers of the female reproductive system include cancers of the cervix, endometrium (also referred to as the corpus uteri), and ovaries. Cervical cancers occur more often in African-American women than in white women, whereas white women are more likely to develop endometrial and ovarian cancers. The incidence of endometrial and ovarian cancer also depends on age, with older women at greater risk. Human papillomavirus infection is the most important risk factor for cervical cancer. Diet, a family history of the disease, and breast cancer are among the risk factors for endometrial and ovarian cancers.

NAS noted in VAO and subsequent reports that there is inadequate or insufficient information to determine whether an association exists between exposure to herbicides and cancers of the female reproductive system.

No studies published since Update 2002 have investigated cancers of the female reproductive system.

NAS concluded that there is inadequate or insufficient information to determine an association between exposure to herbicides and female reproductive cancers. Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and cancers of the female reproductive system outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Testicular Cancer

Testicular cancer is far more likely in men younger than 40 than in men over the age of 40. Cryptorchidism, or undescended testes, is a major risk factor for testicular cancer. Family history of the disease also appears to be a risk factor for testicular cancer.

NAS noted in VAO and subsequent reports that there was inadequate or insufficient information to determine whether an association exists between exposure to herbicides and testicular cancer.

No relevant occupational, environmental, or Vietnam-veteran studies have been published since Update 2002.

NAS concluded that there is inadequate or insufficient evidence to determine an association between exposure to herbicides and testicular cancer.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and testicular cancer outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Urinary Bladder Cancer

Urinary bladder cancer is the most common of the urinary tract cancers. Bladder cancer incidence increases greatly with age over 40 years. The most important known risk factor for bladder cancer is smoking. Occupational exposures to aromatic amines (also called arylamines), polycyclic aromatic hydrocarbons (PAHs), and certain other organic chemicals used in the rubber, leather, textile, paint products, and printing industries are also associated with higher incidence of bladder cancer. High-fat diets have been implicated as risk factors, along with exposure to the parasite Schistosoma haematobium. Exposure to inorganic arsenic is also a risk factor for bladder cancer, and cacodylic acid is a metabolite of inorganic arsenic. The data remain insufficient to conclude that studies of inorganic arsenic exposure are directly relevant to exposure to cacodylic acid. Therefore, NAS did not consider the literature on inorganic arsenic.

A study of the incidence of urinary bladder cancer in Vietnam veterans who participated in Operation Ranch Hand was published in 2004. The study found no significant difference between the expected and observed incidence of

urinary bladder cancer. (Akhtar *et al.*, 2004).

NAS noted in VAO and Update 1996 that there was limited or suggestive evidence of no association between exposure to herbicides used in Vietnam or the contaminant dioxin and urinary bladder cancer. Update 1998 provided additional information that led NAS to change its conclusion to inadequate or insufficient information regarding an association with urinary bladder cancer.

No relevant occupational or environmental studies regarding urinary bladder cancer have been published since Update 2002.

The new evidence presented by Akhtar *et al.*, (2004) did not change the committee's previous findings, which placed urinary bladder cancer in the inadequate or insufficient category.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and urinary bladder cancer outweighs the credible evidence for such an association, and has determined that a positive association does not exist.

Renal Cancer

Renal cancer is twice as common in men as in women. With the exception of Wilms' tumor, which is more likely to appear in children, renal cancer is more common in individuals over age 50. Smoking is a risk factor for renal cancer. Other potential risk factors include diet, weight, and occupational exposure to asbestos, cadmium, and organic solvents. Some people with rare syndromes such as von Hippel-Lindau syndrome and tuberous sclerosis are at higher risk. Firefighters who are exposed to pyrolysis products are also in a known higher-risk group.

NAS noted in VAO and subsequent reports that there was inadequate or insufficient information to determine whether an association exists between exposure to herbicides and renal cancer.

In 2004, Swaen *et al.*, published the results on a total of 21 years of follow-up on the mortality experience of an established cohort of 1,341 licensed herbicide appliers in the Netherlands. (Swaen *et al.*, 2004). Four deaths from kidney cancer were reported, and only three were expected. Due to the relatively small study size and lack of exposure information, NAS did not find this study to be sufficiently suggestive of an association.

No relevant environmental or Vietnam-veteran studies have been published since Update 2002.

On the basis of its evaluation of the epidemiologic evidence reviewed and in previous VAO reports, NAS concluded that there is inadequate or insufficient evidence to determine an association between exposure to herbicides and renal cancer.

Taking account of the available evidence and NAS' analysis, the Secretary has found the credible evidence against an association between herbicide exposure and renal cancer outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Leukemia (Other Than Chronic Lymphocytic Leukemia (CLL))

There are four primary types of leukemia: the acute and chronic forms of lymphocytic leukemia and the acute and chronic forms of myeloid (or granulocytic) leukemia.

Acute lymphocytic leukemia (ALL) is a disease of the young and of individuals older than 70, and plays a small role in the age groups that characterize most Vietnam veterans. Exposure to high doses of ionizing radiation is a known risk factor. Acute myeloid leukemia (AML) is the most common leukemia among adults. Risk factors for AML include high doses of ionizing radiation, occupational exposure to benzene, and some medications used in cancer chemotherapy. Genetic disorders including Fanconi's anemia and Down's syndrome are associated with an increased risk for AML. Tobacco smoking has also been suggested as a risk factor.

The incidence of chronic myeloid leukemia (CML) increases with age for individuals over 30. For individuals in the age groups that characterize most Vietnam veterans, CML accounts for about one in five leukemias. CML is associated with an acquired chromosomal abnormality known as the ''Philadelphia chromosome.'' Exposure to high doses of ionizing radiation is a known risk factor for that abnormality.

NAS noted in VAO and subsequent reports that there is inadequate or insufficient information to determine whether an association exists between exposure to herbicides and leukemia.

In Update 2004, NAS reviewed two relevant occupational studies. A study of 1,341 licensed herbicide appliers in the Netherlands showed that three deaths from all leukemias were reported when 2.2 deaths were expected. (Swaen *et al.*, 2004).

An occupational population-based, case-control study conducted in 11 agricultural and industrial areas of Italy showed an increased risk of leukemia based on exposure to phenoxy herbicides. (Miligi *et al.* 2003.) NAS noted that the small number of cases and other limitations prevented adequate analysis of the increased risk based on the study data.

No environmental studies have been published since those reviewed in Update 2002.

A study of Operation Ranch Hand veterans and a cohort of other Air Force veterans who were not involved in the spraying of herbicides was published in 2004. In this study, all leukemias were combined with multiple myeloma and the lymphomas to form the category of lymphopoietic cancers. No excess of such cancers was reported in the Operation Ranch Hand veterans. These results did not change when the analyses were restricted to veterans whose tours of duty ended between 1966 and 1970, the years when Agent Orange was the predominant herbicide in use in Vietnam. (Akhtar *et al.*, 2004).

On the basis of its evaluation of the epidemiologic evidence reviewed and in previous VAO reports, NAS concluded that there was inadequate or insufficient evidence to determine an association between exposure to herbicides and leukemias other than CLL.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and leukemia (other than CLL) outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Abnormal Sperm Characteristics and Infertility

NAS noted in VAO and subsequent reports that there is inadequate or insufficient information to determine whether an association exists between exposure to herbicides and altered sperm parameters or infertility.

A study examined factors possibly associated with infertility in a group of women living in an agricultural region of Wisconsin. For the study, a woman was considered infertile if she had 12 months of unprotected intercourse without conceiving a pregnancy that ended in live birth. Nine case subjects and 11 control subjects reported being exposed to 2,4,5–T and four case subjects and four control subjects reported being exposed to 2,4–D. This study was limited because the sample sizes were small presenting an inability to examine the effects of specific herbicides. Moreover, information on risk factors were obtained from self-reports, which can be subject to recall bias. (Greenlee *et al.*, 2003).

A study examined whether previously poor semen quality in men from rural and urban areas was attributable to use of pesticides including herbicides, fungicides, and other substances. None of the subjects from Minnesota had detectable 2,4–D metabolites in their urine. The subjects from Missouri had 2,4–D metabolite levels that were only of borderline statistical significance. The study showed that 2,4–D was not associated with sperm mobility or concentration, but showed a weak association with sperm morphology. (Swaen *et al.*, 2003).

A study was conducted to determine whether there was an association between TCDD exposures and the menstrual characteristics of women exposed to it for the next 20 years. The study used women who lived near the site of an industrial explosion in 1976 at Seveso, Italy. The main conclusion from the study was that serum TCDD concentration was associated with some menstrual cycle characteristics, with possible effect modification by menarchial status. (Eskenazi *et al.*, 2002).

No relevant Vietnam-veteran studies have been published since Update 2002.

NAS concluded that there is inadequate or insufficient evidence to determine an association between exposure to herbicides and infertility, subfertility, sperm quality or count, or altered hormone concentrations.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and infertility and sperm abnormalities in veterans outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Spontaneous Abortion

Spontaneous abortion is the expulsion of a nonviable fetus, usually before 20 weeks of gestation. The background risk of a spontaneous abortion is generally 7–15%, but this does not include the many more pregnancies that terminate before the woman becomes aware of the pregnancy.

NAS concluded in VAO and subsequent updates that there was inadequate or insufficient information to determine an association between exposure to herbicides and spontaneous abortion.

No relevant occupational or Vietnam-veteran studies have been published since Update 2002.

Eskenazi *et al.* (2003) evaluated data from the Seveso Women's Health Study of women who lived near the site of an industrial explosion in 1976 at Seveso, Italy for an association between individual serum TCDD concentrations and birth outcomes in women who resided near the accident. No association was revealed by the Eskenazi study. Because the spontaneous abortions were self-reported, a truly unexposed control population could not be used in the study. Therefore, it could be hypothesized that the study does not rule out the possibility of a TCDD effect during the earliest period of pregnancy.

NAS concluded that there is insufficient information available to determine whether an association exists between the risk of spontaneous abortion and maternal exposure to herbicides.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and spontaneous abortion outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Neonatal or Infant Death and Stillbirth in Offspring of Exposed Individuals

Stillbirth, or late fetal death, typically refers to the delivery at or after 20 weeks of gestation of a fetus that shows no signs of life. Neonatal death refers to the death of a liveborn infant within 28 days of birth. Typically, causes of stillbirth and neonatal death overlap considerably and are commonly analyzed together in a category called perinatal mortality. The most common causes of perinatal mortality among low-birthweight liveborn and stillborn infants are placental and delivery complications. Among infants weighing more than 2,500 grams at birth, the most common causes are complications of the cord, placenta, and membranes and lethal congenital malformations. (Kallen, 1988).

NAS concluded in VAO and subsequent updates that there was inadequate or insufficient information to determine an association between exposures to herbicides and stillbirth, neonatal death, or infant death.

No relevant occupational, environmental, or Vietnam-veteran studies have been published since Update 2002.

NAS concluded that there is inadequate or insufficient evidence to determine an association between exposure to herbicides and stillbirth, neonatal death, or infant death in offspring of exposed individuals.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and stillbirth, neonatal death, and infant death in offspring of exposed individuals outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Low Birthweight in Offspring of Exposed Individuals

The World Health Organization (WHO) recommends 2,500 grams as the threshold determination for low birthweight. Low birthweight is among the important predictors of neonatal mortality and morbidity, and preterm delivery is a significant cause. Factors most strongly associated with reduced birthweight are maternal tobacco use during pregnancy, multiple births, and race or ethnicity. Other potential risk factors are socioeconomic status, maternal weight, birth order, maternal complications during pregnancy, and obstetric history. Established risk factors for preterm delivery include race, marital status, low socioeconomic status, tobacco use, and cervical, uterine, or placental abnormalities. (Berkowitz and Papiernik, 1993).

A case-control study examined birthweight in the offspring of women who were involved in farming for seven (7) or more days during their pregnancies. In total, the study included 117 women who delivered low birthweight infants (cases) and 377 women who delivered infants weighing at least 2,500 grams (controls). No significant differences were exhibited in the birthweights in the exposed and non-exposed groups. Pregnancy duration was also the same time, with a mean of 38 weeks in cases and controls. NAS determined the study was limited by its retrospective nature. (Dabrowski *et al.*, 2003).

An environmental study examined the association between TCDD exposure and reproductive outcomes among 510 women exposed to TCDD who had complete pregnancies within 20 years of their exposure. The study showed a small non-significant association between maternal dioxin concentrations and decreased birthweight and prematurity. NAS determined that there were flaws in the study, such as the fact that information was obtained by self-report, and that there was no control group or a measurement of background dioxin. (Eskenazi *et al.*, 2003).

No relevant Vietnam-veteran studies were published since Update 2002.

NAS concluded that there is inadequate or insufficient evidence to determine an association between

exposure to herbicides and low birthweight and preterm delivery in offspring of exposed individuals.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and low birthweight and preterm delivery in offspring of exposed individuals outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Birth Defects (Other Than Spina Bifida) in Offspring of Exposed Individuals

The March of Dimes defines a birth defect as ''an abnormality of structure, function, or metabolism, whether genetically determined or as a result of an environmental influence during embryonic or fetal life.'' (Bloom, 1981). Major birth defects, which occur in 2–3% of live births, are severe enough to interfere with viability or physical well-being. Birth defects are detected in another 5% of babies through their first year of life.

The causes of most birth defects are unknown. Known causes include genetic factors, exposure to some medications, environmental contaminants, occupational hazards, and lifestyle factors.

In 1994, NAS found in VAO that there was inadequate or insufficient information to determine an association between exposure to herbicides and birth defects among offspring. But in Update 1996 and subsequent studies, NAS concluded that there was limited or suggestive evidence of an association between at least one of the compounds of interest and spina bifida in the children of exposed veterans. There was no change in the conclusions about other birth defects.

An environmental study examined the impact of exposure to emissions from municipal solid waste incinerators on birth defects in a region of France over a ten-year period. Congenital anomalies were not significantly associated with exposure overall, but some specific anomalies (facial clefts, renal dysplasia, obstructive uropathies, cardiac anomalies) showed significant dose-response relationships. The exposure indicator in this study could not differentiate exposure to dioxins from exposure to metals. (Cordier *et al.*, 2004).

An ecologic study compared rates of adverse birth outcomes in U.S. agricultural states. The use of herbicides on the fields during the times when certain babies were conceived showed a possible increased risk for some defects, such as musculoskeletal and integumental anomalies. However, this study did not directly measure herbicide exposure; instead, it measured by acreage. (Schreinemachers, 2003).

No relevant occupational studies have been published since Update 2002.

Data from the Centers for Disease Control and Prevention (CDC) regarding birth defects in the past 25 years showed that there was no greater risk among Vietnam veterans for fathering babies with serious birth defects. (Correa-Villasenor *et al.*, 2003).

Excluding spina bifida, NAS concludes that there is inadequate or insufficient evidence to determine an association between exposure to herbicides and all other birth defects in offspring of exposed individuals.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and all other birth defects other than spina bifida outweighs the credible evidence for such an association and he has determined that a positive association does not exist.

Childhood Cancer (Including Acute Myelogenous Leukemia) in Offspring of Exposed Individuals

Cancer remains the leading cause of death from disease in children under the age of 15. Leukemia is the most common cancer in children. The second most common group of cancers in children is that of the central nervous system.

NAS concluded in VAO and subsequent studies that there was inadequate or insufficient information to determine an association between exposure to herbicides and childhood cancers.

An agricultural health study examined childhood cancer in the offspring of male pesticide applicators in Iowa. Incidence was compared with the Iowa Surveillance, Epidemiology and End Result data. Potential associations between pesticide exposure and individual types of cancer were not examined. There was a higher rate of childhood cancers for paternal exposure to herbicides than for maternal exposure. (Flower *et al.*, 2004).

No relevant environmental or Vietnam-veteran studies have been published since Update 2002.

The only new study reviewed for this update (Flower *et al.*, 2004), did not show any significant association between the relevant exposures and childhood cancer in offspring of exposed individuals.

On the basis of its evaluation of the epidemiologic evidence reviewed here and in previous VAO reports, NAS concluded that there is inadequate or insufficient evidence to determine an association between exposure to herbicides and childhood cancer in offspring of exposed individuals.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and childhood cancer in offspring of exposed individuals outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Neurobehavioral Disorders (Cognitive or Neuropsychiatric)

NAS noted in VAO and subsequent reports that there was inadequate or insufficient information to determine whether an association exists between exposure to herbicides and cognitive and neuropsychiatric effects.

Since Update 2002, five reports have investigated associations between neurobehavioral disorders and possible exposure to herbicides. The five reports are: (1) An update of the Air Force Health Study (AFHS) (Barrett *et al.*, 2003), (2) a cross-sectional study of a cohort of Korean veterans who served in Vietnam (Kim *et al.*, 2003), (3) an update of an occupational cohort from the Czech Republic (Pelclova *et al.*, 2002), (4) a cohort study from the Bordeaux region of France (Baldi *et al.*, 2003) and (5) a semi-ecological study from a community adjacent to a wood treatment plant (Dahlgren *et al.*, 2003).

Psychological functioning was compared in Ranch Hand veterans and other Vietnam veterans (Barrett *et al.*, 2003). The characteristics of the study groups indicated that those with high exposure were more likely to be younger enlisted personnel; those with background or low exposure were older officers. Two standard psychological test instruments were administered: The Minnesota Multiphasic Personality Inventory (MMPI) and the Millon Clinical Multiaxial Inventory (MCMI). MMPI results were inconsistent and showed no significant associations with exposure. The conclusions from the studies were limited by the possibility of misclassification of exposure, selection bias, and uncontrolled confounding. The authors concluded that there were few consistent differences in psychological functioning between groups based on serum dioxin concentrations.

A study published results of a cross-sectional study of Korean veterans who served in Vietnam. Health outcomes were assessed by a group of four family

practitioners, blinded to subjects' exposure status, using a ''standardized comprehensive clinical investigation.'' There was a significantly higher prevalence of post-traumatic stress disorder (PTSD) and mood disorder in Vietnam veterans than in the non-Vietnam comparison group; although the association was not significant after controlling for multiple potential confounders, and it did not differ by exposure in Vietnam veterans. The study was limited because of the possibility of selection bias and a chance of residual confounding because of the demographic difference between groups. (Kim *et al.*, 2003).

The Bordeaux study (Baldi *et al.*, 2003) examined a cohort of 2,792 persons over age 65, enrolled in 1987 for the purposes of studying normal and pathological cerebral aging and loss of independence in the elderly. Exposures were categorized into quartiles by the likelihood of occupational use of chemical pesticides on the basis of self-reports, which introduced the possibility of recall bias. The high drop-out rate raises concerns of selection bias. The authors of the study could not identify exposure to specific compounds. The study offered no evidence that would implicate the compounds of interest because the exposures were not comparable to herbicide exposures in Vietnam.

Dahlgren *et al.* used a semi-ecological design to assess the possibility that self-reported symptoms suggesting neurobehavioral disorders in a group of people from eastern Mississippi were related to residence near a creosote treatment plant. (Dahlgren *et al.*, 2003). The study suffered from design weaknesses, including selection and ascertainment bias, lack of objective exposure data, and lack of physician-confirmed diagnoses.

NAS concluded that there is no consistent evidence for any association between neurobehavioral disorders and herbicide exposure.

On the basis of its evaluation of the epidemiological evidence reviewed here and on previous VAO reports, NAS concludes that there is still inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and neurobehavioral disorders (cognitive or neuropsychiatric).

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and neurobehavioral disorders (cognitive or neuropsychiatric) outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Movement Disorders, Including Parkinson's Disease (PD) and Amyotrophic Lateral Sclerosis (ALS)

• Parkinson's Disease

Parkinson's Disease (PD) is a progressive neurodegenerative disorder that affects millions of people worldwide. Its primary clinical manifestations are bradykinesia, resting tremor, cogwheel rigidity, and gait instability. These signs were first described in 1817 as a single entity by James Parkinson, who believed that severe fright from a traumatic experience was a probable cause.

Because of the increasing concern that a link exists between PD and various chemicals used in herbicides, NAS, in VAO and subsequent reports, suggested that as Vietnam veterans move into the age groups when PD is more prevalent, attention be given to the frequency and character of new cases of PD in exposed versus non-exposed individuals.

In the Bordeaux cohort study, new cases at the 8- and 10-year follow-up were identified by self-report in response to the question, ''Do you have Parkinson's disease?'' The incidence for exposed and unexposed subjects, respectively, was estimated at 8.9 and 4.1 cases per 1,000 person-years. The results do suggest increased risk to men with occupational exposure to pesticides, but the use of fungicides in vineyards predominated, rather than any of the compounds of interest. The case-control study from Bordeaux compared 84 subjects over age 70 with PD who had been recruited from hospital-based specialty clinic practices with a control group of 252 subjects without PD, identified from the previously described cohort. There is no evidence from that study to implicate herbicides to Vietnam veterans. (Baldi *et al.*, 2003).

On the basis of its evaluation of the epidemiologic evidence reviewed here and in previous VAO reports, NAS concluded that there is inadequate or insufficient information to determine whether an association exists between exposure to herbicides and PD.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and PD outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

• Amyotrophic Lateral Sclerosis (ALS)

ALS is a progressive motor neuron disease with adult onset that presents with muscle atrophy, weaknesses, and fasciculations. The incidence of ALS peaks between the ages of 55 to 75 years. Known risk factors for ALS are age and a family history of ALS. Interest in the role of occupational or environmental exposure originated in cases of motor neuron disease associated with exposure to heavy metals, chemical plants, animal carcasses, heavy manual labor, work with electricity, pneumatic tools, work in the plastic industry, and work as a truck driver.

No relevant epidemiologic studies have been published since Update 2002.

On the basis of its evaluation of the epidemiologic evidence reviewed here and in previous VAO reports, NAS concluded that there is inadequate or insufficient evidence of an association between exposure to herbicides and motor neuron disease or ALS.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and ALS outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Chronic Peripheral Nervous System Disorders

Peripheral neuropathy consists of disorders of the peripheral nervous system. Manifestations of this syndrome can include a combination of sensory changes, motor weakness, or autonomic instability.

NAS noted in VAO and subsequent reports that there was inadequate or insufficient evidence of an association between exposure to herbicides and peripheral neuropathy.

Peripheral neuropathy was one outcome considered in a study of Korean Vietnam veterans (Kim *et al.*, 2003). It was significantly more common in Vietnam veterans than in non-Vietnam veterans, with a 2.4-fold risk even after controlling for alcohol use and age, although there were no differences based on estimated TCDD exposure within subgroups of Vietnam veterans. Diabetes was also more common in Vietnam veterans. The authors of the study concluded that there was an excess frequency of peripheral neuropathy in Vietnam veterans. The report distinguishes between ''peripheral neuropathy'' and ''neuropathy with diabetes,'' which was not significantly different between the groups. The possibility of selection bias was a concern in this study, only 28% of eligible Vietnam veterans participated in the study and participation may have been related to health status. Therefore,

the study provides some evidence of an association between service in Vietnam and peripheral neuropathy. However, the study does not provide evidence for an association between specific exposure to the compounds of interest and chronic persistent neuropathy.

NAS concluded that there remains inadequate or insufficient evidence of an association between exposure to herbicides and chronic persistent peripheral neuropathy.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and chronic persistent peripheral neuropathy outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Respiratory Disorders

Non-malignant respiratory disorders comprise acute and chronic lung diseases other than Cancer. Acute respiratory disorders include pneumonia and other respiratory infections. Those disorders can be increased in frequency and severity when the normal defense mechanisms of the lower respiratory tract are compromised.

The major risk factor for many non-malignant respiratory disorders is cigarette smoking. Cigarette smoking is the major cause of many airway disorders, and makes almost every respiratory disorder more severe and symptomatic than would otherwise be the case. Vietnam veterans are reported to smoke more heavily than are non-Vietnam veterans (McKinney *et al.*, 1997).

NAS noted in VAO and subsequent updates that there was inadequate or insufficient information to determine an association between exposure to herbicides and respiratory disorders.

A cross-sectional environmental study used questionnaires to gather information on potential adverse health effects among residents near a wood treatment plant. Exposed residents reported greater frequency of chronic bronchitis by history and asthma by history. Selection bias and recall bias limit the utility of the results. It is unclear whether the authors adequately controlled for history of tobacco use. In addition, multiple environmental exposures occurred in the neighborhood near the plant, and the authors could not determine which exposures were responsible for the reported adverse health effects. (Dahlgren *et al.*, 2003).

No relevant occupational or Vietnam-veteran studies have been published since Update 2002. No new studies provide evidence of a direct risk of non-malignant respiratory disorders in adults since those reviewed in Update 2002.

On the basis of its evaluation of the epidemiologic evidence reviewed in Update 2004 and in previous VAO reports, NAS concluded that there is inadequate or insufficient evidence to determine an association between exposure to herbicides and non-malignant acute or chronic respiratory disorders.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and respiratory disorders outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Gastrointestinal, Metabolic, and Digestive Disorders (Changes in Liver Enzymes, Lipid Abnormalities, Ulcers)

Gastrointestinal and digestive disease includes diseases of the esophagus, stomach, intestines, rectum, liver, and pancreas. The two conditions most often discussed in the literature reviewed are peptic ulcer disease and liver disease. The symptoms and signs of gastro intestinal disease and liver toxicity are highly varied and often vague.

The most convenient way to categorize diseases that affect the gastrointestinal system is by the affected anatomic segment.

NAS in VAO and subsequent reports found there was inadequate or insufficient information to determine whether an association exists between exposure to herbicides and gastrointestinal and digestive disease, including liver toxicity.

No relevant environmental or Vietnam-veteran studies have been published since Update 2002.

NAS concluded that there was no information contained in the research reviewed for Update 2004 to change the conclusion that there is inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and gastrointestinal and digestive diseases.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and gastrointestinal and digestive disease outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Plasma lipid (notably cholesterol) concentrations have been shown to predict cardiovascular disease and are considered fundamental to the underlying atherosclerotic process. The two major types of lipids, cholesterol and triglycerides, are carried in the blood attached to proteins to form lipoproteins. NAS in VAO and subsequent reports found there was inadequate or insufficient information to determine whether an association exists between exposure to herbicides and lipid and lipoprotein disorders.

No relevant environmental or Vietnam-veteran studies of lipid and lipoprotein disorders have been published since those reviewed in Update 2002.

An occupational study conducted measured cholesterol and triglyceride concentrations in 12 men who were exposed to extremely high concentrations of TCDD in the late 1960s while they were employed in herbicide production at a chemical factory in the former Czechoslovakia. The correlation between TCDD in 1996 and highest recorded measurement of triglyceride or cholesterol at any point between 1968 and 2001 was 0.66 for triglyceride and 0.78 for cholesterol. No information was given about follow up measures of lipids collected in standard or periodic fashion for participants and there is no discussion of how individual differences in treatment of elevated cholesterol could influence the highest recorded value for total cholesterol. (Pelclová *et al.*, 2002).

Hu *et al.* (2003) conducted a cross-sectional study of dioxin-furan exposures and lipids in workers at municipal-waste incinerator plants in Taipei City, Taiwan. A total of 133 workers were randomly sampled from 3 plants; the workers had to have been employed for at least 6 months in the operation and control or maintenance departments. Seventeen (17) cogeners were measured, including TCDD. Workers with TCDD above the median had higher average cholesterol and were more likely to have cholesterol above 220 mg/dL. The relationship between TCDD and cholesterol was not statistically significant when TCDD was measured by tertiles, quartiles, or as a continuous variable. TCDD was not associated with triglyceride as a continuous or categorical measure.

The study by Pelclová *et al.* has some shortcomings, including the small sample (12 men). The study by Hu *et al.* successfully recruited a cross-section of workers and did show significant variation in cholesterol by a dichotomous measure of TCDD. The loss of statistical significance with more detailed categories or along the full continuum of TCDD values suggests that

the findings from the initial analysis are not robust or consistent. Several individual cogeners other than TCDD were identified as statistically significant correlates of elevated cholesterol. The study did not allow for isolation of the effect of any single exposure. The relationship between herbicide exposure and lipid remains uncertain.

NAS concluded that there is inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and lipid and lipoprotein disorders.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and lipid and lipoprotein disorders outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Immune System Disorders (Immune Suppression, Autoimmunity)

The immune system defends the body against infection by viruses, bacteria, and other disease-producing microoganisms (pathogens). The immune system's cells arise from stem cells in the bone marrow; they are found throughout the body's lymphoid tissues, and they circulate in the blood as white blood cells. The immune system also operates in cancer surveillance, destroying cells that have transformed and might otherwise develop into tumors.

Autoimmune disease is an example of the immune system's causing rather than preventing disease. In this case, the immune system mistakenly attacks the body's own cells and tissues as if they were foreign.

In new studies from Seveso, Italy, plasma immunoglobulin (Ig) and complement concentrations were measured in a random sample of the population. This was conducted in highly exposed zones and in the surrounding uncontaminated areas. The concentrations of one plasma immunoglobulin (IgG), significantly decreased with increasing TCDD concentration. The association was present after adjusting for age, sex, tobacco use, and computation of domestic livestock and poultry. (Baccarelli *et al.*, 2002).

Two studies have evaluated the influence of exposure to TCDD-like compounds on immune response in children. One study characterized the immune status of adolescent boys and girls in Flanders, Belgium, in relation to their blood concentrations of PCBs and dioxin like compounds. The results found in the adolescents might suggest a dioxin-induced suppression of the immune response, consistent with the findings in the laboratory animals exposed to TCDD. (Van Den Heuvel *et al.,* 2002).

In a follow up study of 8 year-old Dutch children perinatally exposed to dioxin, researchers found a decrease in allergy in relation to increasing dioxin exposure. The study found an increased percentage of naïve versus activated T cells, which is consistent with a generalized decrease in immune responsiveness associated with dioxin exposure. (Tusscher *et al.* 2003).

One study examined Korean Vietnam War veterans for evidence of immune system changes in relation to their operation in various areas of Vietnam. A significant increase in plasma IgE was found in both groups of veterans compared with control subjects. The patient group also had significantly decreased plasma IgG1. Those changes correlated with decreased production of interferon gamma in the patient group and with increased production of interleukin 4 in both veterans' groups when the T cells from the subjects were cultured in vitro. No changes in the plasma concentrations of antibodies against double-stranded DNA or extractable nuclear antigens, both markers of autoimmune disease, were found in the veterans, nor were changes found in frequency distribution of peripheral blood leukocyte subpopulations. (Kim H–A *et al.*, 2003).

TCDD is a well known immunosuppressive agent in laboratory animals; it is among the most potent immunotoxicants in the environment. Therefore, one would expect that exposure of humans to sufficiently high doses of TCDD would result in immune suppression. However, several studies of various parameters of human immune function have failed to reveal consistent correlations with TCDD exposure, and no detectable pattern of increased infectious diseases has developed in veterans exposed to high concentrations of TCDD or other herbicides used in Vietnam. Although suppression of the immune response by TCDD could increase the risk of some cancers in Vietnam veterans, there is no evidence to support that connection.

Studies that examined the influence of TCDD on IgE production have generated additional conflicting data. Two studies revealed a significant reduction in IgE production and associated allergic responses correlated with increasing exposure to TCDD and related compounds among children in Belgium and the Netherlands (Tusscher *et al.*, 2003; Van Den Heuvel *et al.*, 2002). In contrast, Korean Vietnam veterans had increased rather than decreased IgE concentrations in plasma—independent of health status. (Kim H–A *et al.*, 2003).

No relevant occupational studies were published since those reviewed in Update 2002.

NAS noted in VAO and subsequent reports that there was inadequate or insufficient information to determine whether an association exists between exposure to herbicides and immune system disorders.

NAS concluded that there was no information reviewed for Update 2004 to change the conclusion that there is inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and immune system disorders.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between immune system disorders and herbicide exposure outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Circulatory Disorders

The term circulatory disorder includes hypertension, heart failure, arteriosclerotic heart disease, peripheral vascular disease, and cerebrovascular disease. NAS noted in VAO and subsequent reports that there was inadequate or insufficient information to determine whether an association exists between exposure to herbicides and circulatory disorders.

An occupational study presented results for a 21-year-old follow up of mortality in a cohort of 1,341 licensed herbicide applicators working for government agencies in the Netherlands. The workers had relatively low cardiovascular mortality. (Swaen *et al.*, 2004).

An ecological study reported no association between measure of dioxin emissions and cardiovascular or cerebrovascular mortality after adjustment for socioeconomic correlates of dioxin emissions. However, the study design precludes inferences about the relationship between exposure and disease among individuals. This study cannot be interpreted as important evidence of no association. (Fukuda *et al.*, 2003).

A Vietnam-veteran study reported the results of a cross-sectional study of exposure to Agent Orange and the prevalence of large number of health outcomes in Korean veterans who had served in Vietnam. The study shows an elevated prevalence of hypertension in

Vietnam veterans compared with that for veterans who served elsewhere. However, some of the weaknesses included in this study include no information on the measurement of disease, and therefore no opportunity to comment on the quality of measurement. There is also the possibility of selection bias in the formation of the study population due to a law in Korea to support medical care and compensation for herbicide victims. (Kim J–S *et al.*, 2003).

The new occupational and environmental studies of circulatory conditions do not support an association for exposure to herbicides, but they also do not represent compelling evidence for the lack of an association.

On the basis of its evaluation of the epidemiologic evidence reviewed here and in previous VAO reports, NAS concluded that there is no information contained in Update 2004 to change the conclusion that there is inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and specific circulatory disorders (coronary artery disease, myocardial infarction, stroke, hypertension) or circulatory conditions in general.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and circulatory disorders outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

AL Amyloidosis

Amyloidosis refers to a group of related disorders that share the common feature of the deposition of insoluable, fibrous amyloid protein, mainly in the extracellular spaces of organs and tissues to a point that causes organs to malfunction. NAS reviewed AL amyloidosis (also sometimes referred to as primary amyloidosis), in which the light chain of immunoglobulin molecules is the aberrant protein. AL amyloidosis is the most common form of amyloidosis in the United States.

VA identified AL amyloidosis as a concern in Update 1998. It was examined specifically by the committees responsible for Updates 2000 and 2002. In Update 2002, NAS found there was inadequate or insufficient information to determine whether an association exists between exposure to herbicides and AL amyloidosis.

No relevant occupational, environmental, or Vietnam-veteran studies have been published since Update 2002.

NAS concluded that there is no information to change the conclusion that there is inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and AL amyloidosis.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and amyloidosis outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Endometriosis

The endometrium is the tissue that lines the inside of the uterus. In endometriosis, the endometrium is found outside the uterus, usually in other parts of the reproductive system, the abdomen, or the tissues near the reproductive organs. The tissue develops into growths or lesions that respond to hormonal changes in the body, and break down and bleed each month in concert with a woman's menstrual cycle. It results in inflammation, internal bleeding, and degeneration of blood and tissue, which can cause scarring, pain, infertility, adhesions, and intestinal problems. The exact cause of endometriosis is unknown, though genetics is a possible etiology.

NAS reviewed endometriosis for the first time in Update 2002. Since Update 2002, three environmental studies have been conducted that examined the relationship between exposures to some of the compounds of interest and endometriosis. One such study investigated the development of endometriosis among participants of the Seveso Women's Health Study. The cohort consisted of women who had lived in proximity to the Seveso accident site in 1976 and had TCDD serum measurements in blood collected between 1976 and 1980. Women in the highest exposure group showed a doubling in the risk of endometriosis compared with the lowest exposure group, although the increase was not statically significant, possibly because of the small number of confirmed cases. A major limitation of the study was the inability to confirm with laparoscopy the disease state of the largest group, those with an uncertain diagnosis. No truly unexposed control group was included in the study. (Eskenazi *et al.*, 2002).

The second study completed a population-based cross-sectional study of residents in several Belgian towns in the vicinity of industrial sites or municipal solid waste incinerators and a control group with no known exposures to dioxins or PCBs. There was no difference in the mean TEQ (toxicity equivalent) concentrations between the 10 cases and 132 controls. The study's usefulness is compromised because of reliance on self-reports and because of the small number of cases. (Fierens *et al.*, 2003).

The third study conducted a pilot case-control study of women of reproductive age in Italy and Belgium to determine whether there is a correlation between blood concentrations of dioxin-like compounds and endometriosis. Controls were patients suspected of having a benign adnexal mass; cases were suspected of having endometriosis. The data did not indicate that the concentration of 2,3,7,8–TCDD was elevated in women with endometriosis. Overall, the study did not show that women with endometriosis had higher 2,3,7,8–TCDD or total TEQ than did controls. The study was limited in its ability to detect differences, however, by the small number of subjects. The selection criteria, which allowed all women with suspected gynecological abnormality, also introduced bias. (De Felip *et al.*, 2004).

No relevant occupational or Vietnam-veteran studies have been published since Update 2002.

None of the three studies demonstrated an increased risk for endometriosis with exposure to dioxin or dioxin-like compounds. NAS concluded that there is inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and endometriosis.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and endometriosis outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Effects on Thyroid Homeostasis

The thyroid gland secretes hormones (T4 and T3) that stimulate metabolism. Secretion of T4 and T3 is under the control of thyroid-stimulating hormone (TSH), which is secreted by the anterior pituitary gland. The thyroid also secretes calcitonin, a hormone that controls calcium concentration in the blood and storage of calcium in bones. Chemical-induced alterations in thyroid homeostasis can adversely affect the development of many organ systems, including the nervous and reproductive

systems. Most adverse effects are caused by lack of thyroid hormone alone rather than by increases in TSH. TCDD affects the concentrations of thyroid hormones; the effects appear to be species-dependent and may reflect both the dose and the duration of exposure. TCDD influences the metabolism of thyroid hormones and TSH. Studies of environmental exposure have emphasized thyroid alterations in prenatal and early childhood development rather than in adults.

NAS reviewed the thyrotoxic potential of herbicides for the first time in Update 2002 and concluded that there was inadequate or insufficient information to determine an association between exposure to herbicides and adverse effects on thyroid homeostasis.

An occupational study measured serum hormone and TCDD concentration in 37 men who had sprayed 2, 4,5–T. In correlation analysis, TCDD concentrations were inversely related to T3 and TSH. The association was strongest when historical, but not current, serum TCDD concentrations were considered. (Johnson *et al.*, 2001).

No relevant environmental studies were published since Update 2002.

A Vietnam-veterans study examined thyroid hormone status in the AFHS cohort. At each examination there was a trend toward an increasing concentration of TSH, which was not accompanied by changes in circulating T4 or in the percentage uptake of T3. Ranch Hand veterans had TSH significantly higher than did the comparison population. No changes in microsomal or antithyroid antibodies were observed, nor was there any evidence of changes in clinical thyroid disease. (Pavuk *et al.*, 2003).

NAS determined the lack of data on the association between exposure to the chemicals of interest and adverse effects on thyroid homeostasis, coupled with the lack of exposure information on Vietnam veterans precludes quantification of any possible increase in their risk.

NAS concluded that there is inadequate or insufficient evidence to determine whether an association exists between exposure to herbicides and adverse effects on thyroid homeostasis.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and adverse effects on thyroid homeostasis outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Gastrointestinal Tumors (Esophagus, Stomach, Pancreas, Colon, Rectum)

Gastrointestinal Tract tumors are among the most common of cancers. NAS reviewed data on esophageal cancer, stomach cancer, pancreatic cancer, colon cancer, and rectal cancer. Colon cancer makes up about 40% of gastrointestinal tract cancer diagnoses and deaths.

The incidence of stomach, colon, rectal, and pancreatic cancers increase with age in people 50–64 years old. In general, the incidence is higher in men than women, and is higher in blacks than in whites. Other risk factors for those cancers vary but always include family history of the same form of cancer, some diseases of the affected organ, and dietary factors.

NAS noted in VAO and subsequent reports that there was limited or suggestive evidence of no association between exposure to herbicides and gastrointestinal (GI) tract tumors.

NAS examined two occupational studies. One study showed that male chemical production workers previously exposed to substantial amounts of dioxin experienced no increased risk from death from gastric cancer. (Bodner *et al.*, 2003).

In another study of licensed herbicide appliers in the Netherlands, a lower than expected number of deaths due to esophagus and stomach cancer was reported. (Swaen *et al.*, 2004).

An environmental study of 590 municipalities in Japan examined the relationships between indexes of dioxin emissions from incineration plants and cause-specific mortality among nearby residents. When the analysis was restricted to municipalities with incineration plants, there was a positive and statistically significant correlation in men for stomach cancer for one dioxin index and a statistically significant negative correlation for three dioxin indexes. (Fukuda *et al.*, 2003).

The Vietnam-veteran study reported on cancer incidence and mortality in Air Force veterans of the Vietnam War. Index cases were Operation Ranch Hand veterans who sprayed dioxin-contaminated herbicides in Vietnam. Comparison subjects served in Southeast Asia during the same period but did not spray herbicides. The group reported that the incidence of cancer of the digestive system was significantly lower than expected, compared with national incidence rates, in white Ranch Hand veterans. There were insufficient numbers of non-white Ranch Hand veterans to make estimates. (Akhtar *et al.*, 2004).

NAS concluded that there was no new evidence to change the previous determination that there is limited or suggestive evidence of no association between exposure to herbicides and gastrointestinal tract cancer.

The evidence that suggests that there is no association between exposure to herbicides and gastrointestinal tumors also implies that Vietnam-veterans are not at increased risk of gastrointestinal tumors resulting from herbicide exposure.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and gastrointestinal tract tumors outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Brain Tumors

The only well-established environmental risk factor for brain tumors is exposure to high doses of ionizing radiation. (American Cancer Society, 2004a; Wrensch *et al.*, 2002). Several other potential risk factors have been examined, but most brain cancers are not associated with any known risk factors. Brain cancer occurs fairly infrequently.

NAS noted in VAO and subsequent reports that there was limited or suggestive evidence of no association between exposure to herbicides and brain tumors.

An occupational study conducted in 2003 updated cancer mortality among Dow Chemical Company workers who were likely to have been exposed to high concentrations of dioxins. Cancers of the brain and nervous system were not elevated. (Bodner *et al.*, 2003).

A 2004 study of the mortality of a cohort of 1,341 licensed herbicide appliers in the Netherlands showed an insignificant increase in brain cancer, but the study was limited by the small number of cases and by potential confounders that could not be evaluated. (Swaen *et al.*, 2004).

No relevant environmental studies were published since Update 2002.

A Vietnam-veteran study describes cancer incidence and mortality in a prospective cohort study of Air Force Operation Ranch Hand veterans who sprayed Agent Orange while serving in Southeast Asia. The Ranch Hand cohort was compared to a group of veterans who did not serve in Southeast Asia as well as U.S. national cancer rates. There was a non-significant increase in the incidence of cancer of the brain and nervous system compared with national rates, and a non-significant increase in Ranch Hand veterans who served during the heaviest use of Agent Orange. There

was no increase in mortality attributable to cancer of the brain and nervous system. This study was limited by the small number of cases. (Akhtar *et al.*, 2004).

NAS concluded that there was no new evidence to change the previous determination that there is limited or suggestive evidence of no association between exposure to herbicides and brain tumors.

Taking account of the available evidence and NAS' analysis, the Secretary has found that the credible evidence against an association between herbicide exposure and brain tumors outweighs the credible evidence for such an association, and he has determined that a positive association does not exist.

Conclusion

NAS reviewed scientific and medical articles published since the publication of its first report as an integral part of the process that resulted in ''Veterans and Agent Orange: Update 2004.'' The comprehensive review and evaluation of the available literature that NAS conducted in conjunction with its report has permitted VA to identify all conditions for which the current body of knowledge supports a finding of an association with herbicide exposure. Accordingly, the Secretary has determined that there is no positive association between exposure to herbicides and any other condition for which he has not specifically determined that a presumption of service connection is warranted.

After careful review of the NAS findings in Update 2004 and other pertinent information, the Secretary has determined that no new presumptions of service connection are warranted for any illnesses based on exposure to herbicides used during the Vietnam War or to dioxin.

Approved: June 5, 2007.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

[FR Doc. E7–11247 Filed 6–11–07; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on OIF/OEF Veterans and Families; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a subcommittee of the Advisory Committee on OIF/OEF Veterans and Families will conduct a site visit in the Las Vegas, Nevada area on June 26–28, 2007. The site visit will include a town hall meeting, tours and briefings at various VA facilities, and a tour of Nellis AFB medical facilities. The town hall meeting will be open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the full spectrum of health care, benefits delivery and related family support issues that confront servicemembers during their transition from active duty to veteran status and during their post-service years. The Committee focuses on the concerns of all men and women with active military service in Operation Iraqi Freedom and/or Operation Enduring Freedom, but pays particular attention to severely disabled veterans and their families.

On June 26, the subcommittee will attend a veterans small business conference at the Caesars Palace Hotel and will receive afternoon briefings by Nellis AFB officials. On June 27, the subcommittee will tour several VA medical clinics and will receive briefings by Veterans Health Administration and Veterans Benefits Administration personnel on issues of particular relevance to OIF/OEF veterans and their families. The subcommittee will conduct a two hour town hall meeting beginning at 7 p.m. in the Jewel Box Theater at the Clark County Library, 1401 E. Flamingo Road, Las Vegas, Nevada. On June 28, the subcommittee will hold a wrap up session to review and analyze the previous days' briefings. That session will be held at the MGM Grand, 3799 Las Vegas Boulevard South, Las Vegas, Nevada.

Public comments will be received by the subcommittee at the town hall meeting on June 27. Individuals wishing to make oral statements at the meeting should contact the Committee at *oifoef@va.gov*. Just prior to the town hall meeting, there will also be a sign up sheet for people to register their interest in making public statements. Oral statements by the public will be limited to five minutes each.

Anyone seeking additional information should contact Ronald Thomas, Esq., Designated Federal Officer, at (202) 273–5182.

Dated: June 6, 2007.

By direction of the Secretary.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. 07–2889 Filed 6–11–07; 8:45 am]

BILLING CODE 8320–01–M

Corrections

Federal Register

Vol. 72, No. 112

Tuesday, June 12, 2007

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

EXPORT-IMPORT BANK

Economic Impact Policy

Correction

In notice document E7–9803 appearing on page 28694 in the issue of Tuesday, May 22, 2007 make the following correction:

In the first column, in the first paragraph, in the fifth line, ''$54 in'' should read ''$54 million in''.

[FR Doc. Z7–9803 Filed 6–11–07; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Tuesday,

June 12, 2007

Part II

Department of Education

34 CFR Parts 674, 682, and 685

Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 674, 682, and 685

[Docket ID ED–2007-OPE–0133]

RIN 1840-AC89

Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the Federal Perkins Loan (Perkins Loan) Program, Federal Family Education Loan (FFEL) Program, and William D. Ford Federal Direct Loan (Direct Loan) Program regulations. The Secretary is amending these regulations to strengthen and improve the administration of the loan programs authorized under Title IV of the Higher Education Act of 1965, as amended.

DATES: We must receive your comments on or before August 13, 2007.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*, select ''Department of Education'' from the agency drop-down menu, then click ''Submit.'' In the Docket ID column, select ED–2007-OPE–0133 to add or view public comments and to view supporting and related materials available electronically. Information on using Regulations.gov, including instructions for submitting comments, accessing documents, and viewing the docket after the close of the comment period, is available through the site's ''User Tips'' link.
- *Postal Mail, Commercial Delivery, or Hand Delivery*. If you mail or deliver your comments about these proposed regulations, address them to Ms. Gail McLarnon, U.S. Department of Education, 1990 K Street, NW., room 8026, Washington, DC 20006–8542.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing on the Federal eRulemaking Portal at *http://www.regulations.gov*. All submissions will be posted to the Federal eRulemaking Portal without change, including personal identifiers and contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Gail McLarnon, U.S. Department of Education, 1990 K Street, NW., Washington, DC 20006–8542. Telephone: (202) 219–7048 or via the Internet: *gail.mclarnon@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Invitation To Comment

We invite you to submit comments regarding these proposed regulations. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the programs.

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments, in person, in room 8026, 1990 K Street, NW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Negotiated Rulemaking

Section 492 of the Higher Education Act of 1965, as amended (HEA) requires the Secretary, before publishing any proposed regulations for programs authorized by Title IV of the HEA, to obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations from individuals and representatives of groups involved in the Federal student financial assistance programs, the Secretary must subject the proposed regulations to a negotiated rulemaking process. The proposed regulations that the Department publishes must conform to agreements resulting from that process unless the Secretary reopens the process or provides a written explanation to the participants in that process stating why the Secretary has decided to depart from the agreements. Further information on the negotiated rulemaking process can be found at: *http://www.ed.gov/policy/highered/reg/hearulemaking/2007/nr.html*.

On August 18, 2006, the Department published a notice in the **Federal Register** (71 FR 47756) announcing our intent to establish up to four negotiated rulemaking committees to prepare proposed regulations. One committee would focus on issues related to the Academic Competitiveness Grant and National Science and Mathematics Access to Retain Talent (SMART) Grant programs. A second committee would address issues related to the Federal student loan programs. A third committee would address programmatic, institutional eligibility, and general provisions issues. Lastly, a fourth committee would address accreditation. The notice requested nominations of individuals for membership on the committees who could represent the interests of key stakeholder constituencies on each committee. The four committees met to develop proposed regulations over the course of several months, beginning in December 2006. This NPRM proposes regulations relating to the student loan programs that were discussed by the second committee mentioned in this paragraph (the ''Loans Committee'').

The Department developed a list of proposed regulatory changes from advice and recommendations submitted by individuals and organizations in testimony submitted to the Department in a series of four public hearings held on:

• September 19, 2006, at the University of California-Berkeley in Berkeley, California.
• October 5, 2006, at the Loyola University in Chicago, Illinois.
• November 2, 2006, at the Royal Pacific Hotel Conference Center in Orlando, Florida.
• November 8, 2006, at the U.S. Department of Education in Washington, DC.

In addition, the Department received written comments on possible regulatory changes submitted directly to the Department by interested parties and organizations. All regional meetings and a summary of all comments received orally and in writing are posted as background material in the docket and can also be accessed at *http://www.ed.gov/policy/highered/reg/hearulemaking/2007/hearings.html.* Staff within the Department also identified issues for discussion and negotiation. Lastly, because The Third Higher Education Extension Act of 2006, (Pub. L. 109–292), made changes to the law governing eligible lender trustee relationships as of September 30, 2006, the Department added this issue to the Loans Committee agenda.

At its first meeting in December, 2006, the Loans Committee reached agreement on its protocols and proposed agenda. These protocols provided that the non-Federal negotiators would not represent the interests of stakeholder constituencies, but would instead participate in the negotiated rulemaking process based on each Committee member's experience and expertise in the Title IV, HEA loan programs.

The members of the Loans Committee were:

• Jennifer Pae, United States Students Association, and Luke Swarthout (alternate), State PIRG (Public Interest Research Groups) Higher Education Project;
• Deanne Loonin and Alys Cohen (alternate) of the National Consumer Law Center.
• Darrel Hammon, Laramie Community College, and Kenneth Whitehurst (alternate), North Carolina Community Colleges.
• Pamela W. Fowler, University of Michigan, Patricia McClurg (alternate), University of Wyoming, and Sara Bauder (alternate), University of Maryland.
• Elizabeth Hicks, Massachusetts Institute of Technology, and Ellen Frishberg (alternate), Johns Hopkins University.
• Jeff Arthur, ECPI College of Technology, Robert Collins (alternate), Apollo Group, and Nancy Broff (alternate), Career College Association.
• Shari Crittendon, United Negro College Fund, and William ''Buddy'' Blakey (alternate), William A. Blakey & Associates, PLLC.
• Scott Giles, Vermont Student Assistance Corporation, and Rachael Lohman (alternate), Pennsylvania Higher Education Assistance Agency.
• Tom Levandowski, Wachovia Corporation, and Lee Woods (alternate), Chase Education Finance.
• Phil Van Horn, Wyoming Student Loan Corporation, and Robert L. Zier (alternate), Indiana Secondary Market for Education Loans.
• Robert Sommer, Sallie Mae, and Wanda Hall (alternate), EdFinancial Services.
• Richard George, Great Lakes Higher Education Guaranty Corporation, and Gene Hutchins (alternate), New Jersey Higher Education Student Assistance Authority.
• Eileen O'Leary, Stonehill College, and Christine McGuire (alternate), Boston University.
• Alisa Abadinsky, University of Illinois at Chicago, and Karen Fooks (alternate), University of Florida.
• Dan Madzelan, U.S. Department of Education.

Ellen Frishberg of Johns Hopkins University resigned from the Committee after the third negotiated rulemaking session.

During its meetings, the Loans Committee reviewed and discussed drafts of proposed regulations. It did not reach consensus on the proposed regulations in this NPRM. More information on the work of this committee can be found at: *http://www.ed.gov/policy/highered/reg/hearulemaking/2007/loans.html.*

These regulations were further refined by the Task Force on Student Loans. The Secretary created this task force on April 24, 2007, to review issues within the student loan industry. The task force was comprised of representatives from several offices within the Department, including the Office of Postsecondary Education, Office of Federal Student Aid, Office of the General Counsel, Office of Budget Service, Office of Planning, Evaluation, and Policy Development, and Office of Inspector General. The task force submitted its recommendations regarding these regulations to the Secretary on May 9, 2007.

Significant Proposed Regulations

The following discussion of the proposed regulations begins with changes that affect more than one of the title IV student loan programs—the Perkins Loan Program, the FFEL Program, or the Direct Loan Program.

This discussion is followed by separate discussions of proposed changes that affect only one of the three programs. Generally, we do not address proposed regulatory provisions that are technical or otherwise minor in effect.

Simplification of Deferment Process (§§ 674.38, 682.210, 682.210, 682.210, and 685.204)

Statute: Sections 428(b)(1)(M), 455(f)(2), and 464(c)(2)(A) of the HEA authorize deferments for borrowers in the FFEL, Direct Loan, and Perkins Loan programs under certain circumstances. A FFEL, Direct Loan, or Perkins Loan borrower may receive a deferment during a period when the borrower is: Enrolled at least half-time in an institution of higher education; enrolled in an approved graduate fellowship program; enrolled in an approved rehabilitation training program; seeking and unable to find full-time employment; performing qualifying active duty military service; or experiencing an economic hardship.

Current Regulations: Currently, a borrower who has loans held by one or more lenders must apply separately to each lender for a deferment in accordance with §§ 674.38, 682.210, and 685.204 of the Department's regulations. Each lender is required to review the borrower's deferment request, and make its own determination of the borrower's eligibility for the deferment. There is an exception to this requirement for in-school deferments. Under §§ 674.38(a)(2) and 682.210(c)(1), a Perkins institution or a FFEL lender may grant an in-school deferment based on information from the borrower's school, or student status information from another source. The Secretary also has this option in the Direct Loan Program under § 685.204(b)(1)(iii)(A)(*3*). When an in-school deferment is granted using this procedure, the institution, lender or Secretary must notify the borrower that the deferment has been granted, and provide the borrower an opportunity to decline the deferment.

Proposed Regulations: The proposed regulations in § 682.210(s)(1)(iii) would allow FFEL lenders to grant graduate fellowship deferments, rehabilitation training program deferments, unemployment deferments, military service deferments, and economic hardship deferments based on information that another FFEL lender or the Department has granted the borrower a deferment for the same reason and the same time period. The proposed regulations in § 685.204(g)(2) would also permit the Department to grant a deferment on a Direct Loan based on deferment information from a

FFEL Program lender. The proposed regulations in § 674.38(a)(2) would permit schools in the Perkins Loan Program to grant deferments based on information from another Perkins Loan holder, FFEL lender, or the Department.

Under the proposed regulations in §§ 674.38(a)(3), 682.210(s)(1)(iv) and 685.204(g)(3), Title IV, HEA loan holders will be able to rely in good faith on the deferment eligibility determinations of other lenders, including the Department. However, if a loan holder has evidence indicating that the borrower does not qualify for a deferment, the loan holder may not grant a deferment based on another holder's determination of deferment eligibility.

In addition, the proposed regulations in §§ 674.38(a)(6), 682.210(i)(1) and (t)(7), and 685.204(g)(5) would allow a borrower's representative to apply for a military service deferment on behalf of the borrower. This change would apply to both the Armed Forces deferment available for loans made before July 1, 1993 and the current military service deferment.

Reasons: The non-Federal negotiators recommended adding provisions to § 682.210 of the regulations to allow FFEL lenders to grant deferments based on deferments granted by other lenders. They noted that this is allowable for in-school deferments and asked to extend this authority to other deferments. Under this proposal, the FFEL lender would determine borrower eligibility for the deferment by contacting the other lender or by checking the Department's National Student Loan Data System (NSLDS). The Department agreed to consider this addition to the regulations. In addition, the Department agreed with the negotiators to allow Perkins Loan schools to grant deferments based on a borrower's FFEL or Direct Loan deferment eligibility as reflected in the proposed changes to § 674.38(a). However, since eligibility and documentation requirements for some Perkins Loan deferments are different from corresponding deferment requirements in the FFEL and Direct Loan programs, these proposed regulations would not allow FFEL lenders, or the Department for Direct Loans, to grant deferments based on a borrower receiving a deferment on his or her Perkins Loan.

The proposed regulations limit this simplified deferment process to deferments that are available to a borrower who received a Title IV, HEA loan on or after July 1, 1993. The negotiators suggested that the new regulations should also apply to deferments that were available to a borrower who first received a Title IV, HEA loan prior to July 1, 1993.

However, the Department decided that the pre-July 1, 1993 deferments are more complex and have more detailed qualifications than the current deferments. In addition, the older deferments are not the same for all types of loans. A borrower could qualify for a deferment on some of their loans but not others. The post-July 1, 1993 deferments are relatively uniform across the Title IV, HEA loan programs and across loan types. In light of these differences, the Department decided that the new policy should apply only to the deferments available on current loans.

Some negotiators asked that the regulations include protection for lenders that grant a deferment in error based on another lender's determination of deferment eligibility. In response, the Department is proposing to add language to §§ 674.38(a)(3), 682.210(s)(1)(iv) and 685.204(g)(3) stating that loan holders may rely in good faith on the deferment determination of another holder, but may not knowingly grant an ineligible borrower a deferment if the loan holder has information indicating that the borrower is not eligible.

Some negotiators proposed that loan holders be allowed to grant a deferment unilaterally, without any contact from the borrower. The Department did not accept this proposal because, although a borrower may qualify for a deferment on all of his or her loans, the borrower may not necessarily want a deferment on all of his or her loans. Under the simplified process, the borrower would not have to submit a deferment application to each lender, but would still have to request the deferment, in writing, electronically or verbally.

Some negotiators requested a change to the regulations that would allow a request for a military service deferment to be submitted by a representative of the borrower as well as the borrower. They noted that borrowers who qualify for these deferments may not be in a position to easily apply for them. The Department agreed that a special provision for these borrowers is warranted. The Department is proposing to amend the regulations in §§ 674.38(a)(6), 682.210(i)(5) and (t)(7), and 685.204(g)(5) to allow a borrower's representative to apply for a military service deferment or an Armed Forces deferment on the borrower's behalf.

The Department notes that granting a deferment under this simplified process is optional for lenders. A lender is not required to use this process when reviewing deferment requests.

Accurate and Complete Copy of a Death Certificate (§§ 674.61, 682.402, and 685.212)

Statute: Sections 437(a) and (d) of the HEA provide for the discharge of a FFEL loan if the borrower, or a dependent on whose behalf a parent has borrowed, dies. This provision also applies to Direct Loans under section 455(a)(1) of the HEA. Section 464(c)(1)(F) provides for the discharge of a Perkins Loan if the borrower dies.

Current Regulations: Current regulations in §§ 674.61(a), 682.402(b), and 685.212(a) state that if a Perkins, FFEL, or Direct Loan borrower dies, or if the student for whom a FFEL or Direct PLUS Loan was borrowed dies, the borrower's loan will be discharged based on an original or certified copy of the death certificate. Under exceptional circumstances, and on a case-by-case basis, a discharge due to the death of the borrower may be granted without an original or certified copy of the death certificate.

Proposed Regulations: The Secretary proposes to amend §§ 674.61(a), 682.402(b), and 685.212(a) to allow the use of an accurate and complete photocopy of the original or certified copy of the borrower's death certificate, in addition to the original or certified copy of the death certificate, to support the discharge of a Title IV loan due to death.

Reasons: The Secretary believes that allowing the use of an accurate and complete photocopy of the death certificate will decrease the burden for survivors of the deceased and for loan holders processing death discharges. We have also learned that, in some states, there are restrictions and additional costs related to getting an additional original or certified copy of the original death certificate to provide to loan holders. Under the proposed regulations, the lender may accept an accurate and complete photocopy of the death certificate. The Secretary chose not to allow the use of a fax or electronic version of the certificate because documents in those formats are more vulnerable to alteration.

Under the proposed regulations a lender may rely on an ''accurate and complete photocopy'' of the original or certified copy of the death certificate to grant a discharge due to the death of the borrower. The intent of the proposed change is not to require an individual to provide an original or certified copy of the death certificate to the lender for the lender to photocopy, but rather to allow a lender to accept a photocopy of the original or certified copy of the death certificate as an accurate and complete

copy of the original or certified copy, unless there is evidence that the copy is not an accurate and complete copy of the original or certified copy.

Although other data sources such as NSLDS, the Social Security Administration's Death Master File, and documents such as a police report or court documents could possibly be used as a basis for discharging a loan due to death, the Department declined to expand the documentation requirements in order to guard against fraud and abuse in the discharge process.

While the Department believes that it is difficult to alter an original or certified copy of an original death certificate because these documents are generally notarized or contain raised, government stamps validating the document's authenticity, we nonetheless solicit public comment on whether the use of a photocopy of an original or certified copy of an original death certificate could lead to fraud and abuse in the death discharge process. Specifically, we are interested in comments that identify how such fraud is likely to occur and ways to address this issue.

Total and Permanent Disability Discharge (§§ 674.61, 682.402, and 685.213)

Statute: Sections 437(a), 464(c)(1)(F), and 455(a)(1) of the HEA provide for a discharge of a borrower's FFEL, Perkins, or Direct Loan Program loan, respectively, if the borrower becomes totally and permanently disabled. A total and permanent disability is determined in accordance with regulations of the Secretary.

Current Regulations: Sections 674.61(b), 682.402(c), and 685.213 of the Perkins, FFEL, and Direct Loan Program regulations, respectively, authorize the discharge of a loan if the borrower becomes totally and permanently disabled. Section 674.51 of the Perkins Loan Program regulations defines *total and permanent disability*, and § 682.200 defines *totally and permanently disabled*, for the purposes of the FFEL and Direct Loan Programs, as the condition of an individual who is unable to work and earn money because of an injury or illness that is expected to continue indefinitely or result in death.

Under current regulations in §§ 674.61(b), 682.402(c), and 685.213, a Perkins, FFEL or Direct Loan borrower submits a discharge application to the loan holder. The application must include a physician's certification that the borrower is totally and permanently disabled as defined in § 682.200 or has a total and permanent disability as defined in §§ 674.51. To establish eligibility for the discharge, a borrower cannot have worked or earned money or received a Title IV loan at any time after the date of the borrower's total and permanent disability. The loan holder reviews the application, and upon making an initial determination that the borrower meets the definition and requirements for a total and permanent disability discharge, notifies the borrower that the loan has been assigned to the Department and that no payments are due to the lender. Under § 685.213 of the current regulations, the Department is responsible for reviewing disability discharge applications submitted by Direct Loan borrowers.

Upon assignment of the Perkins or FFEL Loan or receipt of a Direct Loan discharge application, the Department reviews the application. If the borrower meets the eligibility requirements for a discharge, the Department notifies the borrower that the loan has been placed in a three-year conditional discharge status and that no payments are due during that period. During the three-year conditional discharge period, the borrower's income from employment cannot exceed the poverty line for a family of two for any 12-month period, and the borrower cannot take out any additional Title IV loans. Under current regulations, in some cases, the three-year conditional period will already have elapsed if the borrower's total and permanent disability date is more than three years prior to the date the borrower applies for a discharge. In such cases, a final discharge decision is made immediately upon assignment of the account to the Department without any current income verification, as long as the borrower is otherwise eligible. Otherwise, if, at the end of the three-year conditional discharge period, the borrower still meets the discharge requirements, the Department makes a final determination of eligibility and discharges the loan. Under current regulations, any payments received by the loan holder or the institution after the date the loan is assigned to the Secretary or during the three-year conditional discharge period are forwarded to the Department for crediting to the borrower's account. When the Department makes a final determination to discharge the loan, the payments received on the loan after the date the loan was assigned to the Department are returned. If the borrower does not meet the eligibility requirements during the three-year conditional discharge period, collection activity resumes on the loan.

Proposed Regulations: These proposed regulations would restructure the disability discharge regulations for the Perkins Loan, FFEL, and Direct Loan programs, §§ 674.61(b), 682.402(c) and 685.213, respectively, to clarify the eligibility requirements for a final total and permanent disability discharge and better describe the discharge process. The Department is not changing the definition of *total and permanent disability* in § 674.51 or the definition or *totally and permanently disabled* in § 682.200.

The proposed regulations would: (1) Add a new requirement in §§ 674.61(b)(2)(i), 682.402(c)(2)(i) and 685.213(b)(1) that the borrower submit a discharge application to the loan holder within 90 days of the date the physician certifies the borrower's application; (2) define the date of the borrower's total and permanent disability as the date the physician certifies the borrower's disability on the discharge application form in §§ 674.61(b)(3)(ii), 682.402(c)(3)(ii), and 685.213(c)(2); (3) require a prospective three year conditional discharge period to establish eligibility for a total and permanent disability discharge beginning on the date the Secretary makes an initial determination that the borrower is totally and permanently disabled, in §§ 674.61(b)(3)(iii), 682.402(c)(3)(iii) and 685.213(c)(3); and (4) provide that upon making a final determination of the borrower's total and permanent disability, the Secretary returns those payments made on the loan after the date the physician completed and certified the borrower's discharge on the loan discharge application in §§ 674.61(b)(5), 682.402(c)(4)(iii), 685.213(d)(3)(ii).

Reasons: The Department is proposing to restructure the Perkins Loan, FFEL, and Direct Loan total permanent disability discharge regulations in §§ 674.61(b), 682.402(c) and 685.213, respectively, to clarify the eligibility requirements and to better explain the application and eligibility process. Several negotiators argued that the process and eligibility requirements as currently written are difficult for borrowers to understand. For example, non-Federal negotiators noted that the current regulations establish a different standard for eligibility for the period between the date of the physician's certification and the Secretary's initial determination of eligibility in comparison to the three-year conditional discharge period. The Department proposes to address these concerns by clearly listing the continuing eligibility requirements in § 674.61(b)(2)(iii) of the Perkins Loan Program regulations, § 682.402(c)(3) of the FFEL program regulations, and

§ 685.213(b)(2) of the Direct Loan program regulations and by requiring loan holders to disclose these eligibility requirements to borrowers. Some non-Federal negotiators also noted that even though collection activity is suspended after the borrower submits a discharge application, some borrowers continued to make payments on their loan because they were not aware of the suspension of collection activity. The Department is proposing to amend the regulations to require loan holders to inform borrowers that no further payments on the loan are due once the discharge application is sent to the Secretary for her initial eligibility determination.

The proposed regulations in §§ 674.61(b)(2)(i), 684.402(c)(2)(i) and 685.213(b)(1) would require borrowers to submit the completed application for a total and permanent disability discharge to the loan holder within 90 days of the date the physician certifies the application. This requirement would help ensure that the Secretary has accurate and timely information on which to base her determination. Limiting the time period will also help borrowers avoid the possibility that they might inadvertently take an action that would disqualify them for a final discharge. The Department initially proposed a 30-day application submission requirement, but the Department was persuaded by the non-Federal negotiators that 90 days would provide a more appropriate standard for borrowers.

Under the proposed regulations in §§ 674.61(b)(3)(ii), 682.402(c)(3)(ii), and 685.213(c)(2) if the Secretary makes an initial determination that the borrower qualifies for a discharge, the date of disability is the date the physician certifies the borrower's disability on the form. The proposed regulations also provide for a three-year prospective conditional discharge period to establish eligibility for a total and permanent disability discharge. The conditional discharge period begins on the date that the Secretary makes her initial determination that the borrower is totally and permanently disabled. Thus, the receipt of any Title IV, HEA loans, including consolidation loans, or income by the borrower before the date the physician certified the application form would not disqualify the borrower from receiving a final discharge. However, the borrower would have to meet the disability requirements for a three-year prospective period.

The Department is proposing these changes because currently, in some cases, the three-year conditional discharge period has already elapsed before the borrower applies for a discharge and a final discharge is made immediately upon assignment of the account to the Department. This result is inconsistent with the original intent of the Department's regulations, which was to conform the discharge requirements to other Federal programs that only provide Federal benefits based on a disability after monitoring the applicant's condition. Further, there have been instances when borrowers have received otherwise disqualifying Title IV loans and earnings in excess of allowable levels after the date of application but also after the date of the borrower's retroactive final discharge. Under current regulations, the Secretary grants a final discharge in these circumstances. Some non-Federal negotiators did not agree with the Department's proposal that the borrower's disability date should be the date the physician certifies that the borrower is disabled on the discharge application form.

Lastly, the Department is proposing changes to §§ 674.61(b)(5), 682.402(c)(4)(iii), and 685.213(d)(3)(ii) to provide that the Secretary, upon making a final determination of the borrower's total and permanent disability, will return payments made on the loan after the date the physician completed and certified the borrower's total and permanent disability on the loan discharge application. The non-Federal negotiators did not agree with the Department's position and stated that if a borrower successfully completed a three-year prospective discharge period, the borrower should receive a refund of prior payments made on the loan. The Department is proposing this change because it believes that not counting any loans or income received prior to the date the physician certifies the borrower's disability on the application *and* returning payments made by the borrower or on the borrower's behalf back to the date of disability provided by a physician would create two onset dates and create program integrity issues in the administration of the total and permanent disability discharge process. In addition, in administering the discharge process, the Department has found that, in many cases, certifying physicians have to rely solely on the individual's statements in determining a date of disability onset. In these situations, there may not be a strong medical basis for using that date as a date for establishing eligibility for Federal benefits. In light of this history, the Department believes that the best date to use as the eligibility date is the date the physician certified the application, since that process requires the physician to review the borrower's condition at that time rather than speculate as to the borrower's condition in the past.

NSLDS Reporting Requirements (§§ 674.16, 682.208, 682.401, and 682.414)

Statute: Section 485B(e) of the HEA provides for the Secretary to prescribe by regulation standards and procedures that require all lenders and guaranty agencies to report information to the NSLDS on all aspects of Title IV loans in uniform formats in order to permit the direct comparison of data submitted by individual lenders, servicers, and guaranty agencies.

Current Regulations: The current Perkins Loan Program and FFEL Program regulations do not reflect NSLDS reporting requirements. Under § 682.401(b)(20), guaranty agencies are required to monitor student enrollment status of a FFEL Program borrower, or a student on whose behalf a parent has borrowed, and report to the current holder of the loan within 60 days any changes in the student's enrollment status that triggers the beginning of the borrower's grace period or the beginning or resumption of the borrower's immediate obligation to make scheduled payments.

Current § 682.414(b)(4) requires guaranty agencies to report information consisting of extracts from computer databases and supplied in the medium and the format prescribed in the Stafford and SLS, and PLUS Loan Tape Dump Procedures. The tape dumps, which are now obsolete, contained loan status information on guaranty agency loans.

Proposed Regulations: The Secretary proposes in § 674.16(j) of the Perkins Loan regulations, and § 682.208(i) and § 682.414(b)(4) of the FFEL regulations to require institutions, lenders, and guaranty agencies to report enrollment and loan status information, or any other Title IV-loan-related data required by the Secretary, to the Secretary by a deadline established by the Secretary.

The proposed changes to § 682.401(b)(20) require a guaranty agency to report enrollment and loan status information on a FFEL Program borrower or student to the current holder of any loan within 30 days of any changes to the student's enrollment status.

Reasons: The proposed changes to §§ 674.16(j), 682.208(i) and 682.414(b)(4) would provide for the establishment by the Secretary of NSLDS reporting timeframes to improve the timeliness and availability of

information important to administering the student loan programs. The Secretary also believes that the Department will be able to implement other proposed regulatory changes, such as simplification of the deferment granting process, more easily and more efficiently if timely and accurate information is more readily available in NSLDS.

Some non-Federal negotiators requested that the proposed regulations require the Secretary to consult with program participants before determining the ''deadline dates established by the Secretary''. The Department declined to make this change to the proposed regulations, but noted that there are other opportunities for program participants to be involved in discussions about NSLDS reporting requirements and that it was unnecessary to require it in regulations. The Department is required to consult with the community under section 432(e) of the HEA and will continue to discuss the issues and concerns of Title IV, HEA program participants related to NSLDS reporting through established workgroups and conference calls.

Several negotiators noted that the Department's proposed reduction of the timeframe for a guaranty agency to report enrollment status to a lender from 60 days to 30 days might be disruptive and require systems changes for the various participants in the Title IV loan programs. A negotiator requested a longer time frame of at least 45 days. The Department acknowledges that the change to 30 days will have some impact on the guaranty agencies' and lenders' systems. However, the Department is concerned that a timeframe of 45 days or longer will mean that the information in the NSLDS is quickly out-of-date. The Department invites further comment and discussion on this timeframe and on any associated costs through this NPRM. Also, under the master calendar requirements contained in the HEA, if the Department finalizes these proposed regulations on or before November 1, 2007, this provision will be effective on July 1, 2008, which will provide sufficient time for system reprogramming.

Certification of Electronic Signatures on Master Promissory Notes (MPNs) Assigned to the Department (§§ 674.19, 674.50, 682.409, and 682.414)

Statute: Section 467(a) of the HEA authorizes the Secretary to collect assigned Perkins Loans under such terms and conditions as the Secretary may prescribe. Section 432(a) of the HEA authorizes the Secretary to prescribe regulations as necessary to carry out the purposes of the FFEL Program, including regulations to establish minimum standards with respect to sound management and accountability in the FFEL Program.

Current Regulations: Currently the regulations for the Perkins Loan program and the FFEL Program do not include any requirements for institutions and lenders to create and maintain a record of their electronic signature process for promissory notes and MPNs.

Proposed Regulations: The proposed changes in § 674.19(e)(2) and (3) would require an institution to create and maintain a certification regarding the creation and maintenance of any electronically signed Perkins Loan promissory note or MPN in accordance with documentation requirements in proposed § 674.50. Proposed changes to § 674.19(e)(4)(ii) and § 682.414(a)(5)(iv) would require an institution or the holder of a FFEL loan, respectively, to retain an original of an electronically signed Perkins Loan or FFEL Program MPN for 3 years after all loans on the MPN are satisfied. Under the proposed changes in § 674.50(c)(12) and § 682.414(a)(6), an institution, for assigned Perkins loans, or a guaranty agency and lender, for assigned FFEL loans, would be required to cooperate with the Secretary, upon request, in all matters necessary to enforce an assigned loan that was electronically signed. This cooperation would include providing testimony to ensure the admission of electronic records in legal proceedings and providing the Secretary with the certification regarding the creation and maintenance of electronically signed promissory notes. The proposed changes in §§ 674.50(c)(12)(iii) and 682.414(a)(6)(iii) also would require the institution, or the guaranty agency and lender, respectively, to respond within 10 business days, to any request by the Secretary for any record, affidavit, certification or other evidence needed to resolve any factual dispute in connection with an electronically signed promissory note that has been assigned to the Department. Lastly, proposed changes in §§ 674.50(c)(12)(iv) and 682.414(a)(6)(iv) would require that an institution, or guaranty agency and lender, respectively, ensure that all parties entitled to access have full and complete access to the electronic records associated with an assigned Perkins or FFEL MPN, until all loans made on the MPN are satisfied.

Proposed changes to § 682.409(c)(4)(viii) of the FFEL Program regulations would require the guaranty agency to provide the Secretary with the name and location of the entity in possession of an original, electronically signed MPN that has been assigned to the Department.

Reasons: MPNs are used in all of the Title IV, HEA Loan programs. MPNs, which can be used for up to a 10-year period, have no loan amount or loan period on the face of the note and can be signed electronically. The Department is amending §§ 674.19 and 674.50 of the Perkins Loan Program regulations and §§ 682.409 and 682.414 of the FFEL Program regulations to support the Department's efforts to enforce electronically-signed promissory notes that are assigned to the Department. These requirements will help ensure that the Department has the evidence to enforce the loan in cases in which a factual dispute or a legal challenge is raised in connection with the validity of the borrower's electronic signature and the MPN. In order to preserve the integrity of the Perkins and FFEL programs as well as the Federal fiscal interest, the Department believes it is essential that an institution or lender be able to guarantee the authenticity of a borrower's signature on loans assigned and collected by the Department.

During the regulatory negotiations, the Department originally proposed to require in § 682.406(a) that a lender submit a certification regarding the creation and maintenance of the electronic MPN or promissory note, including the lender's authentication and signature process, to the guaranty agency as part of the default claim process. The certification would have then been submitted to the Department when the guaranty agency assigned a FFEL loan under the mandatory assignment provisions in § 682.409(c). The Department also originally proposed to amend § 682.414(a)(ii) to require a guaranty agency to maintain a certification regarding the creation and maintenance of the lender's electronic MPN for each loan held by the agency.

With respect to the Perkins Loan Program, the Department originally proposed similar new requirements that an institution maintain a certification regarding the creation and maintenance of the MPN in § 674.19(d) and provide the certification to the Department, upon request, when assigning the loan in accordance with § 674.50(c).

Many non-Federal negotiators believed that the Department's original proposal was too burdensome.

Some non-Federal negotiators submitted a counter-proposal to the Department that proposed placing the burden of creating and maintaining a certification of a lender's electronic signature process on the lender that

created the original electronic MPN. This counter-proposal was intended to be consistent with the lenders' current practices. The non-Federal negotiators from lending organizations reaffirmed that lenders will be in possession of and would deliver whatever the Department needs to enforce an electronically signed promissory note or MPN, including expert testimony in court cases.

The Department returned to the final session of negotiations with revised proposed regulations in § 682.414(a)(6) based on the counter-proposal submitted by some of the non-Federal negotiators. The non-Federal negotiators expressed their support for this proposal, but questioned many of the details. In particular, some non-Federal negotiators believed that it was redundant for the certification of a loan holder's electronic signature process to include a requirement that the lender document its borrower authentication process. However, the Department considers this requirement a vital part of the certification. Several non-Federal negotiators noted that the Perkins Loan Program regulations in §§ 674.19(d) and 674.50(c) did not contain the same detailed requirements as § 682.414(a)(6) regarding the contents of the certification. These proposed regulations include the same standards in both programs. Several non-Federal negotiators thought that the provisions in § 674.50(c)(12)(iii) and § 682.414(a)(6)(iii) that require institutions, lenders and guaranty agencies to respond to requests for information from the Department within 10 business days would be too difficult to meet and asked the Department to use another standard. The Department notes, however, that 10 business days is a significant period of time and that it is vital that the Department receive the information as quickly as possible when a borrower is contesting the validity of a debt. Lastly, several non-Federal negotiators expressed concern about the requirement to retain an original electronically signed MPN for at least 7 years after all the loans made on the MPN have been satisfied. In issuing this NPRM, the Department has, after considering these concerns, decided to require that schools and lenders retain the original, electronically signed MPN for at least 3 years after all the loans made on the MPN have been satisfied. This record retention standard is needed to accommodate borrower challenges to an administrative wage garnishment or federal offset action taken by the Department to collect on assigned FFEL loans.

The Department realizes that these proposed regulations for electronically signed documents may have an impact on the operations of lenders, guaranty agencies and institutions. The Department particularly invites comments on possible changes to these regulations to reduce that impact while ensuring the Department's ability to enforce loans.

Record Retention Requirements on Master Promissory Notes (MPNs) Assigned to the Department (§§ 674.19, 674.50, 682.406, and 682.409)

Statute: Section 443(a) of the General Education Provisions Act (GEPA), 20 U.S. 1232f(a), provides that recipients of Federal funds under any applicable program must retain records of the amount and distribution of Federal funds to facilitate effective audits of the use of those funds. The GEPA generally applies to institutions that participate in the Title IV, HEA programs.

Current Regulations: Current requirements related to the retention of loan disbursement records by institutions are in § 668.24(c)(1)(iv) and (e)(1) and require institutions to retain disbursement records, unless otherwise directed by the Secretary, for three years after the end of the award year for which the aid was awarded and disbursed. Section 674.50(c) does not currently include disbursement records as part of the documentation the Secretary may require an institution to submit when assigning a Perkins Loan to the Department.

Section 682.414(a)(4)(ii) and (iii) requires a guaranty agency to ensure that a lender retains a record of each disbursement of loan proceeds to a borrower for not less than three years following the date the loan is repaid in full by the borrower, or for not less than five years following the date the lender receives payment in full from any other source. Section 682.414(a)(4)(iii) also provides that, in particular cases, the Secretary or the guaranty agency may require the retention of records beyond this minimum period. However, S682.409(c)(4) does not currently require a guaranty agency to submit a record of the lender's disbursements when assigning a loan to the Department.

Proposed Regulations: The proposed changes in § 674.19(e)(2)(i) and (e)(3)(i) would require an institution that participates in the Perkins Loan Program to retain records showing the date and amount of each disbursement of each loan made under an MPN. The institution also would be required to retain disbursement records for each loan made on an MPN until the loan is canceled, repaid, or otherwise satisfied. Proposed § 674.50(c)(11) would require an institution to submit disbursement records on an assigned Perkins loan upon the Secretary's request. The proposed changes in § 682.409(c)(4)(vii) would require a guaranty agency to submit the record of the lender's disbursement of loan funds to the school for delivery to the borrower when assigning a FFEL Loan to the Department.

Reasons: The proposed changes to §§ 674.19(e) and 674.50(c) of the Perkins Loan Program regulations that require the retention of MPN disbursement records by an institution and submission of such records, if requested by the Secretary, on Perkins Loans assigned to the Department would support enforcement and collection on the MPN. These regulatory changes would also facilitate the process of proving that a borrower benefited from the proceeds of the loan, if the borrower challenges the validity of the loan. The proposed addition of § 682.409(c)(4)(vii), requiring a guaranty agency to submit a record of the lender's disbursement records upon assigning an FFEL loan to the Department, would accomplish the same enforcement goals.

The Department's original proposal related to the retention of disbursement records in support of enforcement of FFEL loans assigned to the Department presented during the negotiations was different than the changes proposed here. The Department originally proposed to require schools to report to the lender the date and amount of each disbursement of FFEL loan funds to a borrower's account no later than 30 days after delivery of the disbursement to the borrower. Under the Department's original proposal, lenders also would have been required to provide the record of a school's delivery of loan disbursements to a FFEL borrower as a condition for a guaranty agency to make a claim payment and receive reinsurance coverage. Lastly, the Department originally proposed to require that the guaranty agency, upon assignment of a FFEL loan to the Department, submit a record of the school's delivery of loan disbursements to the borrower.

The Department's original proposal for the retention of MPN disbursement records on assigned Perkins Loans is reflected in these proposed regulations.

Some non-Federal negotiators expressed concern about the burden associated with reporting and retaining voluminous amounts of disbursement data when only a limited amount of the data would actually be needed by the Department to enforce an assigned

Perkins or FFEL loan. Some non-Federal negotiators expressed concern that the new requirements could affect the payment of insurance and reinsurance claims in the FFEL program. Some of the non-Federal negotiators asserted that lenders, guaranty agencies, and schools could supply needed disbursement records to the Department without adding new regulations. Several non-Federal negotiators suggested that the Department use existing data systems, such as the NSLDS, to collect disbursement information, rather than requiring new record retention procedures.

The Department carefully considered the concerns of these non-Federal negotiators, and returned to the last session of negotiations with the proposed changes to the regulations on retention of disbursement records that are reflected in this NPRM. The Department decided that requiring the collection, retention, and submission of a school-based record documenting each disbursement of a FFEL loan might be too burdensome in light of the relatively few occasions that require the use of such records. The Department decided to continue to use the lender documentation of disbursements currently provided to the Department in the FFEL assignment process. The Department is proposing to codify this practice in § 682.409(c)(4)(vii). However, the Department intends to monitor this process carefully and will require a guaranty agency or lender to return reinsurance, interest benefits and special allowance for any loan determined to be unenforceable due to the absence of disbursement records in accordance with § 682.406(a)(13). If the disbursement documentation is not available or reliable, the Department reserves its authority to reexamine this issue in the future.

For institutions that participate in the Perkins Loan program, the Department is proposing new provisions requiring the retention of school-based disbursement records because the institution is the lender in the Perkins Loan Program. Moreover, because MPNs have been in use in the Perkins Loan Program for approximately three years, institutions have retained all disbursement records on Perkins MPNs under current record retention requirements in § 668.24. The only new requirement for Perkins institutions will be that these disbursement records must be retained for at least three years after a Perkins Loan is satisfied and that these disbursement records be submitted to the Department on an assigned Perkins MPN, if requested by the Secretary.

Loan Counseling for Graduate or Professional Student PLUS Loan Borrowers (§§ 682.603, 682.604(f), 682.604(g), 685.301, 685.304(a), and 685.304(b))

Statute: Under section 428B(a)(1) of the HEA, a graduate or professional student may borrow a PLUS Loan. However, section 485(b)(1)(A) of the HEA specifically excludes PLUS Loan borrowers from the groups of borrowers for which exit counseling must be provided. The HEA does not address entrance counseling requirements for Stafford and PLUS Loan borrowers.

Current Regulations: The current regulations in §§ 682.604(f) and (g) and 685.304(a) and (b) require entrance and exit counseling for Stafford Loan borrowers, but not for graduate or professional student PLUS Loan borrowers.

Proposed Regulations: Proposed § 682.604(f)(2) would require entrance counseling for graduate or professional student PLUS Loan borrowers. The proposed entrance counseling requirements for student PLUS Loan borrowers would vary, depending on whether the borrower has received a Stafford Loan prior to receipt of the PLUS Loan.

Proposed § 682.604(g) would also modify the exit counseling requirements for Stafford Loan borrowers. If the borrower has received a combination of Stafford Loans and PLUS Loans, the institution must provide average anticipated monthly repayment amount information based on the combination of different loan types the borrower has received in accordance with proposed § 682.604(g)(2)(i).

In addition, the proposed regulations in § 682.603(d) would require institutions, as part of the process for certifying a FFEL Program Loan, to notify graduate or professional students who are applying for a PLUS Loan of their eligibility for a Stafford Loan. The proposed regulations require institutions to provide a comparison of the terms and conditions of a PLUS Loan and Stafford Loan, and ensure that prospective PLUS borrowers have an opportunity to request a Stafford Loan.

The proposed regulations in §§ 685.301(a)(3), 685.304(a)(2), and 685.304(b)(4) would include comparable changes to the Direct Loan Program regulations with respect to graduate or professional student borrowers of Direct PLUS Loans.

Reasons: The committee agreed that with the newly authorized availability of PLUS Loans to graduate and professional students, there is a need to revise the loan counseling requirements to account for graduate and professional student PLUS borrowers.

Several negotiators pointed out that exit counseling is often more beneficial to student borrowers than entrance counseling, as exit counseling occurs at the time the loan is nearing repayment, and students are more focused on repaying the loan at that point. However, the statute specifically exempts PLUS borrowers from exit counseling requirements. Although the Department encourages schools to provide exit counseling to graduate and professional student PLUS borrowers, the Department cannot require schools to provide such counseling.

One negotiator suggested that the Department require a school's Stafford Loan exit counseling include information related to the PLUS Loan if a Stafford Loan borrower also had a PLUS Loan. The Department determined that, in those cases, the exit counseling requirements for Stafford Loan borrowers could be modified to include information on PLUS Loans. Accordingly, that requirement is included in §§ 682.604(g)(2) and 685.304(b)(4) of the proposed regulations.

The Department and the other negotiators agreed that borrowers who are eligible for both Stafford Loans and PLUS Loans should be given information on the relative merits of each loan type, and be given an opportunity to obtain a Stafford Loan prior to the borrower's receipt of a PLUS Loan. Therefore, the Department is proposing to require in §§ 682.603(d) and 685.301(a) that the school provide a comparison of the terms and conditions of a PLUS Loan and a Stafford Loan prior to the graduate or professional student's receipt of a PLUS Loan, so the borrower has the opportunity to make the best decision in terms of which loan to accept.

Several negotiators felt that the Department's initial proposal was too vague, and asked for more specificity regarding which terms and conditions should be highlighted for these borrowers. In response, the Department has added more specificity to §§ 682.603(d)(1) and 685.301(a)(3) of the proposed regulations.

With regard to entrance counseling requirements for borrowers who have both Stafford and PLUS Loans, one negotiator asked if the proposed regulations would preclude a school from providing both Stafford and PLUS Loan entrance counseling at the same time. The Department responded that the proposed regulations would not preclude this practice.

One negotiator pointed out that many graduate or professional student PLUS borrowers will have already received Stafford Loans as undergraduates, and therefore will have already received Stafford Loan entrance counseling. Since the entrance counseling information for both loan types is similar, this negotiator felt that it would be redundant to offer PLUS Loan entrance counseling to a borrower who was already received Stafford Loan entrance counseling. Other negotiators, however, argued that since the terms and conditions of the loans are different, additional counseling should be required. In light of this discussion, the Department is proposing to modify the entrance counseling requirements in §§ 682.604(f)(2) and 685.304(a)(2) to require that different sets of information be provided to graduate or professional student PLUS borrowers who have already received Stafford Loans, and graduate or professional student PLUS borrowers who have not received Stafford Loans.

Maximum Loan Period (§§ 682.401, 682.603, and 685.301)

Statute: The HEA does not address the issue of maximum loan periods specifically.

Current Regulations: Current regulations in § 682.401(b)(2)(ii)(C), § 682.603(f)(2)(i), and § 685.301(a)(9)(ii)(A) provide that the loan period for a title IV, HEA program loan may not exceed 12 months.

Proposed Regulations: Proposed §§ 682.401(b)(2)(ii)(A), 682.603(g)(2)(i), and 685.301(a)(10)(ii)(A) would eliminate the maximum 12-month loan period for annual loan limits in the FFEL and Direct Loan programs and the 12 month period of loan guarantee in the FFEL Program.

Reasons: The Secretary believes eliminating the 12 month limit on loan periods would give schools, lenders and students greater flexibility when rescheduling disbursements. This proposed change would allow institutions to certify a single loan for students in shorter non-term or nonstandard term programs and to provide greater flexibility in rescheduling disbursements for students who drop out and return within the permitted 180-day period.

This issue was added to the rulemaking agenda at the request of some non-Federal negotiators. One proponent of the change noted that, on average, 17 percent of students have an academic program longer than a 12-month period, and by eliminating the maximum length of a loan period, the need to certify another loan to cover the remainder of the program would be eliminated. The negotiators noted that the proposed changes would not increase the amount of borrowing by students. In other words, annual loan limits would still be controlled by the institution's academic year in those instances where the academic year and loan period both exceed 12 months.

The Secretary agrees with these negotiators that it would benefit the students and the FFEL and Direct Loan Programs to remove the 12 month rule from the regulations.

Mandatory Assignment of Defaulted Perkins Loans. (§§ 674.8 and 674.50)

Statute: To participate in the Perkins Loan Program, an institution of higher education enters into a Program Participation Agreement (PPA) with the Secretary under section 463 of the HEA. The HEA enumerates several provisions of the PPA. Section 463(a)(9) of the HEA allows for the addition of provisions to the PPA, agreed to by the institution and the Secretary, that may be necessary to protect the United States from unreasonable risk of loss.

Current Regulations: The regulations governing the required contents of the PPA are in § 674.8 of the Perkins Loan Program regulations. Under § 674.8(d), the PPA includes a provision that the school may voluntarily assign a defaulted Perkins Loan to the Department if the school decides not to service or collect the loan or the loan is in default despite the school's due diligence in collecting the loan.

Proposed Regulations: The proposed regulations in § 674.8(d)(3) would provide that the PPA also include a provision under which the Department could require assignment of a Perkins Loan if the outstanding principal balance of the loan is $100 or more, the loan has been in default for seven or more years, and a payment has not been received on the loan in the preceding 12 months. The proposed regulations provide an exception to the mandatory assignment requirement if payments were not due on the loan in the preceding 12 months because the loan was in an authorized deferment or forbearance period. Under proposed § 674.50(e)(1) the Secretary would accept the assignment of a Perkins Loan without the borrower's Social Security Number if the Secretary has exercised her mandatory assignment authority under § 674.8(d)(3).

Reasons: The Department's records show that institutions are holding more than $400 million in uncollected Perkins Loans that have been in default for 5 years or more. Since Perkins Loans are comprised largely of Federal funds, these uncollected loans present an unreasonable risk of loss to the United States.

The Department has collection tools, such as Federal benefit offsets, that are not available to the Perkins institutions. The Department has encouraged schools to voluntarily assign these old defaulted loans, so that the Department may employ these tools to collect on these loans. As part of this effort, the Department, in recent years, significantly streamlined the voluntary assignment process for Perkins Loans. Despite these efforts, the numbers and amounts of older defaulted Perkins Loans held by schools continues to grow.

To address this problem, the Department proposes modifying the regulations governing the PPA to provide for mandatory assignment of older defaulted loans, at the request of the Secretary. One of the negotiators recommended, as an alternative to the proposed regulations, that the Department adopt a referral process, under which a school could refer a loan to the Department. The Department would collect on the loan and return the proceeds to the school, minus collection charges. Other negotiators proposed that if the Department required mandatory assignment of loans, the funds collected from those Perkins Loans should be re-allocated to Perkins schools.

The Department did not accept these proposals. The Department previously used a referral program with very limited success. In addition, there is no system in place for re-allocation of net Department collections to Perkins institutions. Accordingly, the Department does not believe these proposals are in the Federal fiscal interest.

One negotiator pointed out that the current assignment regulations require a Social Security Number for all assigned loans. This negotiator noted that, in the early years of the program, schools were not required to collect the Social Security Numbers of Perkins Loan borrowers. The negotiator feared that schools would be penalized if they were required to assign loans, only to have the assignments rejected for lack of a Social Security Number. The Department has addressed this concern in the proposed regulations by exempting mandatorily assigned Perkins Loans from the requirement that the institution provide a Social Security Number for all assigned loans.

The Department initially proposed mandatory assignment of defaulted Perkins Loans if the outstanding balance of the loan is $50 or more and the loan has been in default for 5 years.

Negotiators offered a counter-proposal, requiring assignment if the account to be assigned is more than $1,000 in outstanding principal, and the borrower has not made a payment on the loan in 10 years, excluding authorized periods of deferment and forbearance, and excluding loans for which the school has obtained a judgment.

The Department did not accept the counter-proposal because excluding all deferment and forbearance periods from the 10 years would push the loans eligible for mandatory assignment significantly beyond 10 years in default. The Department believes that the proposed criteria would effectively rule out mandatory assignment of many of the loans that would most benefit from the Department's collection activities.

However, the Department has modified its original proposal. In particular, the Department's proposed regulations would require a loan to be assigned if the account balance is $100 or more and it has been in default for at least 7 years. The revised proposal generally approximates the mandatory assignment requirements in the FFEL Program.

Reasonable Collection Costs (§ 674.45)

Statute: Section 464A(b)(1) of the HEA provides for assessing against a borrower reasonable collection costs on a defaulted Title IV loan. The HEA does not define ''reasonable collection costs'' for purposes of the Perkins Loan Program.

Current Regulations: Section 674.45(e) requires a school to assess collection costs against a borrower, based on either the actual costs incurred for those collection actions, or an average of the costs incurred for similar actions taken to collect loans in similar stages of delinquency. The current regulations do not cap collection costs that may be charged to the borrower, except, as described in § 674.39, in the case of a loan that has been successfully rehabilitated. Section 674.39(c)(1) caps collection costs on rehabilitated loans at 24 percent, unless the borrower defaults on the rehabilitated loan. However, § 674.47(e) establishes caps on the amount of unpaid collection costs that a school may charge to its Perkins Fund.

Proposed Regulations: The proposed regulations in § 674.45(e)(3) would limit the amount of collection costs a school may assess against a Perkins Loan borrower to 30 percent of the total of the principal, interest, and late charges collected for first collection efforts; 40 percent of the total of the principal, interest, and late charges collected for second collection efforts; and, in cases of litigation, 40 percent of the total of the principal, interest, and late charges collected plus court costs. The proposed regulations specify that these caps on collection costs go into effect for collection agency placements made on or after July 1, 2008.

Reasons: The lack of a cap on collection costs in the Perkins Loan Program has led to abuse, with some institutions charging collection costs of 60 percent or more. During the negotiations, the Department initially proposed capping Perkins Loan Program collection costs at 24 percent, to match the limit already in place for Perkins loans that have been rehabilitated. Several negotiators contended that this cap was too low. They pointed out that Perkins Loans are often low-balance loans, but that they require the same efforts to collect as higher-balance loans. This can lead to increased collection costs in the Perkins Loan Program.

These negotiators also noted that most collection agencies charge on a contingency fee basis and that a percentage of the amount collected from the borrower goes to the collection agency. One negotiator asserted that a 24 percent collection cap would limit the amount that could be charged to the borrower to 19.3 percent, to allow for the collection agency to retain its fee, and to still make the Perkins Fund whole by recovering and returning to the Fund the entire amount owed by the borrower.

The negotiators also pointed out that collection agency fees are market driven and competitive and that placing a cap on collection costs would increase the collection costs that would have to be absorbed by the Fund. This would have the effect of reducing the amount of Perkins Loans available to future borrowers.

These negotiators also pointed out that litigation is required under certain circumstances in the Perkins Loan program. If schools must litigate to stay in compliance with the Perkins Loan regulations, but can only assess collection costs of 24 percent, this would deplete the Perkins Fund.

Another negotiator argued that it would not be profitable for collection agencies to provide services to smaller schools under the proposed collection costs cap. This negotiator also contended that a low cap would reduce the effectiveness of the collection agencies.

The Department asked negotiators to propose alternatives to the proposed 24 percent cap on collection costs. One negotiator stated that any cap on collection costs in the Perkins Loan Program would be unreasonable, because there are so many variables involved in collecting on a Perkins Loan.

Some negotiators offered a counter-proposal that included a sliding scale for the cap on collection costs: For first collection efforts, 33 percent of the unpaid balance; for second collection efforts, 40 percent of the unpaid balance; for loans that have been litigated, 50 percent plus court costs; for borrowers living abroad, 50 percent of the unpaid balance.

The Department and other negotiators believe that a 50 percent cap is too high. However, the Department's proposed regulations do reflect an increase from the original proposal in light of the arguments and factors noted during the negotiations.

Child or Family Service Cancellation (§ 674.56)

Statute: Under section 465(a)(2)(I) of the HEA, a Perkins Loan borrower may qualify for cancellation of the loan if the borrower is a full-time employee of a public or private nonprofit child or family service agency who is providing, or supervising the provision of, services to high-risk children who are from low-income communities, and the families of such children.

Current Regulations: The current regulations for the child or family service discharge in § 674.56(b) reflect the statutory language, without providing additional details on the eligibility criteria for a child or family service cancellation.

Proposed Regulations: The proposed regulations in § 674.56(b) expand on the current regulations and specify that, to qualify for a child or family service cancellation, a borrower who is a full-time, non-supervisory employee of a child or family service agency must be providing services directly and exclusively to high-risk children from low-income communities. In addition, the proposed regulations specify that if the employee provides services to the families of high-risk children from low-income communities, the services provided to the children's families must be secondary to the services provided to the high-risk children from low-income communities.

Reasons: On October 20, 2005, the Department published Dear Colleague Letter (DCL) GEN–05–15, which clarified the Department's long-standing policy with regard to the eligibility criteria for a child or family service cancellation. The DCL specifies that a full-time, non-supervisory employee of a public or private child or family service agency must be providing services directly and exclusively to high-risk children from low-income

communities to qualify for a child or family service cancellation. As noted in the DCL, many employees of a child or family service agency who do not work directly with high-risk children from low-income communities may provide services that indirectly benefit such children. Congress did not intend such borrowers to qualify for child or family service cancellations, unless the borrower is in a supervisory position, and is supervising staff members who work directly with high-risk children from low-income communities. The NPRM would incorporate this guidance into the regulations in proposed § 674.56(b).

Prohibited Inducements (§§ 682.200 and 682.401)

Statute: Section 435(d)(5) of the HEA provides that, after notice and an opportunity for a hearing, the Secretary may disqualify from participation in the FFEL Program any FFEL lender that provides inducements or engages in other prohibited activity to secure FFEL loan applications or sell other products. Those prohibited inducements and activities include: Offering, directly or indirectly, points, premiums, payments, or other inducements to any educational institution or individual to secure FFEL loan applications; conducting unsolicited mailings of student loan applications to individuals who have not borrowed previously from the lender; offering FFEL loans to a prospective borrower to induce the borrower to purchase an insurance policy or other product; or engaging in fraudulent or misleading advertising. A lender is not prohibited from providing assistance to schools that is comparable to the kinds of assistance that the Department provides to schools through the Direct Loan Program. In order to avoid confusion regarding the types of assistance a lender may provide to schools, the Department will identify and publish a list of services provided to schools through the Direct Loan Program on or before publication of final regulations. The most recent description of the kinds of assistance the Department provides to schools in the Direct Loan Program was published in a Notice of Proposed Rulemaking on August 10, 1999 (64 FR 43428, 43429–43430) and can be accessed at: *http://www.ed.gov/legislation/FedRegister/proprule/1999-3/081099a.html.*

Similarly, section 428(b)(3) of the HEA restricts guaranty agencies from offering inducements or engaging in other prohibited activities to secure applicants for FFEL loans or to secure the designation of the guaranty agency as the insurer of particular loans. A guaranty agency is prohibited from: Offering, directly or indirectly, premiums, payments, or other inducements to any educational institution or its employees to secure FFEL loan applicants; or offering to a lender or its employees, agents, or independent contractors, any premiums, incentive payments, or other inducements to administer or market loans and secure designation as the guarantor or insurer of loans, (except for Unsubsidized Stafford loans and lender-of-last-resort loans). The guaranty agency is also prohibited from conducting unsolicited mailings of student loan applications to students or their parents unless the agency has previously guaranteed a FFEL Loan for the student or parent, and from conducting fraudulent or misleading advertising related to loan availability. A guaranty agency is not prohibited from providing assistance to schools that is comparable to the kinds of assistance the Department provides to schools through the Direct Loan Program.

Current Regulations: Prohibited inducements and other impermissible activities by lenders are contained in the definition of *lender* in 34 CFR § 682.200(b). The regulations mirror the statutory provisions except to clarify that: (1) Assistance provided to schools that is comparable to that provided by the Secretary is limited to the kinds of assistance provided to schools under or in furtherance of the Direct Loan program; (2) unsolicited mailing of student loan application forms includes applications sent to the student and the student's parents; and (3) the prohibition against fraudulent and misleading advertising refers to advertising related to the lender's FFEL program activities. The comparable regulations for guaranty agencies are in 34 CFR 682.401(e), which specifies that a guaranty agency may not offer, directly or indirectly, any premium, payment, or other inducement to an employee or student of a school, or any entity or individual affiliated with a school, to secure FFEL Loan applicants. The regulations provide examples of prohibited inducements of lenders by a guaranty agency and include: Compensating lenders or their representatives to secure loan applications for guarantee by the agency; performing functions that a lender would otherwise perform without appropriate compensation; providing equipment or supplies to lenders at below market cost or rental; and offering to pay a lender not holding loans guaranteed by the agency a fee for applications guaranteed by the agency. The current regulations also recognize the administrative and oversight functions of the guaranty agency by specifically excluding certain activities from the description of prohibited inducements. The regulations also prohibit guaranty agencies from sending unsolicited mailings to students in postsecondary and secondary schools and their parents unless the individual had borrowed previously using the agency's loan guarantee and conducting fraudulent or misleading advertising concerning loan availability.

Proposed Regulations: The proposed regulations would incorporate, with some modifications, current interpretive and clarifying guidance on prohibited inducements and activities provided to lenders and guaranty agencies by the Department over the years since the provisions were added to the HEA. This guidance was contained in various DCLs issued by the Department and in responses to private letter inquiries from program participants. The most comprehensive DCL on this subject was issued in February 1989 (No. 89–L–129). The proposed regulations for both lenders and guaranty agencies adopt the format of that DCL to include a non-exhaustive list of examples of prohibited inducements and activities, and an exhaustive list of permissible activities. Under these proposed regulations, certain activities are identified as permissible, because the Department believes those activities are necessary for the lender or guaranty agency to fulfill its role in the administration of the FFEL Program. Consistent with the Department's longstanding policy in this area, the scope of permissible activities by guaranty agencies is broader than that for lenders in recognition of their administrative, training, outreach, and oversight roles in the FFEL program.

Under paragraph (5)(i) of the definition of *lender* in § 682.200(b) of the proposed regulations, lenders would be prohibited from offering, directly or indirectly, any points, premiums, payments, or other benefits to any school or other party to secure FFEL loan applications or loan volume. The proposed regulations would add a definition of a *school-affiliated organization* to § 682.200, to include alumni organizations, foundations, athletic organizations, and social, academic, and professional organizations. Prohibited payments and other benefits to prospective borrowers would include prizes or additional financial aid funds. The proposed regulations would also provide other examples of ''other benefits'' to a school

that would be prohibited, including: Access to a lender's other financial products, computer hardware, and payment of the cost of printing and distribution of college catalogs and other materials at less than market rate or at no cost.

The proposed regulations would prohibit a lender from undertaking philanthropic activities, such as providing grants, scholarships, restricted gifts, or financial contributions to secure loan applications, loan volume, or placement on a school's preferred lender list. Lenders would also be prohibited from making payments or providing other benefits to a student at a school, or to a loan solicitor or sales representative who visits campuses, in exchange for loan applications secured from individual prospective borrowers. The proposed regulations would prohibit lenders from paying conference or training registration, transportation and lodging costs for employees of schools and school-affiliated organizations. The proposed regulations would further prohibit a lender's payment of any entertainment expenses related to lender-sponsored functions and activities for school and school-affiliated organization employees. Lenders would also be prohibited from providing staffing services to a school as a third-party servicer or otherwise to assist a school with financial aid related functions, on more than a short-term, non-recurring emergency basis. The proposed regulations would also modify prior program guidance by prohibiting all payments of loan application referral or processing fees between lenders, (whether or not the lender receiving the payment participates in the FFEL Program), or between lenders and any other entity. The proposed regulations would not revise the current regulations governing the prohibition on lenders conducting unsolicited mailings, offering FFEL Loans to induce a borrower to purchase a life insurance policy or other product or service offered by the lender, and engaging in fraudulent or misleading advertising.

The proposed regulations would permit a lender to undertake activities that are specifically permitted by the HEA. These activities include: Providing assistance to a school, as identified by the Secretary, that is comparable to the assistance provided by the Department to a school in the Direct Loan Program; offering reduced borrower loan origination fees; offering reduced borrower interest rates; paying Federal default fees that would otherwise be paid by the borrower; and purchasing loans from another loan holder at a premium. In addition, the proposed regulations would permit a lender to participate in a school's or guaranty agency's student financial aid and financial literacy outreach activities, as long as the lender does not promote its student loan or other services to the recipients or attendees and there is full disclosure of any lender sponsorship, including the development and printing of any materials. The proposed regulations would allow a lender to provide a toll-free telephone number and free data transmission services to schools that participate in the FFEL program with the lender and to the school's borrowers and prospective borrowers for the purpose of communications on FFEL Loans. The proposed regulations would permit a lender to continue to offer repayment incentive programs to borrowers under which the borrower receives or retains a benefit, such as a reduced interest rate or forgiveness of a certain amount of loan principal in exchange for the borrower making one or more scheduled payments. The proposed regulations would also permit a lender to sponsor meals, refreshments, and receptions to school officials or employees that are reasonable in cost and that are scheduled in conjunction with meeting or conference events if those functions are open to all meeting or conference attendees. The proposed regulations would also permit a lender to provide schools, school-affiliated organizations and borrowers items of nominal value that constitute a form of generalized marketing or are intended to create good will.

Section 682.401 of the proposed regulations, which governs guaranty agency prohibited inducements and permitted activities, would generally mirror the proposed regulations for lenders. The proposed regulations would prohibit a guaranty agency from providing a school with prizes or additional financial aid funds under any Title IV, State or private program based on the school's voluntary or coerced agreement to participate in the guaranty agency's program or to provide a specified volume of loans, using the agency's loan guarantee. The proposed regulations would prohibit the payment of entertainment expenses, including expenses for private hospitality suites, tickets to shows or sporting events, meals, alcoholic beverages, and any lodging, rental, transportation or other gratuities related to any activity sponsored by the guaranty agency or a lender participating in the agency's program, for school employees or employees of school-affiliated organizations. The proposed regulations would prohibit a guaranty agency from undertaking philanthropic activities, including providing scholarships, grants, restricted gifts, or financial contributions in exchange for FFEL loan applications or application referrals, a specified volume or dollar amount of FFEL loans using the agency's loan guarantee, or the placement of a lender that uses the agency's loan guarantee on a school's list of recommended or suggested lenders. The proposed regulations would also prohibit a guaranty agency from providing staffing services to a school, including as a third-party servicer, other than on a short-term, non-recurring emergency basis to assist the school with financial aid-related functions. The proposed regulations would also prohibit a guaranty agency from assessing additional costs or denying benefits to a school or lender that would otherwise be provided by the agency because the school or lender declined to agree to participate in the agency's program or declined or failed to provide a certain volume of loan applications or loan volume for the agency's loan guarantee.

Unlike the proposed regulations for participating lenders, the proposed regulations would allow a guaranty agency to provide meals and refreshments that are reasonable in cost and provided in connection with guaranteed agency-provided training for school and lender program participants and for elementary, secondary, and postsecondary school personnel and in conjunction with other workshops and forums customarily used by the guaranty agency to fulfill its responsibilities under the HEA. The proposed regulations also would permit a guaranty agency to pay travel and lodging costs that are reasonable as to cost, location and duration, to facilitate attendance of school staff in training programs and facility service tours that school staff would otherwise be unable to attend. Guaranty agencies would also be permitted to pay reasonable costs for school officials to participate on an agency's governing board, a standing official advisory committee, or in support of other official activities of an agency in accordance with proposed § 682.401(e)(2)(iv). The proposed regulations also reflect the guaranty agency's ability under the HEA to pay Federal default fees on loans that would otherwise be paid by the borrowers and to undertake default aversion activities approved by the Secretary with certain guaranty agency funds. There are no proposed changes to the current regulations governing a guaranty

agency's direct or indirect payment of incentives or other inducements to lenders to secure the agency as an insurer of the lender's FFEL loans, or relating to the prohibitions against the unsolicited mailing or distribution of unsolicited loan applications to students in secondary or postsecondary schools and their parents and against fraudulent and misleading advertising concerning loan availability.

The proposed regulations would also clarify and strengthen the Department's authority to enforce the rules related to improper inducements. There are three proposed changes in this area. First, the proposed regulations would amend §§ 682.413(h), 682.705(c), and 682.706(d) to provide that, in any formal action against a lender or guaranty agency based on a violation of the prohibited inducement provisions, once the Department's deciding official finds that the lender or guaranty agency provided or offered the payments or activities specified in the definition of *lender* in § 682.200 or § 682.401, the Secretary will apply a ''rebuttable presumption'' that the activities or payments were undertaken or made by the lender or guaranty agency to secure FFEL Loan applications or FFEL loan volume. The lender or guaranty agency will have a full opportunity to show that the activity or payment was made for reasons unrelated to securing loan applications or loan volume.

Another proposed change in this area would add a new § 682.406(d) to specify that a guaranty agency may not make a claim payment from its Federal Fund to a lender or request a reinsurance payment from the Department on a loan if the lender offered or provided an improper inducement, as defined in the definition of lender in § 682.200(b), to a school or other party in connection with the making of the loan. This change would reflect the Department's long-standing policy that a loan made in violation of the prohibited inducement provisions is not eligible for federal subsidy payments.

The final change in the area of enforcement related to inducements would clarify and expand the borrower's legal rights. Since 1994, the promissory notes and MPNs used in the FFEL Program have included a description of the borrower's rights under the Federal Trade Commission's (FTC's) Holder Rule as it applies to FFEL loans. Under the FTC's Holder Rule, if a loan is made by a for-profit school, or the borrower is referred to the lender by a for-profit school, any lender holding the borrower's loans is subject to all claims and defenses that the borrower could assert against the school with respect to the loan. Section 682.209(k) of the proposed regulations would expand the protections provided by the FTC's Holder Rule by essentially incorporating it into the regulations, applying it to all loans made under the FFEL Program and specifying that it applies if the lender making the loan offered or provided an improper inducement to the school or any other party in connection with the making of the loan.

Reasons: The Department believes that more explicit regulatory requirements governing prohibited incentive payments and other inducements by lenders and guaranty agencies are needed to ensure FFEL Program integrity, reassure borrowers and taxpayers of that integrity, and enhance the Secretary's enforcement authority in this area. Current regulations are primarily limited to restating the statutory language currently in the HEA. The Department's interpretive and policy guidance in this area over the years has been issued in DCLs and in responses to private letter inquiries from program participants. The most comprehensive guidance on this subject was published as DCL 89–L–129/S–55/G–157 in February 1989. The most recent guidance on prohibited school and lender relationships was published as DCL 95–G–278/L–178/S–73 in March 1995. The Department believes that this guidance, and the general requirements of the law, may no longer be generally known and understood by lenders and other participants that have entered the FFEL industry in the last few years. Moreover, the FFEL Program has changed significantly since this prior guidance was issued. In recent years, the increased competition among FFEL lenders, particularly in the FFEL Consolidation Loan Program, has resulted in a number of lenders offering a variety of benefits to borrowers, schools, and school-affiliated organizations. There has also been a rapid growth in private alternative loans marketed by many of the same lenders participating in the FFEL Program. Special relationships between schools and lenders have developed, jeopardizing a borrower's right to choose a FFEL lender and undermining the student financial aid administrator's role as an impartial and informed resource for students and parents working to fund postsecondary education.

During the negotiated rulemaking discussions, several negotiators expressed concern about the impact that the proposed regulations might have on the numerous business arrangements between schools and financial institutions, and recommended that any regulations listing prohibited and permissible activities be based on a limited interpretation of the applicable statutory language. Another negotiator suggested that the regulations could have a ''chilling effect'' on school and lender relationships. A couple of negotiators argued that the intent of the statutory prohibition of lender and guaranty agency inducements was not to curtail competition for market share, but to prevent unnecessary borrowing that would not have occurred if not for the incentive, and that given the current FFEL annual loan limits and the cost of education, borrowers were borrowing due to high levels of unmet need rather than any incentives being provided. One negotiator argued that inducements to borrowers were a problem only if the inducement resulted in harm to the individual or raised credibility issues about the loan process.

Other negotiators expressed the view that, because of improper inducements, borrowers were actively being ''steered'' by schools to particular lenders and argued that the credibility of the loan process was an issue that the Department needed to address. One negotiator contended that inducements to borrowers created unequal terms to borrowers in the FFEL Program and appeared to operate as ''redlining'' because the inducements were often based on school loan volume, the volume of large dollar loans, or a school's cohort default rate.

A couple of negotiators recommended that, rather than attempting to identify an exhaustive list of inducements, the regulations should simply provide illustrative examples of acceptable relationships between schools and lenders, so that future program developments would not necessarily require a change to the regulations.

Negotiators with expertise in guaranty agency operations asked the Department to make it clear that school involvement in, and guaranty agency financial support of, guaranty agency advisory committee activities would continue to be permissible because of the importance of those activities to FFEL Program administration. One of these negotiators also recommended that the list of permissible activities for guaranty agencies be expanded to permit additional training and outreach activities to avert defaults authorized under the HEA. Another of these negotiators asked that the regulations make a clear distinction between contractual, third-party servicer agreements between a guaranty agency and school that are paid at the market

rate, and the limited emergency assistance offered by lenders and guaranty agencies to schools at no cost or at less than a market rate. This same negotiator asked the Department to clarify that a guaranty agency or school's compliance with state administered programs or requirements did not present an inducement-related conflict.

A couple of negotiators recommended that the Department clarify the nature of the emergency situation under which a lender or guaranty agency could offer assistance to a school in fulfilling its financial aid functions at little or no cost. The negotiators noted that the definition of an ''emergency'' is subjective, and should not excuse a school from complying with the requirement that it be administratively capable to participate in the Title IV programs, which includes retaining sufficient, trained staff during peak processing periods. They recommended that the Department specify that an ''emergency'' cannot be an annual or recurring event. The Department specifically solicits comments on whether an ''emergency'' should be limited to a State- or Federally-declared natural or national disaster that affects a school or whether an ''emergency'' should encompass broader circumstances.

Several negotiators with expertise in lender and guaranty agency operations submitted counter-proposals to the Department's proposed regulatory language. These alternative proposals would have significantly expanded the lists of permissible activities for lenders and guaranty agencies. The Department did not accept these counter-proposals because they would have allowed activities and payments that the Department believes are not appropriately performed by lenders and guaranty agencies. These alternative proposals would: Permit lenders to pay for meals and refreshments, lodging, and transportation costs for employees of schools and school-affiliated organizations equivalent to those permitted to be paid by guaranty agencies; incorporate into the regulations the detailed listing of comparable services provided by the Department to Direct Loan schools that was published in a Notice of Proposed Rulemaking on August 10, 1999 (64 FR 43428, 43429–43430); permit lenders to pay reasonable loan application ''referral'' fees to unaffiliated parties in addition to other lenders; expand permissible borrower repayment incentive programs to include loan forgiveness benefits for academic achievement and certain kinds of employment; and prohibit philanthropic giving by lenders and guaranty agencies in exchange for application referrals, or a specific volume or dollar amount of loans made, or placement on a school's list of recommended or suggested lenders. The proposal would also have incorporated into the regulations selected paragraphs from the Department's DCL 89–L–129/S–55/G–157, February 1989.

A couple of negotiators voiced concern about the impact of the proposed treatment of philanthropic giving by lenders on general philanthropic activities supporting postsecondary institutions by financial institutions.

Several negotiators objected to the Department's proposal to include enforcement-related provisions in the proposed regulations. One negotiator stated that the ''rebuttable presumption'' language was problematic because the statutory language governing prohibited inducements requires a demonstration that the inducement was provided in exchange for loans or loan volume. The same negotiator stated that enforcement would be better enhanced by clear regulations that define terms and explain permissible and impermissible activities. Several negotiators also objected to the inclusion of the FTC Holder Rule provision into the proposed regulations. One negotiator argued that these proposed regulations converted what was a lender eligibility issue into a borrower right and put lenders at risk simply by being on a school's preferred lender list. The negotiator also stated that it would lead to nuisance litigation by borrowers. The negotiators questioned why an inducement infraction by a lender should lead to a loss of reinsurance and questioned the basis of the proposed provision that denied claim payment to a lender and reinsurance to the guaranty agency if it was determined that the loan was made based on an impermissible inducement.

The Department believes that the proposed regulations adequately implement the statutory requirements in the HEA's prohibited inducement provisions and does not believe it will affect unrelated contracts or agreements between postsecondary institutions and financial institutions or general philanthropic giving by financial institutions. Some negotiators believed that borrowers are being inappropriately steered to various lenders through the use of inducements provided by lenders to schools and that these activities, if left unchecked, deny borrowers their choice of lender and undermine the credibility of the FFEL Program. The Secretary, through these proposed regulations, is enhancing the borrower's choice of lender and providing for the disclosure of appropriate information.

The Department believes that the proposed regulations provide clear and detailed examples of prohibited inducements and improper activities based on previously published guidance with some modifications to reflect changes that have occurred in the FFEL program. The proposed regulations would retain the Department's long-standing policy distinction between permissible activities by lenders and guaranty agencies in recognition of their different roles in the FFEL program. The Department has not, however, authorized lenders or guaranty agencies to provide staff assistance to schools except in an emergency, which must be short-term and *nonrecurring.* As noted earlier, one negotiator asked the Department to provide a specific exemption from the inducement restrictions for State-established programs or requirements. However, such an exemption is not authorized under the HEA. The prohibition on improper inducements in sections 428(b)(3) and 435(d)(5)(A) of the HEA applies to State guaranty agencies, lenders, and institutions, as well as to all other participants in the FFEL program. Based on these current statutory provisions, the Department recently sent letters to two State guaranty agencies noting that State authorized programs those agencies administer could create an improper inducement, because those programs potentially provide benefits to institutions that participate in the State guaranty agency's guarantee program and deny benefits to institutions that participate in other guaranty agencies' programs. The proposed regulations would reflect the continued prohibition of such programs in proposed section 682.410(e)(1)(i)(B) and (e)(1)(ii).

The proposed regulations would adopt a modified version of the Department's prior policy, under which ''reasonable'' application referral fees can be paid to a nonparticipating lender or to another participating FFEL lender by prohibiting all such payments to a lender or any other entity. The Department believes that there is no longer a need for payment of such fees in the current FFEL market and that lender payment of such fees to school-affiliated organizations and other unaffiliated parties are a significant problem in the FFEL Program. In addition, in an attempt to avoid the prohibition on inducements, lenders have tried to classify fees that are based on success in securing loan applications or the size and characteristics of loans

disbursed as ''referral'' or ''marketing'' fees. Compensation or fees based on the number of applications or the volume of loans made or disbursed are improper, regardless of label, under the Department's current and prior policy and would continue to be improper under these proposed regulations. Lenders are free, as they have been historically, to continue to contract for general marketing services, provided those services are not compensated based on the number of applications, or the volume of loans made or disbursed.

The proposed regulations do not incorporate the list of services the Department provides to Direct Loan schools that was published in the August 10, 1999 notice of proposed rulemaking as was requested by some of the negotiators. As the Department made clear during the negotiated rulemaking discussions, the Department would not want to limit itself or the lending community by codifying a list of services that cannot be easily updated and therefore the proposed regulations allow the use of other forms of public announcement.

The proposed regulations also would not expand the list of permissible lender repayment incentive programs that are based strictly on a borrower establishing a successful payment pattern in the repayment of a loan to include ''loan forgiveness'' based on academic achievement or employment in a particular field. The Department believes that repayment incentive programs do not represent a prohibited inducement if they are conditioned on the borrower's timely repayment of the loan and borrower receipt of the benefit is not coincidental to the loan origination process. The Department believes that the forms of loan forgiveness described by some of the negotiators would be an inducement offered by lenders to market FFEL loans.

Finally, the Department believes that the addition of the enforcement provisions is necessary to clarify and strengthen the Department's authority to enforce the regulations related to the use of improper inducements. The proposed regulations will result in more effective and fair enforcement of these restrictions. In response to the negotiators' concerns about the placement of the rebuttable presumption provision outside the formal administrative penalty process, the Department revised the proposed regulations to incorporate that provision into the regulations that govern formal administrative proceedings and to clarify that the rebuttable presumption applies only when the Secretary takes a formal administrative action against a lender or guaranty agency. As the Department pointed out during the negotiated rulemaking discussion, violations of the prohibited inducement provisions are difficult for the Department to enforce. It is virtually impossible for the Department to prove the relationship between the parties when the documentation is under the control of the two parties and the Department cannot issue subpoenas to compel testimony. To enforce these provisions more effectively, the Department must be able to identify a connection between certain activities and loans. The Department believes that the adoption and use of a rebuttable presumption will improve the Department's ability to enforce the prohibition on improper inducements while protecting the appropriate due process rights of lenders and guaranty agencies.

The Department's proposal to include violations of the prohibited inducement provisions in § 682.406 as a condition of reinsurance codifies the Department's existing policy and practice when it documents violations of the prohibited inducement provisions.

Finally, the Department believes that the proposed change to expand the protections provided by the FTC's Holder Rule by including a form of that rule in the proposed regulations will allow borrowers to assert any legal rights they may have if they have been harmed in a situation in which the lender has offered or provided an improper inducement. Moreover, by applying the FTC's Holder Rule to all loans, irrespective of the type of school attended by the borrower, the proposed regulations will ensure that all FFEL borrowers have the same legal rights.

Eligible Lender Trustees (ELTs) (§§ 682.200 and 682.602)

Statute: The Third Higher Education Extension Act of 2006 (HEA Extension Act) (Pub. L. 109–292) amended the definition of *lender* in section 435(d)(2) of the HEA to prohibit new ELT relationships and restrict existing ELT relationships by imposing limits on school or school-affiliated organizations that make or originate loans through an ELT in the FFEL Program.

Current Regulations: The definition of *lender* currently in § 682.200 does not reflect these new restrictions on ELT relationships in the FFEL Program. The current regulations also do not contain a definition of *school-affiliated organizations*.

Proposed Regulations: The changes in proposed § 682.200 implement the HEA Extension Act by amending the definition of *lender* in § 682.200 to prohibit a FFEL lender from entering into a new ELT relationship with a school or a school-affiliated organization after September 30, 2006. ELT relationships in existence prior to that date would be allowed to continue with certain restrictions. The proposed regulations would also implement the HEA Extension Act by creating a new section (formerly reserved § 682.602) that applies the same limits imposed on FFEL school lenders by the Higher Education Reconciliation Act (HERA) (Pub. L. 109–171) to school and school-affiliated ELT arrangements entered into after January 1, 2007. Lastly, proposed § 682.200 would define the term *school-affiliated organization* as any organization that is directly or indirectly related to a school and includes, but is not limited to alumni organizations, foundations, athletic organizations, and social, academic, and professional organizations.

Reasons: We are proposing to amend the definition of *lender* in § 682.200 and add new § 682.602 to reflect the changes made to section 435(d)(2) of the HEA by the HEA Extension Act. Because the HEA Extension Act did not define ''school-affiliated organization,'' but included these organizations in imposing limits on ELT arrangements, we developed and are proposing to add a definition of this term to § 682.200 to add clarity to the regulations. During the negotiated rulemaking, several non-Federal negotiators expressed concern about the phrase ''directly or indirectly related to a school'' in the definition of *school-affiliated organization.* They felt that we should qualify this phrase to make it clear that the definition applies only to organizations that are under the common control and ownership of a school. The Department disagreed with this suggestion, because many organizations such as alumni and social organizations are clearly school-affiliated but may not be under the control and ownership of a school.

Frequency of Capitalization (§ 682.202)

Statute: Section 428C(b)(4)(C)(ii)(III) of the HEA provides for the capitalization of interest on Consolidation Loans.

Current Regulations: Under current § 682.202(b)(3), a lender may capitalize unpaid interest as frequently as every quarter. Capitalization is also permitted when repayment is required to begin or resume.

Proposed Regulations: Under proposed § 682.202, the frequency of capitalization on Federal Consolidation Loans would be limited to quarterly, except that a lender could only capitalize unpaid interest that accrues

during an in-school deferment at the expiration of the deferment. These proposed regulations would be consistent with the current practice in the Direct Loan Program.

Reasons: The proposed regulations would align the FFEL Program with the Direct Loan Program. Capitalization would take place when the borrower changes status at the end of a period of authorized in-school deferment.

This change was proposed by non-Federal negotiators to protect borrowers that previously consolidated their loans while in an in-school status to lock in low interest rates. Statutory provisions, subsequently repealed by the HERA, allowed in-school FFEL borrowers to request an early conversion to repayment status. Unlike Direct Loan borrowers, FFEL borrowers were not able to consolidate their loans while they were in an in-school status. By converting to repayment status, these borrowers could consolidate their loans. Consolidation Loans received by these borrowers were then immediately placed into in-school deferments. The proposed regulations would limit when the interest on these loans could be capitalized.

Loan Discharge for False Certification as a Result of Identity Theft (§§ 682.208, 682.211, 682.300, 682.302 and 682.411)

Statute: Section 437(c) of the HEA authorizes a discharge of a FFEL Loan or a Direct Loan if the borrower's eligibility to borrow was falsely certified because the borrower was a victim of the crime of identity theft.

Current Regulations: Section 682.402 of the FFEL Program regulations and § 685.215 of the Direct Loan Program regulations authorize a discharge of a loan if the borrower's eligibility to borrow the loan was falsely certified because the borrower was the victim of the crime of identity theft. Section 682.402 requires that, before the borrower's obligation is discharged, the borrower must provide the loan holder a copy of a local, State, or Federal court verdict or judgment that conclusively determines that the individual who is named as the borrower of the loan was the victim of the crime of identity theft. A Direct Loan borrower must provide the Secretary the same documentation to establish eligibility for the discharge.

Proposed Regulations: The proposed regulations do not include any changes to the eligibility requirements with which a borrower must comply to obtain a loan discharge as a result of the crime of identity theft. However, the proposed regulations § 682.208 would allow a lender to suspend credit bureau reporting on a loan for 120 days while the lender investigates a borrower's claim that he or she is the victim of identity theft. The proposed regulations in § 682.211 would allow a lender to grant a 120-day administrative forbearance to a borrower upon the lender's receipt of a valid identity theft report as defined under the Fair Credit Reporting Act (15 U.S.C. 1681a) or notification from a credit bureau of an allegation of identity theft while the lender determines the enforceability of the loan. Under the proposed changes in §§ 682.208 and 682.211, the lender could no longer collect interest and special allowance payments on the loan if the lender determines that the loan is unenforceable. The proposed regulations would allow the lender a three-year period, however, to submit a claim if, within that time period, the lender receives from the borrower a local, State, or Federal court verdict of judgment conclusively proving that the borrower was the victim of the crime of identity. The proposed regulations in §§ 682.300 and 682.302 would clarify that the Secretary terminates the payment of interest benefits and special allowance on eligible FFEL Program Loans consistent with the changes we are proposing in § 682.208. Lastly, proposed regulations in § 682.411 would specify that the HEA does not preempt provisions of the Fair Credit Reporting Act that provide for the suspension of credit bureau reporting and collection on a loan after the lender receives a valid identity theft report or notification from a credit bureau.

Reasons: Interim final regulations published on August 9, 2006 (71 FR 64377) and final regulations published on November 1, 2006 (71 FR 45665) implemented changes made to the HEA by the HERA to authorize a discharge of a FFEL or Direct Loan Program loan if the borrower's eligibility to borrow was falsely certified because the borrower was a victim of the crime of identity theft. Although some of the negotiators had concerns with these earlier regulations, the Department believes that the current regulations properly reflect the statutory provision and therefore did not propose any changes.

Some non-Federal negotiators asked the Department to add regulations that would allow loan holders to take actions required by other Federal laws when they receive an allegation that a loan was certified due to a crime of identity theft. The Department agreed. The proposed regulations in §§ 682.208 and 682.211 would allow for the suspension of credit bureau reporting and collection activity, respectively. The proposed regulations in § 682.411 would allow lenders to comply with the Fair Credit Reporting Act and stop credit bureau reporting on delinquent loans while the lender investigates an alleged identity theft without violating the FFEL Program regulations.

Preferred Lender Lists (§§ 682.212 and 682.401)

Statute: Section 432(m) of the HEA requires the Secretary, in consultation with guaranty agencies, lenders, and other organizations involved in student financial assistance to develop common application forms and promissory notes, or MPNs for use in the FFEL Program. These forms must be formatted to require the applicant to clearly indicate a choice of lender. Under Section 479A(c) of the HEA, schools are authorized to refuse to certify, on a case-by-case basis, a statement that permits a student to receive a loan. The reason for the school's refusal must be documented and provided to the student in writing. In exercising this authority, a school may not discriminate against any borrower.

Current Regulations: Many schools provide lists of preferred or recommended lenders to students and prospective borrowers. There are no current regulations that govern a school's use of such lists. Current § 682.603(e) authorizes a school to refuse to certify a borrower's eligibility for a FFEL Loan but specifies that, in exercising that authority, a school must not engage in any pattern or practice that would result in denial of a borrower's access to loans on the basis of certain factors including the borrower's choice of a particular lender or guaranty agency.

Proposed Regulations: Section 682.212(h)(1) of the proposed regulations specifies the requirements that a school must meet if it chooses to provide a list of recommended or preferred FFEL lenders for use by the school's students and their parents, and prohibits the use of a preferred lender list to deny or otherwise impede the borrower's choice of lender. Section 682.212(h)(1)(ii) of the proposed regulations would require a school using a preferred lender list to include on the list at least three lenders that are not affiliated with each other. Section 682.212(h)(1)(iii) of the proposed regulations would also prohibit a school from including lenders on the list that have offered, or been solicited by the school to offer, financial or other benefits to the school in exchange for placement on the list. The proposed regulations further provide, in § 682.212(h)(2)(iii), that if a school has listed a lender on its preferred lender list and the lender offers specific

borrower benefits (such as lower fees or interest rates) to the school's borrowers, the school must ensure that the lender provides the same benefits to all borrowers at the school. Section 682.212(h)(2) of the proposed regulations would also require the school to disclose to prospective borrowers, as part of the list, the method and criteria the school used to select any lender that it recommends or suggests, to provide comparative information to prospective borrowers about interest rates and other benefits offered by the lenders, and to include a prominent statement, in any information related to its list of lenders, advising prospective borrowers that they are not required to use one of the school's recommended or suggested lenders. Section 682.212(h)(2)(v) of the proposed regulations would also prohibit a school from assigning, through award packaging or other methods, a lender to first-time borrowers and from delaying certification of a borrower's loan eligibility to a lender because that particular lender is not on the school's preferred lender list. The proposed regulations would also revise § 682.603(e) to further clarify that a school may never refuse or delay certification of a borrower's loan eligibility because of the borrower's choice of lender.

Reasons: The Department believes that it is necessary at this time to establish rules to govern a school's optional use of a preferred lender list to preserve a borrower's right to choose a FFEL lender. These proposed regulations will help ensure that such lists are a source of useful, unbiased consumer information that can assist students and their parents in choosing a FFEL lender from the over 3,000 lenders that participate in the FFEL Program.

The Department has not previously regulated or restricted the use of lists of preferred or recommended lenders. With student loan defaults a national concern in the early 1990s, some schools began recommending to borrowers that they use lenders that the school believed provided high-quality customer service in loan origination and servicing, with the goal of preventing loan delinquency and default and its negative consequences for borrowers and schools. With the significant growth of loan volume in recent years, and increased competition among FFEL lenders, the focus of school selection of preferred lenders has shifted. Lenders began offering web-based and proprietary applications and electronic data transmission to reduce the administrative burden for schools and borrowers and the processing time necessary to secure a student loan. Increased competition among FFEL lenders has also led to a proliferation of student loan borrower benefits, such as reduced interest rates and fees. Given the growing complexity surrounding the FFEL program, students and parents have been relying extensively on financial aid administrators as a source of assistance to identify lenders that offer the best service and benefits to borrowers. The use of preferred lender lists and other consumer information related to the student loan process has played a useful role in assisting financial aid officers in dealing with the large volume of requests for information and assistance.

There is increasing evidence, however, that the preferred lender lists maintained by many schools do not represent the result of unbiased research by the school to identify the lenders providing the best combination of service and benefits to borrowers. There has also been increasing evidence that some schools have been restricting the ability of borrowers to choose the lender of their FFEL Program loan. The Department has identified instances in which a school selected the lender for the borrower as part of the financial aid award packaging process, provided borrowers with an electronic link to only one lender after recommending a loan as part of the award package, identified only one lender as their preferred lender in their published financial aid information, or, if the school was an authorized FFEL Program lender, directed the aid administrator to use the school as the only lender. Some other schools have significantly delayed or declined to provide the necessary loan eligibility certification to a lender for a student or parent borrower because the lender was not on the school's preferred list or did not participate in the electronic processing system that the school used. When these situations were identified, and in response to student and parent complaints, the Department has investigated and addressed them on a case-by-case basis, and reminded the school of its legal responsibilities. Over the last three years, the Department has also used Department-sponsored meetings and other conferences to highlight inappropriate and, in some cases, illegal practices related to the use of preferred lender lists. Unfortunately, many of these practices have continued, despite the Department's efforts.

Recent Department investigations have shown that, in some cases, a school's selection of a preferred or recommended lender was the result of a lender's offer of prohibited inducements that took the form of direct payments or other benefits to the school, its students, or its employees rather than the result of the school's effort to research and analyze the various lender offerings to its students. In 1995, the Department reminded schools of the prohibited inducement provisions in the law and the sanctions attached to them, and warned schools against such activities with both FFEL school lenders and non-school FFEL lenders (DCL 95–G–278). Despite these actions, the Department's Office of Inspector General reported to the Secretary in August 2003 that these relationships were becoming an increasing problem in the FFEL program, and recommended that the Secretary provide additional guidance to both schools and lenders. The continuing and growing concern about these relationships led the Secretary to decide to address preferred lender lists as part of this rulemaking process.

These proposed regulations are similar to the proposals submitted by the Department to the negotiating committee during the negotiated rulemaking process. Some negotiators questioned the need to regulate in this area, stating that it would be highly intrusive and advising the Department that it would be better to address the use of preferred lender lists through training and enforcement as part of school reviews and audits. Another negotiator recommended that any proposed regulations on this topic be limited to schools that used a preferred lender list to actively impede a borrower's choice of lender. Some negotiators thought that the Secretary should consider prohibiting the use of preferred lender lists entirely while other negotiators endorsed the continued use of preferred lender lists as a helpful tool for both schools and prospective borrowers. Several negotiators expressed the view that regulations in this area would be administratively burdensome and could result in schools discontinuing the use of such lists. Some negotiators expressed concern that if schools discontinued using a preferred lender list, students would be subject to increased direct marketing from student loan lenders, which they viewed as counterproductive to the goal of educating students and parents about the student loan process.

Some negotiators stated that the Department's proposed requirement of a minimum number of three lenders on any list was arbitrary. A couple of those negotiators expressed concern that some schools, particularly small schools, would have difficulty complying with

the requirement because only one lender was willing to make FFEL loans to students at the schools. A group of negotiators submitted a counter-proposal to exempt schools from the requirement that a preferred lender list include at least three lenders if the school: Had less than 500 borrowers entering repayment in a given year; had issued a request for proposal to lenders to which there were at least three responses; recommended a certain lender in accordance with State law; or was a Historically Black College or University or a Tribally-controlled College or University. One other negotiator strongly recommended that the Department require schools to provide information about their business dealings with each of the lenders on the preferred lender list. However, several school-based negotiators stated that such a requirement was administratively unfeasible and would not be helpful to students because there were generally many business arrangements between schools and financial institutions that were not related to the school's participation in the FFEL Loan Program and over which student financial aid personnel have no control. These same negotiators also objected to the Department's proposal that, in addition to disclosing the method and criteria used by the school to choose the lenders on the school's preferred lender list, the school be required to provide comparative information on the interest rates and other borrower benefits offered by those lenders. The school-based negotiators stated that this requirement would represent a significant administrative burden and that schools could not ensure the accuracy of the information on borrower-benefit offerings. Many negotiators objected to the Department's proposed prohibition against a school soliciting borrower benefits from a lender in exchange for the lender's placement on the school's preferred lender list. These negotiators argued that one of a school's primary reasons for providing a list of lenders was to identify lenders offering the best interest rates and borrower benefits possible for the school's borrowers, and believed that a school's efforts to negotiate better benefits for their borrowers should not be restricted.

The Department's proposed regulations would require that any school list of recommended lenders contain at least three lenders to provide borrower choice. To further ensure that the listed lenders provide an actual choice for a borrower, the proposed regulations provide that the three lenders must not be affiliated with each other. The Department expects a school to collect and retain a statement certifying to this fact, upon which the school can rely, from each of the lenders they propose to include on their list. The Department is not proposing any exemption to the minimum of three lenders. The Department also believes that the disclosure of supporting information and data with the list is the most efficient and effective method to ensure that borrowers make informed consumer decisions. The Department understands that providing comparative interest rate and benefit information, in addition to describing the method and criteria used to select lenders for the list, will involve additional efforts for schools in preparing and providing a preferred lender list. To assist schools with this effort, the Department is developing a model format that a school may use to present this information. The Department will be sharing a draft of the model format with representatives of school, lending and guaranty agency communities as well as students and parents to solicit their thoughts and suggestions. The draft model format will then be revised and submitted for clearance to the Office of Management and Budget (OMB) as required by the Paperwork Reduction Act of 1995. This clearance process will afford additional opportunities for public comment on the draft model format. The Department plans to submit a model format form to OMB for its review when these proposed regulations are published in final form.

The Department also agrees that schools should not be discouraged from negotiating with lenders for the best possible interest rates and borrower benefits for their borrowers. As a result, the proposed regulations, while continuing to prohibit a school's solicitation of payments and other benefits from a lender for the school or its employees in exchange for the lender's placement on the school's list, would not prohibit a school from soliciting lenders for borrower benefits in exchange for placement on the school's list.

Executive Order 12866

Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether the regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may (1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order.

Pursuant to the terms of the Executive order, it has been determined this proposed regulatory action will not have an annual effect on the economy of more than $100 million. Therefore, this action is not ''economically significant'' and subject to OMB review under section 3(f)(1) of Executive Order 12866. In accordance with the Executive order, the Secretary has assessed the potential costs and benefits of this regulatory action and has determined that the benefits justify the costs.

Need for Federal Regulatory Action

These proposed regulations address a broad range of issues affecting students, borrowers, schools, lenders, guaranty agencies, secondary markets and third-party servicers participating in the FFEL, Direct Loan, and Perkins Loan programs. Prior to the start of negotiated rulemaking, through a notice in the **Federal Register** and four regional hearings, the Department solicited testimony and written comments from interested parties to identify those areas of the Title IV regulations that they felt needed to be revised. Areas identified during this process that are addressed by these proposed regulations include:

- Duplication of effort for loan holders and borrowers in the deferment granting process. The Department has proposed changes that allow Title IV loan holders to grant a deferment under a simplified process.
- Difficulty experienced by members of the armed forces when applying for a Title IV loan deferment. The Department has proposed changes that allow a borrower's representative to apply for an armed forces or military service deferment on behalf of the borrower.
- Confusion regarding the eligibility requirements that a Title IV loan borrower must meet to qualify for a total and permanent disability loan discharge. The Department has

proposed changes to clarify these requirements.

• Lack of entrance and exit counseling for graduate and professional PLUS Loan borrowers. The Department has proposed changes that require entrance counseling and modified exit counseling.

• Costs associated with capitalization on Federal Consolidation Loans for borrowers who consolidated while in an in-school status. The Department has proposed changes to limit the frequency of capitalization on such loans.

Based on its experience in administering the HEA, Title IV loan programs, staff with the Department also identified several issues for discussion and negotiation, including:

• Risk to the Federal fiscal interest associated with the total and permanent disability discharge on a Title IV loan. The Department has proposed changes to require a prospective three-year conditional discharge so that the applicant's condition can be monitored before the borrower receives a Federal benefit.

• Enforcement issues and risk to the Federal fiscal interest associated with electronically-signed MPNs that have been assigned to the Department. The Department has proposed changes that require loan holders to maintain a certification regarding the creation and maintenance of any electronically-signed promissory notes and that require loan holders to provide disbursement records should the Secretary need the records to enforce an assigned Title IV loan.

• Excessive collection costs charged to defaulted Perkins Loan borrowers. The Department has proposed changes that cap collection costs in the Perkins Loan Program.

• Unreasonable risk of loss to the United States associated with the more than $400 million in uncollected Perkins Loans that have been in default for 5 years or more. The Department has proposed changes that provide for mandatory assignment of older, defaulted Perkins loans at the request of the Secretary.

• Program integrity issues associated with prohibited incentive payments and other inducements by lenders and guaranty agencies. The Department has proposed changes that explicitly identify prohibited inducements and allowable activities.

• Abuse associated with the use of lists of preferred or recommended lenders. The Department has proposed changes that ensure such lists are a source of useful, unbiased consumer information that can assist students and their parents in choosing a FFEL lender.

Lastly, regulations were required to implement The HEA Extension Act, which made changes to eligible lender trustee relationships as discussed earlier.

Regulatory Alternatives Considered

A broad range of alternatives to the proposed regulations was considered as part of the negotiated rule-making process. These alternatives are reviewed in detail elsewhere in this preamble under the *Reasons* sections accompanying the discussion of each proposed regulatory provision.

Benefits

Many of the proposed regulations codify existing sub-regulatory guidance or make relatively minor changes intended to establish consistent definitions or streamline program operations across the three Federal student loan programs. The Department believes the additional clarity and enhanced efficiency resulting from these changes represent benefits with little or no countervailing costs or additional burden.

Benefits provided in these regulations include: The clarification of rules on preferred lender lists and prohibited inducements; simplification of the process for granting deferments; changes to the process of granting loan discharges that reduce burden for loan holders, protect borrowers from unnecessary collection activities, and simplify the application process; limits on the frequency with which FFEL lenders can capitalize interest on Consolidation Loans; limits on the amount of collection costs charged to defaulted Perkins Loan borrowers; and the mandatory assignment to the Department of longstanding defaulted Perkins Loan with limited recent collection activity. Of these proposed provisions, only the mandatory assignment of defaulted Perkins Loans has a substantial economic impact-although the single-year impact is less than the $100 million threshold.

Preferred Lender and Prohibited Inducements: The proposed regulations include a number of provisions affecting the use of preferred lender lists and lender inducements. The use of preferred lender lists by schools is completely optional; while the Department encourages maximum disclosure of loan information to borrowers, a school can avoid the minimal costs associated with the disclosures required by the proposed regulations by simply opting not to have a preferred lender list. Accordingly, there are no mandated costs for these proposals.

The student loan industry features high competition among loan providers, using an array of interest rate discounts and other borrower benefits to attract volume. By increasing the amount of information available to borrowers and clarifying permissible relationships between lenders and schools, the proposed provisions are expected to improve market transparency and remove transaction barriers for loan borrowers, improving market openness and efficiency for both borrowers and loan providers.

The proposed regulations generally prohibit lenders and guaranty agencies from regularly providing schools with personnel and other support services for loan application and other processing activities. The provision of these services appears to have been a relatively standard practice in some institutional sectors. To the extent schools must now pay for this activity themselves, the regulations do not increase costs but rather shift costs from lenders to schools. The Department is interested in comments related to any potential burden associated with this provision. The HEA and implementing regulations currently require schools to maintain the administrative capability to operate Title IV programs. The proposed regulations are consistent with this requirement by prohibiting lenders and guaranty agencies from providing schools with personnel and other support services and activities in exchange for loan applications.

Simplification of Deferment Process: In general, current regulations require each lender to determine a borrower's qualification for a deferment and require a borrower to initiate the application for a military service deferment. The proposed regulation allows a lender to use the determination of deferment eligibility made by another eligible lender and allows a borrower's representative to apply for a military service deferment. In both instances, no additional costs are incurred. In the deferment-granting process, a lender must still make a determination, but responsibility may be shifted among individual lenders. In cases in which a loan is transferred to a different lender in the middle of a deferment period, the new loan holder will not need to make a separate initial determination of eligibility. Similarly, under the proposed regulations, a single individual will still submit an application for military service deferment; the proposal merely allows individuals dispatched on active duty to designate a representative to submit their application.

Changes to Loan Discharge Provisions: The proposed regulations streamline and simplify the process for applying for death and disability loan discharges and ensures regulations are internally consistent and in compliance with other statutes, including the Fair Credit Reporting Act. Under current regulations, applicants must submit an original or certified copy of the death certificate in order to receive a loan discharge; the proposed regulation would allow the use of an accurate and complete photocopy of the original or certified copy of the death certificate. The workload to the applicant is unchanged and no additional costs are incurred. The proposed regulations for the total and permanent disability discharges also standardize definitions and dates for the conditional discharge period and require additional disclosure of information to borrowers. The proposed regulations require lenders to notify borrowers that additional payments are not required after the date a discharge application has been submitted. As a lender must already submit the application to the Secretary, the cost of electronically notifying the borrower of the repayment requirement is negligible. Note: The proposed regulations do not change the borrower's repayment responsibility and do not affect the cash flows of the loan program.

Reasonable Collection Costs on Defaulted Perkins Loans: The HEA and implementing regulations specify and limit the level of collection costs on defaulted loans payable by a borrower in the FFEL and Direct Loan programs; similar restrictions do not exist for the Perkins Loan Program. There have been several reports that some schools assess excessive collection costs to defaulted borrowers. The Department does not have data to support or deny this assertion and is interested in any comments or data on this issue. In the absence of data, the Department assumes there is no measurable difference between the collection cost rate charged borrowers in the overall Perkins Loans program and that of the other Federal student loan programs. Given this assumption, the regulations are estimated to have no measurable economic impact.

Mandatory Assignment of Certain Defaulted Perkins Loans: As discussed elsewhere in this preamble, the proposed regulations would require institutions to assign to the Department any Perkins Loans that have been in default for 7 or more years and have not had any collection activity for at least 12 months. Department data indicate that Perkins Loan institutions hold more than $400 million in uncollected loans that have been in default for 5 years or more. Since Perkins Loans are made with a combination of Federal and institutional funds, these uncollected loans present an unreasonable risk of loss to the United States.

The Department believes its use of collection tools such as Federal offset will substantially improve the recovery rate on these older loans, as Perkins institutions lack access to these tools. Accordingly, the Department has long encouraged voluntary assignment of these longstanding non-performing defaulted loans. Despite this encouragement, and notwithstanding substantial simplification of the voluntary assignment process, the number and outstanding balance of older, defaulted Perkins Loans have continued to increase.

Perkins Loans are made from a capital fund held by schools, which generally includes 75 percent Federal funds and 25 percent institutional matching funds. As discussed below, the proposed regulations, once implemented, could increase collections on defaulted loans by $15 million over the next 10 years. Under the assignment process, 100 percent of these collections become Federal revenue. In the absence of the regulations, given the age of the loans and the inability of the schools to collect, the Department assumes there would be no Federal or institutional revenue. The proposed regulations therefore would have minimal economic impact on schools. The impact on borrowers is that the increased use of Federal tools will require borrowers to fulfill their obligation to repay their loans.

To estimate the impact of this proposed change, the Department used a statistically representative sample from records in NSLDS to identify outstanding Perkins Loans that have been in default for at least 7 years and for which the outstanding balance has not decreased in at least 12 months. The Department identified $23 million in outstanding Perkins Loans that meet these criteria and so would be subject to mandatory assignment. This portfolio increases approximately $1 million annually under current regulations. Historically, using the credit reform discounting method in which future collections are discounted to reflect a current year cost, the Department collects approximately 80 percent of outstanding principal on loans held in-house. If the $23 million of assignable Perkins Loans produced the same collection level, government revenues would increase, on a discounted basis, by $18 million over the next approximately 10 years as borrowers repay their loans. This level of collection is unlikely as these borrowers have been out of repayment for many years. This amount was reduced by $3 million to reflect the Department's standard collections costs. Accordingly, the Department estimates the proposed regulation will increase net collections and reduce Federal costs by $15 million.

Costs

Because entities affected by these regulations already participate in the Title IV, HEA programs, these lenders, guaranty agencies, and schools must already have systems and procedures in place to meet program eligibility requirements. These regulations generally would require discrete changes in specific parameters associated with existing guidance—such as the provision of entrance counseling, the retention of records, or the submission of data to NSLDS—rather than wholly new requirements. Accordingly, entities wishing to continue to participate in the student aid programs have already absorbed most of the administrative costs related to implementing these proposed regulations. Marginal costs over this baseline are primarily related to one-time system changes that, while possibly significant in some cases, are an unavoidable cost of continued program participation. In assessing the potential impact of these proposed regulations, the Department recognizes that certain provisions—primarily the mandatory assignment of Perkins Loans and the addition of entrance counseling for graduate and professional PLUS Loan borrowers—will result in additional workload for staff at some institutions of higher education. (This additional workload is discussed in more detail under the Paperwork Reduction Act of 1995 section of this preamble.) Additional workload would normally be expected to result in estimated costs associated with either the hiring of additional employees or opportunity costs related to the reassignment of existing staff from other activities. In this case, however, these costs are not incurred because other provisions in the proposed regulations—primarily changes involving the maximum length of loan period—result in offsetting workload reductions that greatly outweigh the estimated additional burden. The Department estimates annual net burden for institutions of higher education related to the Title IV student loan programs will decrease by 180,000 hours as a result of the proposed regulations. While regulations related to

mandatory assignment result in a net increase in burden under the Perkins Loan Program, schools participating in the Perkins Loan Program also typically participate in either the FFEL or Direct Loan Program, both of which have net burden reductions that outweigh the increase under the Perkins Loan Program. In addition, the estimated annual burden for Perkins Loan Program participants will drop dramatically after the first year, during which institutions will need to assign all outstanding loans that currently meet the requirements for mandatory assignment. In subsequent years, the number of loans assigned will be limited to those that newly meet the requirements.

The Department is particularly interested in comments on possible administrative burdens related to the proposed regulations. In a number of areas, such as certification of electronic signatures, preferred lenders, and prohibited inducements, non-Federal negotiators raised concerns about possible administrative burden associated with provisions included in these proposed regulations. Given the limited data available, however, the Department is particularly interested in comments and supporting information related to possible burden stemming from the proposed regulations. Estimates included in this notice will be reevaluated based on any information received during the public comment period.

Assumptions, Limitations, and Data Sources

Estimates provided above reflect a baseline in which the proposed changes implemented in these regulations do not exist. In general, these estimates should be considered preliminary; they will be reevaluated in light of any comments or information received by the Department prior to the publication of the final regulations. The final regulations will incorporate this information in a more robust analysis.

In developing these estimates, a wide range of data sources were used, including NSLDS data, operational and financial data from Department of Education systems, and data from a range of surveys conducted by the National Center for Education Statistics such as the 2004 National Postsecondary Student Aid Survey, the 1994 National Education Longitudinal Study, and the 1996 Beginning Postsecondary Student Survey. Data on administrative burden at participating schools, lenders, guaranty agencies, and third-party servicers are extremely limited; accordingly, as noted above, the Department is particularly interested in comments in this area.

Elsewhere in this **SUPPLEMENTARY INFORMATION** section we identify and explain burdens specifically associated with information collection requirements. See the heading *Paperwork Reduction Act of 1995.*

Accounting Statement

As required by OMB Circular A–4 (available at *http://www.Whitehouse.gov/omb/Circulars/a004/a-4.pdf),* in Table 1 below, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these proposed regulations. This table provides our best estimate of the changes in Federal student aid payments as a result of these proposed regulations. Savings are classified as transfers from program participants (borrowers in default).

TABLE 1.—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED SAVINGS

[In millions]

Category	Transfers
Annualized Monetized Transfers.	$15.
From Whom To Whom?	Defaulted Perkins Loan Borrowers to Federal Government.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum ''Plain Language in Government Writing'' require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§'' and a numbered heading; for example, § 682.209 Repayment of a loan.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section of this preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. These proposed regulations would affect institutions of higher education, lenders, and guaranty agencies that participate in Title IV, HEA programs and individual students and loan borrowers. The U.S. Small Business Administration Size Standards define these institutions as ''small entities'' if they are for-profit or nonprofit institutions with total annual revenue below $5,000,000 or if they are institutions controlled by governmental entities with populations below 50,000. Guaranty agencies are State and private nonprofit entities that act as agents of the Federal government, and as such are not considered ''small entities'' under the Regulatory Flexibility Act. Individuals are also not defined as ''small entities'' under the Regulatory Flexibility Act.

A significant percentage of the lenders and schools participating in the Federal student loan programs meet the definition of ''small entities.'' While these lenders and schools fall within the SBA size guidelines, the proposed regulations do not impose significant new costs on these entities.

The Secretary invites comments from small institutions and lenders as to whether they believe the proposed changes would have a significant economic impact on them and, if so, requests evidence to support that belief.

Paperwork Reduction Act of 1995

Proposed §§ 674.8, 674.16, 674.19, 674.38, 674.45, 674.50, 674.61, 682.200, 682.208, 682.210, 682.211, 682.401, 682.402, 682.406, 682.409, 682.411, 682.414, 682.602, 682.603, 682.604, 682.610, 685.204, 685.212, 685.213, 685.215, 685.301, 685.304 contain information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to the Office of Management and Budget (OMB) for its review.

Collection of Information: Perkins Loan Program, FFEL Program, and Direct Loan Program.

Sections 674.38, 682.210, and 685.204—Deferment

The proposed regulations in §§ 674.38 and 682.210 would allow FFEL lenders and schools that participate in the Perkins Loan Program to grant graduate fellowship deferments, rehabilitation training program deferments, unemployment deferments, economic hardship deferments and military service deferments based on information from another FFEL loan holder or from the Department. The proposed regulations in § 685.204 would permit the Department to grant a deferment on a Direct Loan based on information from a FFEL loan holder. Finally, the proposed regulations would allow a representative of the borrower to apply for a military deferment on a Perkins, FFEL or Direct Loan on behalf of the borrower. The proposed regulations would affect borrowers seeking a deferment and loan holders and servicers. This proposed change represents a decrease in burden because borrowers with more than one loan would no longer be required to gather and supply documentation to each loan holder in order to establish eligibility for a deferment. Conversely, loan holders would be able to rely on the determination of eligibility by another holder based on that holder's receipt and review of required documentation from the borrower. We estimate that the proposed changes will decrease burden for borrowers and loan holders (and their servicers) by 9,383 hours and 1,042 hours, respectively. Thus, we estimate a total burden reduction of 10,425 hours in OMB Control Numbers 1845–0019, 1845–0020, and 1845–0021.

The proposed change allowing a borrower's representative to apply for a military deferment on behalf of the borrower does not represent a change in burden. The deferment application and eligibility determination process would remain the same.

Sections 674.61, 682.402 and 685.212—Loan Discharge for Death

The proposed regulations would allow the use of an accurate and complete copy of the original or certified copy of the death certificate, in addition to the original or a certified copy, to support the discharge of a borrower's or parent borrower's Title IV loan. This proposed change represents a decrease in burden for the survivor of the borrower and the loan holder (or its servicer) because each party will now have increased flexibility in gathering and reviewing documentation that supports a loan discharge based on the death of the borrower. We estimate that the proposed changes will decrease burden for borrowers' survivors and loan holders (and their servicers) by 3,410 hours and 2,273 hours, respectively. Thus, we estimate a total burden reduction of 5,683 hours. The proposed changes will be reflected in OMB Control Numbers 1845–0019, 1845–0020 and 1845–0021.

Sections 674.61, 682.402, and 685.213—Total and Permanent Disability Discharge

The proposed regulations restructure §§ 674.61, 682.402 and 685.213 to clarify the regulatory requirements for the total and permanent disability discharge process. The proposed changes require a borrower to complete a prospective conditional discharge period of three years from the date that the Secretary makes an initial determination that a borrower is totally and permanently disabled in order to qualify for the total and permanent disability discharge on his or her Perkins, FFEL or Direct Loan. Lastly, the proposed changes explicitly state that, in order to qualify for a discharge, the borrower must meet the definition of total and permanent disability under the Perkins Loan or Direct Loan regulations or the definition of totally and permanently disabled under the FFEL regulations and receive no further Title IV loans from the date the physician certifies the borrower's total and permanent disability on the discharge application. The proposed regulatory changes would affect Title IV borrowers seeking a total and permanent disability loan discharge, loan holders (and their servicers), and guaranty agencies.

The proposed changes would not constitute an increase in burden for borrowers because the application process and the eligibility requirements have not changed. The proposed changes would also not constitute an increase in burden for loan holders and guaranty agencies because these entities are not responsible for monitoring the borrower's status during the prospective conditional discharge period or for making a final determination of the borrower's eligibility for discharge. Changes to the Permanent and Total Disability Loan Discharge Application Form would need to be made, however, to state that the conditional discharge period would be prospective from the date of the physician's certification of the borrower's disability on the form. The Total and Permanent Disability Discharge Application currently in use will expire on May 5, 2008. Final regulations implementing these provisions will be effective July 1, 2008. A revised Total and Permanent Disability Discharge Form associated with OMB Control Number 1845–0065 will be submitted for OMB review by January 31, 2008 thereby ensuring that a newly-approved form will be available for a borrower's use by the time final regulations are effective.

Sections 674.16, 682.208, 682.401 and 682.414—NSLDS Reporting Requirements

The proposed changes to §§ 674.16, 682.208, 682.401 and 682.414 require schools, lenders, and guaranty agencies to report enrollment and loan status information, or any other data required by the Secretary, to NSLDS by a deadline established by the Secretary. Requiring these entities to report information to NSLDS on a deadline established by the Secretary codifies existing Departmental practice and we believe that it will not result in an increase or decrease in burden; however we invite comments on this issue.

The proposed changes in § 682.401 that require a guaranty agency to report a borrower's enrollment status to the current holder of a loan within 30 days, instead of the existing 60-day timeframe, do not represent an increase in burden. Under current practice, 33 of the 35 existing guaranty agencies participate in a free service provided by the National Student Clearinghouse Total Enrollment Reporting Process (TERP). TERP already provides enrollment information to lenders and lender servicers on behalf of the guaranty agency within a 30-day period. The remaining two guaranty agencies are expected to enroll with TERP by the end of the year.

Sections 674.19, 674.50, and 682.414—Certification of Electronic Signature on Title IV Loan Program Master Promissory Notes (MPNs) Assigned to the Department

The proposed changes to §§ 674.19, 674.50 and 682.414 support the Department's efforts to enforce defaulted Perkins Loan or FFEL MPNs that are assigned to the Department by requiring that schools, lenders and guarantors create, maintain, and provide to the Secretary, upon request, an affidavit or certification regarding the creation and maintenance of electronic MPNs or promissory notes, including the authentication and signature process. The proposed changes in §§ 674.19 and 682.414 would also require schools and the holder of the original electronically signed FFEL MPN to retain an original of an

electronically signed MPN, and associated loan records, for three years after all the loans made on the MPN are satisfied. The proposed changes in §§ 674.50 and 682.414 would also require schools, lenders and guarantors to provide any record, affidavit or certification requested by the Secretary to resolve any factual dispute involving an electronically signed promissory note assigned to the Department, including testimony, if appropriate, to ensure admission of electronic loan records in litigation or legal proceedings to enforce a loan. The proposed changes would affect schools that participate in the Perkins Loan Program and FFEL lenders and guarantors.

The proposed changes represent an increase in burden for schools and FFEL lenders and guarantors by requiring the development of certifications regarding the creation and maintenance of the records associated with electronically signed MPNs. The proposed changes represent a further increase in burden by requiring that schools and lenders retain an original electronically signed MPN or promissory note for three years after all the loans on the MPN are satisfied, even after the loans are assigned to the Department. We estimate that the proposed changes will increase burden for schools, FFEL lenders, and guarantors by 2 hours, 322 hours, and 36 hours, respectively, based on the total number of Perkins and FFEL loans referred for litigation for the 2006–2007 period. Thus we estimate the total annual burden increase to be 360 hours. The increase as a result in the proposed changes will be reflected in OMB Control Numbers 1845–0019 and 1845–0020.

Sections 674.19, 674.50, and 682.409—Retention of Disbursement Records Supporting MPNs

The proposed changes to §§ 674.19 and 674.50 would require institutions that participate in the Perkins Loan program to retain disbursement records for each loan made to a borrower on a MPN until all the loans on the MPN are satisfied. The proposed changes in § 674.50 would also require an institution to submit disbursement records, upon request, for each loan made to a borrower on a MPN that has been assigned to the Department should the Department need the records to enforce the loan. The proposed changes represent an increase in burden for schools that participate in the Perkins Loan Program. Although Perkins Loan institutions are currently required to retain disbursement records for three years under 34 CFR § 668.24, the requirement to retain the disbursement records for three years after the loan is satisfied is new. The requirement that an institution submit disbursement records, upon request, as part of the assignment process, is also new. We estimate that the proposed changes will increase burden by a total of 22 hours annually. The increase in burden as a result of the proposed changes will be reflected in OMB Control Number 1845–0019.

The proposed changes in § 682.409 would require a guaranty agency to submit a record of the lender's disbursement of Stafford and PLUS loan funds to the school for delivery to the borrower for each loan assigned to the Department. (FFEL lenders are already required to retain disbursement records under § 682.414(a)(4)(ii)). The proposed changes in § 682.409 would also require a guaranty agency to provide to the Secretary the name and location of the entity in possession of originals of electronically signed MPNs that have been assigned to the Department. In reviewing the proposed changes to § 682.409, we reexamined the existing burden reflected in OMB Control Number 1845–0020 and noted that no burden is currently associated with the FFEL mandatory assignment process. The Department has determined that the FFEL mandatory assignment process required under § 682.409 represents 2,380 burden hours for each guaranty agency for a total annual burden of 83,333 hours, which will be reflected in OMB Control Number 1845–0020. The proposed changes, which codify existing assignment procedures, are included in these burden hour calculations.

Sections 682.208, 682.211, 682.300, 682.302, 682.402, 682.411, and 685.215—Identity Theft

Interim final regulations published in August 2006 and final regulations published in November 2006 provided for a discharge of a FFEL or Direct Loan Program loan if the borrower's eligibility to borrow was falsely certified because the borrower was a victim of the crime of identity theft. We have decided against making changes to the regulations as published but are proposing regulations to provide lenders with relief from certain due diligence requirements on a loan when identity theft is alleged.

We are proposing changes in § 682.208 and § 682.211 to allow lenders to temporarily suspend credit bureau reporting and to grant a 120-day administrative forbearance, respectively, on a loan certified as a result of alleged identity theft while the lender investigates the situation. We are proposing changes in §§ 682.300 and 682.302 to specify that the payment of interest and special allowance on eligible FFEL Program Loans must cease on the date the lender determines the loan is legally unenforceable based on the receipt of an identity theft report. Lastly, we are proposing changes in § 682.411 to permit a lender to take steps in accordance with the Fair Credit Reporting Act when the lender receives notice of an alleged identity theft. The proposed changes affect borrowers, lenders and guarantors.

The proposed changes are burden neutral. The Department's Inspector General has confirmed that very few Title IV student loans are falsely certified as the result of the crime of identity theft. The burden associated with the suspension of credit bureau reporting and the application of a 120-day administrative forbearance by the lender while investigating an alleged identity theft would be negligible given that so few loans are affected and the time-period under which these requirements are waived is so short.

Sections 682.603, 682.604, 685.301, and 685.304—Entrance Counseling for Graduate/Professional PLUS Borrowers

The proposed changes to §§ 682.603 and 685.301 would require institutions, as part of the process for certifying a FFEL Loan or originating a Direct Loan, to notify Graduate/Professional PLUS Loan student borrowers who are eligible for Stafford Loans of their eligibility for a Stafford Loan and of the terms and conditions of a Stafford Loan that are more beneficial to a borrower than the terms and conditions of a PLUS loan, and to give borrowers an opportunity to request a Stafford Loan at that time. The proposed changes in §§ 682.604 and 685.304 would also establish a separate entrance counseling requirement for Graduate/Professional PLUS student borrowers. We estimate that the proposed changes will increase burden on an annual basis by an additional 79,992 hours for individual borrowers and by 2,719 hours for institutions of higher education, which will be reflected in OMB Control Number 1845–0020.

Sections 682.401, 682.603, and 685.301—Maximum Length of a Loan Period

The proposed changes in §§ 682.401, 682.603, and 685.301 would eliminate the maximum 12-month loan period for annual loan limits in the FFEL and Direct Loan Programs and the 12-month period of loan guarantee in the FFEL program to allow institutions to certify a single loan for students in shorter non-

term or nonstandard term programs. The proposed changes would also provide greater flexibility in scheduling disbursements for students who drop out and return within the permitted 180-day period. The proposed changes affect schools and lenders.

The proposed changes represent a decrease in burden because schools and lenders will be able to certify and disburse one loan, as opposed to two loans, when programs are longer than 12 months. We estimate a decrease of burden on schools and lenders by 358,375 hours for each group for an annual total reduction of 716,750 hours. As a result of these proposed changes, the decrease in burden will be reflected in OMB Control Numbers 1845–0020 and 1845–0021.

Sections 674.45—Reasonable Collection Costs in the Perkins Loan Program

The proposed changes in § 674.45 would limit the collection costs an institution may assess against a Perkins Loan borrower to 30 percent of the total of the outstanding principal, interest, and late charges on the loan collected for first collection efforts, 40 percent for second and subsequent collection efforts, and 40 percent plus court costs for collection efforts resulting from litigation. The changes affect institutions that participate in the Perkins Loan Program and collection agencies.

The changes do not represent a change in burden. Collection practices and procedures would not change; only the amount assessed against a defaulted borrower would change. Therefore, there is no additional burden associated with this provision.

Sections 674.8 and 674.50—Mandatory Assignment of Defaulted Perkins Loans

The proposed changes to §§ 674.8 and 674.50 would provide the Department with the authority to require assignment of a Perkins Loan if the outstanding principal balance on the loan is $100 or more, the loan has been in default for seven or more years, and a payment has not been received on the loan in the past 12 months. Institutions that participate in the Perkins Loan Program (and their servicers) would be affected by these changes.

The proposed change allowing the Department to require the assignment of certain defaulted Perkins Loans represents an increase in burden because institutions would be required to prepare and submit for assignment to the Department loans that might not otherwise have been assigned. We estimate that the proposed changes will increase burden on schools (and their servicers) annually by a total of 95,393 hours. The increased burden associated with these proposed changes will be reflected in OMB Control Number 1845–0019.

Sections 682.200 and 682.602—Eligible Lender Trustee

The proposed changes implement the HEA Extension Act by amending the definition of *lender* to prohibit a FFEL lender from entering into an eligible lender trustee (ELT) relationship with a school or a school-affiliated organization as of September 30, 2006, but allowing current relationships to continue. The proposed changes also add a new definition of *school-affiliated organization*, and add a new § 682.602 to apply most of the same restrictions that are imposed on FFEL school lenders by the HERA to school and school-affiliated ELT arrangements as of January 1, 2007. The entities affected by these proposed changes are lenders, ELTs, schools and school-affiliated organizations.

The proposed changes impose limits and prohibit certain arrangements between schools and school-affiliated organizations and eligible lender trustees. The affected entities under the proposed regulations are schools and school-affiliated organizations. We estimate that burden will increase by 57,000 hours and 86,000 hours for schools and school-affiliated organizations, respectively, and we will include this burden in OMB control number 1845–0020.

Sections 682.212 and 682.603—Preferred Lender

The proposed regulations in § 682.212 would require that any school's list of recommended lenders contain at least three unaffiliated lenders to provide borrower choice. The Department expects a school to collect and retain a statement certifying to this fact, upon which the school can rely, from each of the lenders they propose to include on their list. The proposed regulations also require the disclosure of supporting information and data with the list as the most efficient and effective method to ensure that borrowers make informed consumer decisions. The provision of comparative interest rate and benefit information, in addition to describing the method and criteria used to select lenders for the list, will involve additional efforts for schools in preparing and providing a preferred lender list. We estimate that burden will increase by 141,625 hours for institutions of higher education. The increased burden associated with the proposed changes in § 682.212 will be reflected under a new OMB Control Number upon publication of the NPRM.

To assist schools with this effort, the Department is developing a model format that a school may use to present this information. The Department will be sharing a draft of the model format with representatives of school, lending and guaranty agency communities as well as students and parents to solicit their thoughts and suggestions. The draft model format will then be revised and submitted for clearance to OMB as required by the Paperwork Reduction Act of 1995. This clearance process will afford additional opportunities for public comment on the draft model format. The Department is not requesting comments on this form at this point, but will publish a separate notice in the **Federal Register**, with a 60-day request for public comment, to do so and will submit the form for OMB approval when these proposed regulations are published in final form.

The proposed changes in § 682.603 provide that a school must certify Stafford and PLUS loans expeditiously regardless of the lender chosen by the borrower, that a school cannot assign a lender to a first-time borrower, and that a school may not engage in practices that deny a borrower access to FFEL loans based on the borrower's selection of a lender or guaranty agency. These proposed changes do not change the certification process or the data collection requirements associated with the certification process.

Sections 682.200, 682.209, 682.401, and 682.406—Prohibited Inducements

The proposed changes to §§ 682.200 and 682.401 provide lists of prohibited activities in which lenders and guaranty agencies may not engage to secure loan applications or loan volume in the FFEL Program. The proposed regulations would also include lists of permissible activities in which lenders and guaranty agencies may engage as part of their roles as administrators of the FFEL program. The entities affected by these changes are lenders and guaranty agencies. The inclusion of a detailed list of prohibited and permissible activities in §§ 682.200 and 682.401 largely codifies long-standing Department guidance and does not represent an increase in burden.

The proposed changes in § 682.209 would allow a borrower to assert any defense available under applicable State law against repayment of the loan if the lender making the loan offered or provided an improper inducement to the borrower's school. The entities affected by the proposed changes are borrowers, institutions, lenders, and

guaranty agencies. The proposed change does not represent a change in burden. This borrower defense against repayment is currently available to borrowers of FFEL Loans who attend a proprietary school. The proposed change extending this entitlement to FFEL Loan borrowers who attend other types of schools is a codification of the rights extended to such borrowers under State laws. Therefore, there is no burden associated with this change.

The proposed changes in § 682.406 provide that a guaranty agency may not make a claim payment on a loan if the lender offered or provided an improper inducement to the school, a borrower, or any other individual or entity. The entities affected by the proposed changes are lenders and guaranty agencies. The proposed change does not represent a change in burden. The forms and procedures associated with the claim filing process would remain unchanged.

Consistent with the discussion above, the following chart describes the sections of the proposed regulations involving information collections, the information being collected, and the collections the Department will submit to the Office of Management and Budget for approval and public comment under the Paperwork Reduction Act.

Regulatory section	Information collection	Collection
§§ 674.38, 682.210 and 685.204.	This proposed regulation allows a loan holder to grant deferments based upon information from another holder, rather than requiring the borrower to resubmit deferment documentation to each holder separately.	OMB 1845–0019, 1845–0020 and 1845–0021.
§§ 674.61, 682.402 and 685.212.	Allows for the use of an accurate and complete copy of the original or certified copy of a borrower's original or certified copy of the death certificate to support the discharge of a Title IV loan.	OMB 1845–0019, 1845–0020 and 1845–0021.
§§ 674.61, 682.402 and 685.213.	A revised Total and Permanent Disability Discharge Form will be submitted to OMB for review by January 31, 2008 for review and approval prior to the effective date of July 1, 2008.	OMB 1845–0065.
§§ 674.19, 674.50, and 682.414.	Requires that schools, lenders and guarantors create, maintain, and provide an affidavit or certification, upon request, regarding the creation and maintenance of electronic MPNs or promissory notes, including the authentication and signature process.	OMB 1845–0019 and 1845–0020.
§§ 674.19 and 674.50	Requires Perkins loan participating schools to retain MPNs until all the loans on the MPN are satisfied.	OMB 1845–0019.
§§ 682.603, 682.604, 685.301 and 685.304.	Requires Entrance Counseling for all Grad PLUS loans	OMB 1845–0020 and 1845–0021
§§ 682.401, 682.603 and 685.301.	Eliminates the maximum loan timeframe of 12 months.	OMB 1845–0020 and 1845–0021.
§§ 674.8 and 674.50	Requires the mandatory assignment of Perkins loans when the outstanding principal balance on the loan is $100 or more, the loan has been in default 7 or more years, and a payment has not been received in the past 12 months.	OMB 1845–0019.
§§ 682.200 and 682.602	Imposes the same rules for FFEL school lenders by HERA to school and school-affiliated organization arrangements.	OMB 1845–0020.
682.212	Requires institutions that use a preferred lenders list to provide information on the method and criteria used to select the lenders on the list.	OMB 1845–XXXX This will be a new collection. A separate 60-day **Federal Register** notice will be published to solicit comment on this form once it is developed.

If you want to comment on the proposed information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the U.S. Department of Education. Send these comments by e-mail to *OIRA_DOCKET@omb.eop.gov* or by fax to (202) 395–6974. Commenters need only submit comments via one submission medium. You may also send a copy of these comments to the Department contact named in the **ADDRESSES** section of this preamble.

We consider your comments on these proposed collections of information in—

- Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives the comments within 30 days of publication. This does not affect the deadline for your comments to us on the proposed regulations.

Intergovernmental Review

These programs are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

The Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or

authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Number: 84.032 Federal Family Education Loan Program; 84.037 Federal Perkins Loan Program; and 84.268 William D. Ford Federal Direct Loan Program)

List of Subjects in 34 CFR Parts 674, 682 and 685

Administrative practice and procedure, Colleges and universities, Education, Loan programs—education, Reporting and recordkeeping requirements, Student aid, Vocational education.

Dated: May 31, 2007.

Margaret Spellings,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend parts 674, 682, and 685 of title 34 of the Code of Federal Regulations as follows:

PART 674—FEDERAL PERKINS LOAN PROGRAM

1. The authority citation for part 674 continues to read as follows:

Authority: 20 U.S.C. 1087aa–1087hh and 20 U.S.C. 421–429, unless otherwise noted.

2. Section 674.8 is amended by:

A. In paragraph (d)(1), removing the words ''; or'' and adding in their place the punctuation ''.''.

B. Adding a new paragraph (d)(3).

The addition reads as follows:

§ 674.8 Program participation agreement.

* * * * *

(d) * * *

(3) The institution shall, at the request of the Secretary, assign its rights to a loan to the United States without recompense if—

(i) The amount of outstanding principal is $100.00 or more;

(ii) The loan has been in default, as defined in § 674.5(c)(1), for seven or more years; and

(iii) A payment has not been received on the loan in the preceding twelve months, unless payments were not due because the loan was in a period of authorized forbearance or deferment.

* * * * *

3. Section 674.16 is amended by adding new paragraph (j) to read as follows:

§ 674.16 Making and disbursing loans.

* * * * *

(j) The institution must report enrollment and loan status information, or any Title IV loan-related information required by the Secretary, to the Secretary by the deadline date established by the Secretary.

* * * * *

4. Section 674.19 is amended by:

A. Redesignating paragraphs (e)(2)(i) and (ii) as paragraphs (e)(2)(iii) and (iv).

B. Adding new paragraphs (e)(2)(i) and (ii).

C. Revising paragraph (e)(3).

D. In paragraph (e)(4)(i), removing the words ''Master Promissory Note (MPN)'' and adding, in their place, the word ''MPN''.

E. Revising paragraph (e)(4)(ii).

The addition and revisions read as follows:

§ 674.19 Fiscal procedures and records.

* * * * *

(e) * * *

(2) * * *

(i) An institution shall retain a record of disbursements for each loan made to a borrower on a Master Promissory Note (MPN). This record must show the date and amount of each disbursement.

(ii) For any loan signed electronically, an institution must maintain an affidavit or certification regarding the creation and maintenance of the institution's electronic MPN or promissory note, including the institution's authentication and signature process in accordance with the requirements of § 674.50(c)(12).

* * * * *

(3) *Period of retention of disbursement records, electronic authentication and signature records, and repayment records.* (i) An institution shall retain disbursement and electronic authentication and signature records for each loan made using an MPN for at least three years from the date the loan is canceled, repaid, or otherwise satisfied.

(ii) An institution shall retain repayment records, including cancellation and deferment requests for at least three years from the date on which a loan is assigned to the Secretary, canceled or repaid.

(4) * * *

(ii) If a promissory note was signed electronically, the institution must store it electronically and the promissory note must be retrievable in a coherent format. An original electronically signed MPN must be retained by the institution for 3 years after all the loans made on the MPN are satisfied.

* * * * *

5. Section 674.38 is amended by:

A. In paragraph (a)(1), removing the words ''(a)(2)'' and adding, in their place, the words ''(a)(5)''.

B. Redesignating paragraphs (a)(2) and (a)(3) as paragraphs (a)(5) and (a)(7), respectively.

C. Adding new paragraphs (a)(2), (a)(3), (a)(4), and (a)(6).

The additions read as follows:

§ 674.38 Deferment procedures.

(a) * * *

(2) After receiving a borrower's written or verbal request, an institution may grant a deferment under §§ 674.34(b)(1)(ii), 674.34(b)(1)(iii), 674.34(b)(1)(iv), 674.34(d), 674.34(e), and 674.34(h) if the institution is able to confirm that the borrower has received a deferment on another Perkins Loan, a FFEL Loan, or a Direct Loan for the same reason and the same time period. The institution may grant the deferment based on information from the other Perkins Loan holder, the FFEL Loan holder or the Secretary or from an authoritative electronic database maintained or authorized by the Secretary that supports eligibility for the deferment for the same reason and the same time period.

(3) An institution may rely in good faith on the information it receives under paragraph (a)(2) of this section when determining a borrower's eligibility for a deferment unless the institution, as of the date of the determination, has information indicating that the borrower does not qualify for the deferment. An institution must resolve any discrepant information before granting a deferment under paragraph (a)(2) of this section.

(4) An institution that grants a deferment under paragraph (a)(2) of this section must notify the borrower that the deferment has been granted and that the borrower has the option to cancel

the deferment and continue to make payments on the loan.

* * * * *

(6) In the case of a military service deferment under §§ 674.34(h) and 674.35(c)(1), a borrower's representative may request the deferment on behalf of the borrower. An institution that grants a military service deferment based on a request from a borrower's representative must notify the borrower that the deferment has been granted and that the borrower has the option to cancel the deferment and continue to make payments on the loan. The institution may also notify the borrower's representative of the outcome of the deferment request.

* * * * *

6. Section 674.45 is amended by:

A. Redesignating paragraph (e)(3) as paragraph (e)(4).

B. Adding new paragraph (e)(3).

The addition reads as follows:

§ 674.45 Collection procedures.

* * * * *

(e) * * *

(3) For loans placed with a collection firm on or after July 1, 2008, reasonable collection costs charged to the borrower may not exceed—

(i) For first collection efforts, 30 percent of the amount of principal, interest, and late charges collected;

(ii) For second and subsequent collection efforts, 40 percent of the amount of principal, interest, and late charges collected; and

(iii) For collection efforts resulting from litigation, 40 percent of the amount of principal, interest, and late charges collected plus court costs.

* * * * *

7. Section 674.50 is amended by:

A. Adding new paragraphs (c)(11) and (12).

B. In paragraph (e)(1), adding the words '', unless the loan is submitted for assignment under paragraph 674.8(d)(3) of this section'' immediately after the word ''borrower''.

The additions read as follows:

§ 674.50 Assignment of defaulted loans to the United States.

* * * * *

(c) * * *

(11) A record of disbursements for each loan made to a borrower on an MPN that shows the date and amount of each disbursement.

(12)(i) Upon the Secretary's request with respect to a particular loan or loans assigned to the Secretary and evidenced by an electronically signed promissory note, the institution that created the original electronically signed promissory note must cooperate with the Secretary in all activities necessary to enforce the loan or loans. Such institution must provide—

(A) An affidavit or certification regarding the creation and maintenance of the electronic records of the loan or loans in a form appropriate to ensure admissibility of the loan records in a legal proceeding. This certification may be executed in a single record for multiple loans provided that this record is reliably associated with the specific loans to which it pertains; and

(B) Testimony by an authorized official or employee of the institution, if necessary, to ensure admission of the electronic records of the loan or loans in the litigation or legal proceeding to enforce the loan or loans.

(ii) The certification in paragraph (c)(12)(i)(A) of this section must include, if requested by the Secretary—

(A) A description of the steps followed by a borrower to execute the promissory note (such as a flowchart);

(B) A copy of each screen as it would have appeared to the borrower of the loan or loans the Secretary is enforcing when that borrower signed the note electronically;

(C) A description of the field edits and other security measures used to ensure integrity of the data submitted to the originator electronically;

(D) A description of how the executed promissory note has been preserved to ensure that it has not been altered after it was executed;

(E) Documentation supporting the institution's authentication and electronic signature process; and

(F) All other documentary and technical evidence requested by the Secretary to support the validity or the authenticity of the electronically signed promissory note.

(iii) The Secretary may request a record, affidavit, certification or evidence under paragraph (a)(6) of this section as needed to resolve any factual dispute involving a loan that has been assigned to the Secretary, including, but not limited to, a factual dispute raised in connection with litigation or any other legal proceeding, or as needed in connection with loans assigned to the Secretary that are included in a Title IV program audit sample, or for other similar purposes. The institution must respond to any request from the Secretary within 10 business days.

(iv) As long as any loan made to a borrower under an MPN created by an institution is not satisfied, the institution is responsible for ensuring that all parties entitled to access have full and complete access to the electronic loan record.

* * * * *

8. Section 674.56 is amended by revising paragraph (b)(1) to read as follows:

§ 674.56 Employment cancellation—Federal Perkins loan, NDSL, and Defense loan.

* * * * *

(b) * * *

(1) An institution must cancel up to 100 percent of the outstanding balance on a borrower's Federal Perkins loan or NDSL made on or after July 23, 1992, for service as a full-time employee in a public or private nonprofit child or family service agency who is providing services directly and exclusively to high-risk children who are from low-income communities and the families of these children, or who is supervising the provision of services to high-risk children who are from low-income communities and the families of these children. To qualify for a child or family service cancellation, a non-supervisory employee of a child or family service agency must be providing services only to high-risk children from low-income communities and the families of these children. The employee must work directly with the high-risk children from low-income communities, and the services provided to the children's families must be secondary to the services provided to the children.

* * * * *

9. Section 674.61 is amended by:

A. Revising the second sentence in paragraph (a).

B. Revising paragraphs (b), (c), and (d).

The revisions read as follows:

§ 674.61 Discharge for death or disability.

(a) * * * The institution must discharge the loan on the basis of an original or certified copy of the death certificate, or an accurate and complete photocopy of the original or certified copy of the death certificate. * * *

(b) *Total and permanent disability*—(1) *General.* A borrower's Defense, NDSL, or Perkins loan is discharged if the borrower becomes totally and permanently disabled, as defined in § 674.51(s), and satisfies the additional eligibility requirements contained in this section.

(2) *Discharge application process.* (i) To qualify for discharge of a Defense, NDSL, or Perkins loan based on a total and permanent disability, a borrower must submit a discharge application approved by the Secretary to the institution that holds the loan. The application must contain a certification by a physician, who is a doctor of medicine or osteopathy legally authorized to practice in a State, that the

borrower is totally and permanently disabled as defined in § 674.51(s). The borrower must submit the application to the institution within 90 days of the date the physician certifies the application.

(ii) If, after reviewing the borrower's application, the institution determines that the application is complete and supports the conclusion that the borrower is totally and permanently disabled, the institution must suspend collection activities and assign the loan to the Secretary.

(iii) At the time the loan is assigned to the Secretary, the institution must notify the borrower that—

(A) The loan has been assigned to the Secretary for determination of eligibility for a total and permanent disability discharge and that no payments are due on the loan; and

(B) In order to remain eligible for the discharge from the date the physician completes and certifies the borrower's total and permanent disability on the application until the date the Secretary makes an initial eligibility determination—

(*1*) The borrower cannot work and earn money or receive any new title IV loans; and

(*2*) The borrower must, on any loan received prior to the date the physician completed and certified the application, ensure that the full amount of any title IV loan disbursement made to the borrower on or after the date the physician completed and certified the application is returned to the holder within 120 days of the disbursement date.

(3) *Secretary's initial eligibility determination.* (i) The borrower must continue to meet the conditions in paragraph (b)(2)(iii)(B) of this section from the date the physician completes and certifies the borrower's total and permanent disability on the application until the date the Secretary makes an initial determination of the borrower's eligibility in accordance with paragraph (b)(3)(ii) of this section.

(ii) If the Secretary determines that the certification provided by the borrower supports the conclusion that the borrower meets the criteria for a total and permanent disability discharge, the borrower is considered totally and permanently disabled as of the date the physician completes and certifies the borrower's application.

(iii) Upon making an initial determination that the borrower is totally and permanently disabled as defined in § 674.51(s), the Secretary notifies the borrower that the loan will be in a conditional discharge status for a period of up to three years, beginning on the date the Secretary makes the initial determination that the borrower is totally and permanently disabled. The notification to the borrower identifies the conditions of the conditional discharge period specified in paragraph (b)(4)(i) of this section.

(iv) If the Secretary determines that the certification provided by the borrower does not support the conclusion that the borrower meets the criteria for a total and permanent disability discharge, the Secretary notifies the borrower that the application for a disability discharge has been denied, and that the loan is due and payable under the terms of the promissory note.

(4) *Eligibility requirements for a total and permanent disability discharge.* (i) A borrower meets the eligibility criteria for a discharge of a loan based on a total and permanent disability if, during and at the end of the three-year conditional discharge period—

(A) The borrower's annual earnings from employment do not exceed 100 percent of the poverty line for a family of two, as determined in accordance with the Community Service Block Grant Act;

(B) The borrower does not receive a new loan under the Perkins, FFEL or Direct Loan programs, except for a FFEL or Direct Consolidation Loan that does not include any loans that are in a conditional discharge status; and

(C) The borrower ensures, on any loan received prior to the date the physician completed and certified the application, that the full amount of any title IV loan disbursement made on or after the date of the Secretary's initial eligibility determination is returned to the holder within 120 days of the disbursement date.

(ii) During the conditional discharge period, the borrower or, if applicable, the borrower's representative—

(A) Is not required to make any payments on the loan;

(B) Is not considered past due or in default on the loan, unless the loan was past due or in default at the time the conditional discharge was granted;

(C) Must promptly notify the Secretary of any changes in address or phone number;

(D) Must promptly notify the Secretary if the borrower's annual earnings from employment exceed the amount specified in paragraph (b)(4)(i)(A) of this section; and

(E) Must provide the Secretary, upon request, with additional documentation or information related to the borrower's eligibility for a discharge under this section.

(iii) If, at any time during or at the end of the three-year conditional discharge period, the Secretary determines that the borrower does not continue to meet the eligibility requirements for a total and permanent disability discharge, the Secretary ends the conditional discharge period and resumes collection activity on the loan. The Secretary does not require the borrower to pay any interest that accrued on the loan from the date of the Secretary's initial eligibility determination described in paragraph (b)(3) of this section through the end of the conditional discharge period.

(5) *Payments received after the physician's certification of total and permanent disability.* (i) If, after the date the physician completes and certifies the borrower's loan discharge application, the institution receives any payments from or on behalf of the borrower on or attributable to a loan that was assigned to the Secretary for determination of eligibility for a total and permanent disability discharge, the institution must forward those payments to the Secretary for crediting to the borrower's account.

(ii) At the same time that the institution forwards the payment, it must notify the borrower that there is no obligation to make payments on the loan while it is conditionally discharged prior to a final determination of eligibility for a total and permanent disability discharge, unless the Secretary directs the borrower otherwise.

(iii) When the Secretary makes a final determination to discharge the loan, the Secretary returns any payments received on the loan after the date the physician completed and certified the borrower's loan discharge application.

(c) *No Federal reimbursement.* No Federal reimbursement is made to an institution for cancellation of loans due to death or disability.

(d) *Retroactive.* Discharge for death applies retroactively to all Defense, NDSL, and Perkins loans.

* * * * *

PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

10. The authority citation for part 682 continues to read as follows:

Authority: 20 U.S.C. 1071 to 1087–2 unless otherwise noted.

11. Section 682.200(b) is amended by:

A. Amending the definition of *Lender* by revising paragraph (5) and adding paragraph (7).

B. Adding a definition of *School-affiliated organization.*

The revisions and additions read as follows:

§ 682.200 Definitions.

(b) * * *

Lender. * * *

(5)(i) The term *eligible lender* does not include any lender that the Secretary determines, after notice and opportunity for a hearing before a designated Department official, has, directly or through an agent or contractor—

(A) Except as provided in paragraph (5)(ii) of this definition, offered, directly or indirectly, points, premiums, payments, or other inducements to any school or other party to secure applications for FFEL loans or to secure FFEL loan volume. This includes but is not limited to—

(*1*) Payments or offerings of other benefits, including prizes or additional financial aid funds, to a prospective borrower in exchange for applying for or accepting a FFEL loan from the lender;

(*2*) Payments or other benefits to a school, any school-affiliated organization or to any individual in exchange for FFEL loan applications, or application referrals, or a specified volume or dollar amount of loans made, or placement on a school's list of recommended or suggested lenders;

(*3*) Payments or other benefits provided to a student at a school who acts as the lender's representative to secure FFEL loan applications from individual prospective borrowers;

(*4*) Payments or other benefits to a loan solicitor or sales representative of a lender who visits schools to solicit individual prospective borrowers to apply for FFEL loans from the lender;

(*5*) Payment of referral or processing fees to another lender or any other party;

(*6*) Payment of conference or training registration, transportation, and lodging costs for an employee of a school or school-affiliated organization;

(*7*) Payment of entertainment expenses, including expenses for private hospitality suites, tickets to shows or sporting events, meals, alcoholic beverages, and any lodging, rental, transportation, and other gratuities related to lender-sponsored activities for employees of a school or a school-affiliated organization;

(*8*) Undertaking philanthropic activities, including providing scholarships, grants, restricted gifts, or financial contributions in exchange for FFEL loan applications or application referrals, or a specified volume or dollar amount of FFEL loans made, or placement on a school's list of recommended or suggested lenders; and

(*9*) Staffing services to a school as a third-party servicer or otherwise on more than a short-term, emergency basis, and which is non-recurring, to assist a school with financial aid-related functions.

(B) Conducted unsolicited mailings to a student or a student's parents of FFEL loan application forms, except to a student who previously has received a FFEL loan from the lender or to a student's parent who previously has received a FFEL loan from the lender;

(C) Offered, directly or indirectly, a FFEL loan to a prospective borrower to induce the purchase of a policy of insurance or other product or service by the borrower or other person; or

(D) Engaged in fraudulent or misleading advertising with respect to its FFEL loan activities.

(ii) Notwithstanding paragraph (5)(i) of this definition, a lender, in carrying out its role in the FFEL program and in attempting to provide better service, may provide—

(A) Assistance to a school that is comparable to the kinds of assistance provided to a school by the Secretary under the Direct Loan program, as identified by the Secretary in a public announcement, such as a notice in the **Federal Register**;

(B) Support of and participation in a school's or a guaranty agency's student aid and financial literacy-related outreach activities, as long as the name of the entity that developed and paid for any materials is provided to the participants and the lender does not promote its student loan or other products;

(C) Meals, refreshments, and receptions that are reasonable in cost and scheduled in conjunction with training, meeting, or conference events if those meals, refreshments, or receptions are open to all training, meeting, or conference attendees;

(D) Toll-free telephone numbers for use by schools or others to obtain information about FFEL loans and free data transmission service for use by schools to electronically submit applicant loan processing information or student status confirmation data;

(E) A reduced origination fee in accordance with § 682.202(c);

(F) A reduced interest rate as provided under the Act;

(G) Payment of Federal default fees in accordance with the Act;

(H) Purchase of a loan made by another lender at a premium;

(I) Other benefits to a borrower under a repayment incentive program that requires, at a minimum, one or more scheduled payments to receive or retain the benefit; and

(J) Items of nominal value to schools, school-affiliated organizations, and borrowers that are offered as a form of generalized marketing or advertising, or to create good will.

(iii) For the purposes of paragraph (5) of this definition—

(A) The term ''school-affiliated organization'' is defined in section 682.200.

(B) The term ''applications'' includes the Free Application for Federal Student Aid (FAFSA), FFEL loan master promissory notes, and FFEL consolidation loan application and promissory notes.

(C) The term ''other benefits'' includes, but is not limited to, preferential rates for or access to the lender's other financial products, computer hardware or non-loan processing or non-financial aid-related computer software at below market rental or purchase cost, and printing and distribution of college catalogs and other materials at reduced or no cost.

* * * * *

(7) An eligible lender may not make or hold a loan as trustee for a school, or for a school-affiliated organization as defined in this section, unless on or before September 30, 2006—

(i) The eligible lender was serving as trustee for the school or school-affiliated organization under a contract entered into and continuing in effect as of that date; and

(ii) The eligible lender held at least one loan in trust on behalf of the school or school-affiliated organization on that date.

(8) Effective January 1, 2007, and for loans first disbursed on or after that date under a trustee arrangement, an eligible lender operating as a trustee under a contract entered into on or before September 30, 2006, and which continues in effect with a school or a school-affiliated organization, must comply with the requirements of § 682.601(a)(3), (a)(5), and (a)(7). * * *

School-affiliated organization. A school-affiliated organization is any organization that is directly or indirectly related to a school and includes, but is not limited to, alumni organizations, foundations, athletic organizations, and social, academic, and professional organizations.

* * * * *

12. Section 682.202 is amended by:

A. In paragraph (b)(2) introductory text, adding the words, ''and (b)(5)'' immediately after the words ''(b)(4)''.

B. Redesignating paragraph (b)(5) as paragraph (b)(6).

C. Adding a new paragraph (b)(5).

The addition reads as follows:

§ 682.202 Permissible charges by lenders to borrowers.

* * * * *

(b) * * *

(5) For Consolidation loans, the lender may capitalize interest as provided in paragraphs (b)(2) and (b)(3) of this section, except that the lender may capitalize the unpaid interest for a period of authorized in-school deferment only at the expiration of the deferment.

* * * * *

13. Section 682.208 is amended by:

A. Revising paragraph (a).

B. Adding new paragraphs (b)(3) and (b)(4).

C. Adding a new paragraph (i).

The revisions and addition read as follows:

§ 682.208 Due diligence in servicing a loan.

(a) The loan servicing process includes reporting to national credit bureaus, responding to borrower inquiries, establishing the terms of repayment, and reporting a borrower's enrollment and loan status information.

* * * * *

(b) * * *

(3) Upon receipt of a valid identity theft report as defined in section 603(q)(4) of the Fair Credit Reporting Act (15 U.S.C. 1681a) or notification from a credit bureau that information furnished by the lender is a result of an alleged identity theft as defined in § 682.402(e)(14), an eligible lender shall suspend credit bureau reporting for a period not to exceed 120 days while the lender determines the enforceability of a loan.

(i) If the lender determines that a loan does not qualify for a discharge under § 682.402(e)(1)(i)(C), but is nonetheless unenforceable, the lender must—

(A) Notify the credit bureau of its determination; and

(B) Comply with §§ 682.300(b)(2)(ix) and 682.302(d)(1)(viii).

(ii) [Reserved]

(4) If, within 3 years of the lender's receipt of an identity theft report, the lender receives from the borrower evidence specified in § 682.402(e)(3)(v), the lender may submit a claim and receive interest subsidy and special allowance payments that would have accrued on the loan.

* * * * *

(i) A lender shall report enrollment and loan status information, or any Title IV loan-related data required by the Secretary, to the guaranty agency or to the Secretary, as applicable, by the deadline date established by the Secretary.

* * * * *

14. Section 682.209 is amended by adding new paragraph (k) to read as follows:

§ 682.209 Repayment of a loan.

* * * * *

(k) Any lender holding a loan is subject to all claims and defenses that the borrower could assert against the school with respect to that loan if—

(1) The loan was made by the school or a school-affiliated organization;

(2) The lender who made the loan provided an improper inducement, as defined in paragraph (5)(i) of the definition of *Lender* in § 682.200(b), to the school or any other party in connection with the making of the loan;

(3) The school refers borrowers to the lender; or

(4) The school is affiliated with the lender by common control, contract, or business arrangement.

* * * * *

15. Section 682.210 is amended by:

A. In paragraph (i)(1), adding the words, ''or a borrower's representative'' immediately following the words ''a borrower''.

B. Adding new paragraph (i)(5).

C. In paragraph (s)(1), by redesignating the text following the heading as paragraph designation (s)(1)(i).

D. Adding new paragraphs (s)(1)(ii), (s)(1)(iii), (s)(1)(iv), (s)(1)(v), (t)(7), and (t)(8).

The additions read as follows:

§ 682.210 Deferment.

* * * * *

(i) * * *

(5) A lender that grants a military service deferment based on a request from a borrower's representative must notify the borrower that the deferment has been granted and that the borrower has the option to cancel the deferment and continue to make payments on the loan. The lender may also notify the borrower's representative of the outcome of the deferment request.

* * * * *

(s) * * *

(1) * * *

(ii) As a condition for receiving a deferment, except for purposes of paragraph (s)(2) of this section, the borrower must request the deferment and provide the lender with all information and documents required to establish eligibility for the deferment.

(iii) After receiving a borrower's written or verbal request, a lender may grant a deferment under paragraphs (s)(3) through (s)(6) of this section if the lender is able to confirm that the borrower has received a deferment on another FFEL loan or on a Direct Loan for the same reason and the same time period. The lender may grant the deferment based on information from the other FFEL loan holder or the Secretary or from an authoritative electronic database maintained or authorized by the Secretary that supports eligibility for the deferment for the same reason and the same time period.

(iv) A lender may rely in good faith on the information it receives under paragraph (s)(1)(iii) of this section when determining a borrower's eligibility for a deferment unless the lender, as of the date of the determination, has information indicating that the borrower does not qualify for the deferment. A lender must resolve any discrepant information before granting a deferment under paragraph (s)(1)(iii) of this section.

(v) A lender that grants a deferment under paragraph (s)(1)(iii) of this section must notify the borrower that the deferment has been granted and that the borrower has the option to pay interest that accrues on an unsubsidized FFEL loan or to cancel the deferment and continue to make payments on the loan.

* * * * *

(t) * * *

(7) To receive a military service deferment, the borrower, or the borrower's representative, must request the deferment and provide the lender with all information and documents required to establish eligibility for the deferment, except that a lender may grant a borrower a military service deferment under the procedures specified in paragraphs (s)(1)(iii) through (s)(1)(v) of this section.

(8) A lender that grants a military service deferment based on a request from a borrower's representative must notify the borrower that the deferment has been granted and that the borrower has the option to cancel the deferment and continue to make payments on the loan. The lender may also notify the borrower's representative of the outcome of the deferment request.

* * * * *

16. Section 682.211 is amended by:

A. Redesignating paragraphs (f)(6), (f)(7), (f)(8), (f)(9), (f)(10), (f)(11) as paragraphs (f)(7), (f)(8), (f)(9), (f)(10), (f)(11), and (f)(12), respectively.

B. Adding new paragraph (f)(6).

The addition reads as follows:

§ 682.211 Forbearance.

* * * * *

(f)(1) * * *

(6) Upon receipt of a valid identity theft report as defined in section 603(q)(4) of the Fair Credit Reporting Act (15 U.S.C. 1681a) or notification from a credit bureau that information furnished by the lender is a result of an

alleged identity theft as defined in § 682.402(e)(14), for a period not to exceed 120 days necessary for the lender to determine the enforceability of a loan. If the lender determines that the loan does not qualify for discharge under § 682.402(e)(1)(i)(C), but is nonetheless unenforceable, the lender must comply with §§ 682.300(b)(2)(ix) and 682.302(d)(1)(viii).

* * * * *

17. Section 682.212 is amended by:

A. In paragraph (c) introductory text, removing the words ''the Student Loan Marketing Association,''.

B. In paragraph (d), removing the words ''the Student Loan Marketing Association or''.

C. Adding new paragraph (h).

The addition reads as follows:

§ 682.212 Prohibited transactions.

* * * * *

(h)(1) A school may, at its option, make available a list of recommended or suggested lenders, in print or any other medium or form, for use by the school's students or their parents, provided such list—

(i) Is not used to deny or otherwise impede a borrower's choice of lender;

(ii) Does not contain fewer than three lenders that are not affiliated with each other and that will make loans to borrowers or students attending the school; and

(iii) Does not include lenders that have offered, or have been solicited by the school to offer, financial or other benefits to the school in exchange for inclusion on the list or any promise that a certain number of loan applications will be sent to the lender by the school or its students.

(2) A school that provides or makes available a list of recommended or suggested lenders must—

(i) Disclose to prospective borrowers, as part of the list, the method and criteria used by the school in selecting any lender that it recommends or suggests;

(ii) Provide comparative information to prospective borrowers about interest rates and other benefits offered by the lenders;

(iii) Ensure that any benefits offered to borrowers by the lenders are the same for all borrowers at the school;

(iv) Include a prominent statement in any information related to its list of lenders, advising prospective borrowers that they are not required to use one of the school's recommended or suggested lenders;

(v) For first-time borrowers, not assign, through award packaging or other methods, a borrower's loan to a particular lender; and

(vi) Not cause unnecessary certification delays for borrowers who use a lender that has not been recommended or suggested by the school.

(3) For the purposes of paragraph (h) of this section, a lender is affiliated with another lender if—

(i) The lenders are under the ownership or control of the same entity or individuals;

(ii) The lenders are wholly or partly owned subsidiaries of the same parent company;

(iii) The directors, trustees, or general partners (or individuals exercising similar functions) of one of the lenders constitute a majority of the persons holding similar positions with the other lender; or

(iv) One of the lenders is making loans on its own behalf and is also holding loans as a trustee lender for another entity.

* * * * *

18. Section 682.300 is amended by:

A. In paragraph (b)(2)(vii), removing the word ''or'' at the end of the paragraph.

B. In paragraph (b)(2)(viii), removing the punctuation ''.'' at the end of the paragraph and adding, in its place, ''; or''.

C. Adding new paragraph (b)(2)(ix).

The addition reads as follows:

§ 682.300 Payment of interest benefits on Stafford and Consolidation loans.

* * * * *

(b) * * *

(2) * * *

(ix) The date on which the lender determines the loan is legally unenforceable based on the receipt of an identity theft report under § 682.208(b)(3).

* * * * *

19. Section 682.302 is amended by—

A. In paragraph (d)(1)(vi)(B), removing the word ''or'' at the end of the paragraph.

B. In paragraph (d)(1)(vii), by removing the punctuation ''.'' and adding, in its place, ''; or''.

C. Adding new paragraph (d)(1)(viii).

The addition reads as follows:

§ 682.302 Payment of special allowance on FFEL loans.

* * * * *

(d) * * *

(1) * * *

(viii) The date on which the lender determines the loan is legally unenforceable based on the receipt of an identity theft report under § 682.208(b)(3).

* * * * *

20. Section 682.401 is amended by:

A. In paragraph (b)(2)(ii)(A), removing the punctuation ''; '' at the end of the paragraph and adding, in its place, the words '', as defined in 34 CFR 668.3; or''.

B. Revising paragraph (b)(2)(ii)(B).

C. Removing paragraph (b)(2)(ii)(C).

D. In paragraph (b)(20) introductory text, removing the number ''60'' and adding, in its place, the number ''30''.

E. Revising paragraph (e).

The revisions read as follows:

§ 682.401 Basic program agreement.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(B) A period attributable to the academic year that is not less than the period specified in paragraph (b)(2)(ii)(A) of this section, in which the student earns the amount of credit in the student's program of study required by the student's school as the amount necessary for the student to advance in academic standing as normally measured on an academic year basis (for example, from freshman to sophomore or, in the case of schools using clock hours, completion of at least 900 clock hours).

* * * * *

(e) *Prohibited activities.* (1) A guaranty agency may not, directly or through an agent or contractor—

(i) Except as provided in paragraph (e)(2) of this section, offer directly or indirectly from any fund or assets available to the guaranty agency, any premium, payment, or other inducement to any prospective borrower of a FFEL loan, or to a school or school-affiliated organization or an employee of a school or school-affiliated organization, to secure applications for FFEL loans. This includes, but is not limited to—

(A) Payments or offerings of other benefits, including prizes or additional financial aid funds, to a prospective borrower in exchange for processing a loan using the agency's loan guarantee;

(B) Payments or other benefits, including prizes or additional financial aid funds under any title IV or State or private program, to a school or school-affiliated organization based on the school's or organization's voluntary or coerced agreement to use the guaranty agency for processing loans, or a specified volume of loans, using the agency's loan guarantee;

(C) Payments or other benefits to a school or any school-affiliated organization, or to any individual in exchange for FFEL loan applications or application referrals, a specified volume or dollar amount of FFEL loans, or the

placement of a lender that uses the agency's loan guarantee on a school's list of recommended or suggested lenders;

(D) Payment of entertainment expenses, including expenses for private hospitality suites, tickets to shows or sporting events, meals, alcoholic beverages, and any lodging, rental, transportation or other gratuities related to any activity sponsored by the guaranty agency or a lender participating in the agency's program, for school employees or employees of school-affiliated organizations;

(E) Undertaking philanthropic activities, including providing scholarships, grants, restricted gifts, or financial contributions in exchange for FFEL loan applications or application referrals, a specified volume or dollar amount of FFEL loans using the agency's loan guarantee, or the placement of a lender that uses the agency's loan guarantee on a school's list of recommended or suggested lenders; and

(F) Staffing services to a school as a third-party sevicer or otherwise on more than a short-term, emergency basis, which is non-recurring, to assist the institution with financial aid-related functions.

(ii) Assess additional costs or deny benefits otherwise provided to schools and lenders participating in the agency's program on the basis of the lender's or school's failure to agree to participate in the agency's program, or to provide a specified volume of loan applications or loan volume to the agency's program or to place a lender that uses the agency's loan guarantee on a school's list of recommended or suggested lenders.

(iii) Offer, directly or indirectly, any premium, incentive payment, or other inducement to any lender, or any person acting as an agent, employee, or independent contractor of any lender or other guaranty agency to administer or market FFEL loans, other than unsubsidized Stafford loans or subsidized Stafford loans made under a guaranty agency's lender-of-last-resort program, in an effort to secure the guaranty agency as an insurer of FFEL loans. Examples of prohibited inducements include, but are not limited to—

(A) Compensating lenders or their representatives for the purpose of securing loan applications for guarantee;

(B) Performing functions normally performed by lenders without appropriate compensation;

(C) Providing equipment or supplies to lenders at below market cost or rental; and

(D) Offering to pay a lender that does not hold loans guaranteed by the agency a fee for each application forwarded for the agency's guarantee.

(iv) Mail or otherwise distribute unsolicited loan applications to students enrolled in a secondary school or a postsecondary institution, or to parents of those students, unless the potential borrower has previously received loans insured by the guaranty agency.

(v) Conduct fraudulent or misleading advertising concerning loan availability.

(2) Notwithstanding paragraphs (e)(1)(i), (ii), and (iii) of this section, a guaranty agency is not prohibited from providing—

(i) Assistance to a school that is comparable to that provided by the Secretary to a school under the Direct Loan Program, as identified by the Secretary in a public announcement, such as a notice in the **Federal Register**;

(ii) Default aversion activities approved by the Secretary under section 422(h)(4)(B) of the Act;

(iii) Meals and refreshments that are reasonable in cost and provided in connection with guaranty agency provided training of program participants and elementary, secondary, and postsecondary school personnel and with workshops and forums customarily used by the agency to fulfill its responsibilities under the Act;

(iv) Meals, refreshments and receptions that are scheduled in conjunction with training, meeting, or conference events if those meals, refreshments, or receptions are open to all training, meeting, or conference attendees;

(v) Travel and lodging costs that are reasonable as to cost, location, and duration to facilitate the attendance of school staff in training or service facility tours that they would otherwise not be able to undertake, or to participate in the activities of an agency's governing board, a standing official advisory committee, or in support of other official activities of the agency;

(vi) Toll-free telephone numbers for use by schools or others to obtain information about FFEL loans and free data transmission services for use by schools to electronically submit applicant loan processing information or student status confirmation data;

(vii) Payment of Federal default fees in accordance with the Act; and

(viii) Items of nominal value to schools, school-affiliated organizations, and borrowers that are offered as a form of generalized marketing or advertising, or to create good will.

(3) For the purposes of this section—

(i) The term ''school-affiliated organization'' is defined in § 682.200.

(ii) The term ''applications'' includes the FAFSA, FFEL loan master promissory notes, and FFEL consolidation loan application and promissory notes.

(iii) The terms ''other benefits'' includes, but is not limited to, preferential rates for or access to a guaranty agency's products and services, computer hardware or non-loan processing or non-financial aid related computer software at below market rental or purchase cost, and the printing and distribution of college catalogs and other non-counseling or non-student financial aid-related materials at reduced or not costs.

(iv) The terms *premium, incentive payment,* and *other inducement* do not include services directly related to the enhancement of the administration of the FFEL Program the guaranty agency generally provides to lenders that participate in its program. However, the terms *premium, incentive payment,* and *inducement* do apply to other activities specifically intended to secure a lender's participation in the agency's program.

* * * * *

21. Section 682.402 is amended by:

A. Revising the first sentence in paragraph (b)(2).

B. Revising the third sentence in paragraph (b)(3).

C. Revising paragraph (c).

D. In paragraph (e)(2)(iv), adding the words ''or inaccurate'' immediately after the word ''adverse''.

The revisions read as follows:

§ 682.402 Death, disability, closed school, false certification, unpaid refunds, and bankruptcy payments.

* * * * *

(b) * * *

(2) A discharge of a loan based on the death of the borrower (or student in the case of a PLUS loan) must be based on an original or certified copy of the death certificate, or an accurate and complete photocopy of the original or certified copy of the death certificate. * * *

(3) * * * If the lender is not able to obtain an original or certified copy of the death certificate, or an accurate and complete photocopy of the original or certified copy of the death certificate or other documentation acceptable to the guaranty agency, under the provisions of paragraph (b)(2) of this section, during the period of suspension, the lender must resume collection activity from the point that it had been discontinued. * * *

(c)(1) *Total and permanent disability.* A borrower's loan is discharged if the

borrower becomes totally and permanently disabled, as defined in § 682.200(b), and satisfies the additional eligibility requirements contained in this section.

(2) *Discharge application process.* After being notified by the borrower or the borrower's representative that the borrower claims to be totally and permanently disabled, the lender promptly requests that the borrower or the borrower's representative submit, on a form approved by the Secretary, a certification by a physician, who is a doctor of medicine or osteopathy legally authorized to practice in a State, that the borrower is totally and permanently disabled as defined in § 682.200(b). The borrower must submit the application to the lender within 90 days of the date the physician certifies the application. If the lender and guaranty agency approve the discharge claim, under the procedures in paragraph (c)(5) of this section, the guaranty agency must assign the loan to the Secretary.

(3) *Secretary's initial eligibility determination.* (i) During the period from the date the physician completes and certifies the borrower's total and permanent disability on the application until the Secretary makes an initial determination of the borrower's eligibility in accordance with paragraph (c)(3)(ii) of this section—

(A) The borrower cannot work and earn money or receive any new title IV loans; and

(B) The borrower must, on any loan received prior to the date the physician completed and certified the application, ensure that the full amount of any title IV loan disbursement made to the borrower on or after the date the physician completed and certified the application is returned to the holder within 120 days of the disbursement date.

(ii) If the Secretary determines that the certification provided by the borrower supports the conclusion that the borrower meets the criteria for a total and permanent disability discharge, as defined in § 682.200(b), the borrower is considered totally and permanently disabled as of the date the physician completes and certifies the borrower's application.

(iii) Upon making an initial determination that the borrower is totally and permanently disabled as defined in § 682.200(b), the Secretary suspends collection activity and notifies the borrower that the loan will be in a conditional discharge status for a period of up to three years. This notification identifies the conditions of the conditional discharge specified in paragraph (c)(4)(i) of this section. The conditional discharge period begins on the date the Secretary makes the initial determination that the borrower is totally and permanently disabled, as defined in § 682.200(b).

(iv) If the Secretary determines that the certification and information provided by the borrower do not support the conclusion that the borrower meets the criteria for a total and permanent disability discharge in paragraph (c)(4)(i) of this section, the Secretary notifies the borrower that the application for a disability discharge has been denied, and that the loan is due and payable to the Secretary under the terms of the promissory note.

(4) *Eligibility requirements for total and permanent disability discharge.* (i) A borrower meets the eligibility criteria for a discharge of a loan based on total and permanent disability if, during and at the end of the three-year conditional discharge period—

(A) The borrower's annual earnings from employment do not exceed 100 percent of the poverty line for a family of two, as determined in accordance with the Community Service Block Grant Act;

(B) The borrower does not receive a new loan under the Perkins, FFEL, or Direct Loan programs, except for a FFEL or Direct Consolidation Loan that does not include any loans that are in a conditional discharge status; and

(C) The borrower ensures, on any loan received prior to the date the physician completed and certified the application, that the full amount of any title IV loan disbursement made on or after the date of the Secretary's initial eligibility determination is returned to the holder within 120 days of the disbursement date.

(ii) During the conditional discharge period, the borrower or, if applicable, the borrower's representative—

(A) Is not required to make any payments on the loan;

(B) Is not considered delinquent or in default on the loan, unless the borrower was delinquent or in default at the time the conditional discharge was granted;

(C) Must promptly notify the Secretary of any changes in address or phone number;

(D) Must promptly notify the Secretary if the borrower's annual earnings from employment exceed the amount specified in paragraph (c)(4)(i)(A) of this section; and

(E) Must provide the Secretary, upon request, with additional documentation or information related to the borrower's eligibility for discharge under this section.

(iii) If the borrower satisfies the criteria for a total and permanent disability discharge during and at the end of the conditional discharge period, the balance of the loan is discharged at the end of the conditional discharge period and any payments received after the physician completed and certified the borrower's loan discharge application are returned.

(iv) If, at any time during the three-year conditional discharge period, the borrower does not continue to meet the eligibility criteria for a total and permanent disability discharge, the Secretary ends the conditional discharge period and resumes collection activity on the loan. The Secretary does not require the borrower to pay any interest that accrued on the loan from the date of the initial determination described in paragraph (c)(3)(ii) of this section through the end of the conditional discharge period.

(5) *Lender and guaranty agency responsibilities.* (i) After being notified by a borrower or a borrower's representative that the borrower claims to be totally and permanently disabled, the lender must continue collection activities until it receives either the certification of total and permanent disability from a physician or a letter from a physician stating that the certification has been requested and that additional time is needed to determine if the borrower is totally and permanently disabled, as defined in § 682.200(b). Except as provided in paragraph (c)(5)(iii) of this section, after receiving the physician's certification or letter the lender may not attempt to collect from the borrower or any endorser.

(ii) The lender must submit a disability claim to the guaranty agency if the borrower submits a certification by a physician and the lender makes a determination that the certification supports the conclusion that the borrower meets the criteria for a total and permanent disability discharge, as specified in paragraph (c)(4)(i) of this section.

(iii) If the lender determines that a borrower who claims to be totally and permanently disabled is not totally and permanently disabled, as defined in § 682.200(b), or if the lender does not receive the physician's certification of total and permanent disability within 60 days of the receipt of the physician's letter requesting additional time, as described in paragraph (c)(3) of this section, the lender must resume collection and is deemed to have exercised forbearance of payment of both principal and interest from the date collection activity was suspended. The lender may capitalize, in accordance

with § 682.202(b), any interest accrued and not paid during that period.

(iv) The guaranty agency must pay a claim submitted by the lender if the guaranty agency has reviewed the application and determined that it is complete and that it supports the conclusion that the borrower meets the criteria for a total and permanent disability discharge, as specified in paragraph (c)(4)(i) of this section.

(v) If the guaranty agency does not pay the disability claim, the guaranty agency must return the claim to the lender with an explanation of the basis for the agency's denial of the claim. Upon receipt of the returned claim, the lender must notify the borrower that the application for a disability discharge has been denied, provide the basis for the denial, and inform the borrower that the lender will resume collection on the loan. The lender is deemed to have exercised forbearance of both principal and interest from the date collection activity was suspended until the first payment due date. The lender may capitalize, in accordance with § 682.202(b), any interest accrued and not paid during that period.

(vi) If the guaranty agency pays the disability claim, the lender must notify the borrower that—

(A) The loan will be assigned to the Secretary for determination of eligibility for a total and permanent disability discharge and that no payments are due on the loan; and

(B) To remain eligible for the discharge from the date the physician completes and certifies the borrower's total and permanent disability on the application until the Secretary makes an initial eligibility determination, the borrower—

(*1*) Cannot work and earn money or receive any new title IV loans; and

(*2*) Must ensure that the full amount of any title IV loan disbursement made to the borrower on or after the date the physician completed and certified the application is returned to the holder within 120 days of the disbursement date.

(vii) After receiving a claim payment from the guaranty agency, the lender must forward to the guaranty agency any payments subsequently received from or on behalf of the borrower.

(viii) The Secretary reimburses the guaranty agency for a disability claim paid to the lender after the agency pays the claim to the lender.

(ix) The guaranty agency must assign the loan to the Secretary after the guaranty agency pays the disability claim.

* * * * *

22. Section 682.406 is amended by adding new paragraph (d) to read as follows:

§ 682.406 Conditions for claim payments from the Federal Fund and for reinsurance coverage.

* * * * *

(d) A guaranty agency may not make a claim payment from the Federal Fund or receive a reinsurance payment on a loan if the lender offered or provided an improper inducement as defined in paragraph (5)(i) of the definition of lender in § 682.200(b).

23. Section 682.409 is amended by adding new paragraphs (c)(4)(vii) and (viii).

The additions read as follows:

§ 682.409 Mandatory assignment by guaranty agencies of defaulted loans to the Secretary.

* * * * *

(c) * * *

(4) * * *

(vii) The record of the lender's disbursement of Stafford and PLUS loan funds to the school for delivery to the borrower.

(viii) If the MPN or promissory note was signed electronically, the name and location of the entity in possession of the original electronic MPN or promissory note.

* * * * *

24. Section 682.411 is amended by revising paragraph (o) as follows:

§ 682.411 Lender due diligence in collecting guaranty agency loans.

* * * * *

(o) *Preemption.* The provisions of this section—

(1) Preempt any State law, including State statutes, regulations, or rules, that would conflict with or hinder satisfaction of the requirements or frustrate the purposes of this section; and

(2) Do not preempt provisions of the Fair Credit Reporting Act that provide relief to a borrower while the lender determines the legal enforceability of a loan when the lender receives a valid identity theft report or notification from a credit bureau that information furnished is a result of an alleged identity theft as defined in § 682.402(e)(14).

* * * * *

25. Section 682.413 is amended by:

A. Adding new paragraph (h).

B. In the Note at the end of the section, removing the word ''Note'' and adding, in its place, the words ''Note to Section 682.413''.

The addition reads as follows:

§ 682.413 Remedial actions.

* * * * *

(h) In any action to require repayment of funds or to withhold funds from a guaranty agency, or to limit, suspend, or terminate a guaranty agency based on a violation of § 682.401(e), if the Secretary finds that the guaranty agency provided or offered the payments or activities listed in § 682.401(e)(1), the Secretary applies a rebuttable presumption that the payments or activities were offered or provided to secure applications for FFEL loans or to secure FFEL loan volume. To reverse the presumption, the guaranty agency must present evidence that the activities or payments were provided for a reason unrelated to securing applications for FFEL loans or securing FFEL loan volume.

* * * * *

26. Section 682.414 is amended by:

A. Adding new paragraph (a)(5)(iv).

B. Adding new paragraph (a)(6).

C. Revising paragraph (b)(4).

The additions and revisions read as follows:

§ 682.414 Records, reports, and inspection requirements for guaranty agency programs.

(a) * * *

(5) * * *

(iv) If a lender made a loan based on an electronically signed MPN, the holder of the original electronically signed MPN must retain that original MPN for at least 3 years after all the loans made on the MPN have been satisfied.

(6)(i) Upon the Secretary's request with respect to a particular loan or loans assigned to the Secretary and evidenced by an electronically signed promissory note, the guaranty agency and the lender that created the original electronically signed promissory note must cooperate with the Secretary in all activities necessary to enforce the loan or loans. The guaranty agency or lender must provide—

(A) An affidavit or certification regarding the creation and maintenance of the electronic records of the loan or loans in a form appropriate to ensure admissibility of the loan records in a legal proceeding. This certification may be executed in a single record for multiple loans provided that this record is reliably associated with the specific loans to which it pertains; and

(B) Testimony by an authorized official or employee of the guaranty agency or lender, if necessary to ensure admission of the electronic records of the loan or loans in the litigation or legal proceeding to enforce the loan or loans.

(ii) The certification described in paragraph (a)(6)(i) of this section must include, if requested by the Secretary—

(A) A description of the steps followed by a borrower to execute the promissory note (such as a flow chart);

(B) A copy of each screen as it would have appeared to the borrower of the loan or loans the Secretary is enforcing when the borrower signed the note electronically;

(C) A description of the field edits and other security measures used to ensure integrity of the data submitted to the originator electronically;

(D) A description of how the executed promissory note has been preserved to ensure that is has not been altered after it was executed;

(E) Documentation supporting the lender's authentication and electronic signature process; and

(F) All other documentary and technical evidence requested by the Secretary to support the validity or the authenticity of the electronically signed promissory note.

(iii) The Secretary may request a record, affidavit, certification or evidence under paragraph (a)(6) of this section as needed to resolve any factual dispute involving a loan that has been assigned to the Secretary including, but not limited to, a factual dispute raised in connection with litigation or any other legal proceeding, or as needed in connection with loans assigned to the Secretary that are included in a Title IV program audit sample, or for other similar purposes. The guaranty agency must respond to any request from the Secretary within 10 business days.

(iv) As long as any loan made to a borrower under a MPN created by the lender is not satisfied, the holder of the original electronically signed promissory note is responsible for ensuring that all parties entitled to access to the electronic loan record, including the guaranty agency and the Secretary, have full and complete access to the electronic loan record.

(b) * * *

(4) A report to the Secretary of the borrower's enrollment and loan status information, or any Title IV loan-related data required by the Secretary, by the deadline date established by the Secretary.

* * * * *

27. Section 682.602 is added to read as follows:

§ 682.602 Rules for a school or school-affiliated organization that makes or originates loans through an eligible lender trustee.

(a) A school or school-affiliated organization may not contract with an eligible lender to serve as trustee for the school or school-affiliated organization unless—

(1) The school or school-affiliated organization originated and continues or renews a contract made on or before September 30, 2006 with the eligible lender; and

(2) The eligible lender held at least one loan in trust on behalf of the school or school-affiliated organization on September 30, 2006.

(b) Effective January 1, 2007, and for loans first disbursed on or after that date under a lender trustee arrangement that continues in effect after September 30, 2006—

(1) A school in a trustee arrangement or affiliated with an organization involved in a trustee arrangement to originate loans must comply with the requirements of § 682.601(a), except for paragraphs (a)(3), (a)(4), (a)(7), and (a)(9) of that section; and

(2) A school-affiliated organization involved in a trustee arrangement to make loans must comply with the requirements of § 682.601(a)(5) and (a)(8).

(Authority: 20 U.S.C. 1082, 1085)

28. Section 682.603 is amended by:

A. In paragraph (a), at the end of the last sentence, removing the words ''on the application by the student'' and adding, in their place, the words ''by the borrower and, in the case of a parent borrower of a PLUS loan, the student and the parent borrower''.

B. In paragraph (b) introductory text, removing the words ''making application for the loan''.

C. In paragraph (c), removing the reference ''paragraph (e) of this section'' and adding in its place, the reference ''paragraph (f) of this section''.

D. Redesignating paragraphs (d), (e), (f), (g), (h), and (i) as paragraphs (e), (f), (g), (h), (i), and (j), respectively.

E. Adding a new paragraph (d).

F. In the introductory language in newly redesignated paragraph (e), removing the words '' application, or combination of loan applications,'' and adding, in their place, the words '', or a combination of loans,''.

G. In newly redesignated paragraph (e)(2) introductory text, adding the words ''for the period of enrollment'' after the word ''attendance''.

H. In newly redesignated paragraph (e)(2)(ii), adding the word ''Subsidized'' immediately before the word ''Stafford'' and removing the words ''that is eligible for interest benefits'' immediately after the word ''loan''.

I. Revising newly redesignated paragraph (f).

J. In newly redesignated paragraph (g)(2)(i), removing the words '', not to exceed 12 months,''.

The addition and revision read as follows:

§ 682.603 Certification by a participating school in connection with a loan application.

* * * * *

(d) Before certifying a PLUS loan application for a graduate or professional student borrower, the school must determine the borrower's eligibility for a Stafford loan. If the borrower is eligible for a Stafford loan but has not requested the maximum Stafford loan amount for which the borrower is eligible, the school must—

(1) Notify the graduate or professional student borrower of the maximum Stafford loan amount that he or she is eligible to receive and provide the borrower with a comparison of—

(i) The maximum interest rate for a Stafford loan and the maximum interest rate for a PLUS loan;

(ii) Periods when interest accrues on a Stafford loan and periods when interest accrues on a PLUS loan; and

(iii) The point at which a Stafford loan enters repayment and the point at which a PLUS loan enters repayment; and

(2) Give the graduate or professional student borrower the opportunity to request the maximum Stafford loan amount for which the borrower is eligible.

* * * * *

(f) In certifying loans, a school—

(1) May not refuse to certify, or delay certification, of a Stafford or PLUS loan based on the borrower's selection of a particular lender or guaranty agency;

(2) May not, for first-time borrowers, assign through award packaging or other methods, a borrower's loan to a particular lender;

(3) May refuse to certify a Stafford or PLUS loan or may reduce the borrower's determination of need for the loan if the reason for that action is documented and provided to the borrower in writing, provided that—

(i) The determination is made on a case-by-case basis; and

(ii) The documentation supporting the determination is retained in the student's file; and

(4) May not, under paragraph (f)(1), (2), and (3) of this section, engage in any pattern or practice that results in a denial of a borrower's access to FFEL loans because of the borrower's race, sex, color, religion, national origin, age, handicapped status, income, or

selection of a particular lender or guaranty agency.

* * * * *

29. Section 682.604 is amended by:

A. Revising paragraph (f)(1).

B. Redesignating paragraphs (f)(2), (f)(3), and (f)(4) as paragraphs (f)(5), (f)(6), and (f)(7), respectively.

C. Adding new paragraphs (f)(2), (f)(3), and (f)(4).

D. Revising newly redesignated paragraph (f)(5) introductory text.

E. In newly redesignated paragraph (f)(5)(iv), removing the words, ''of a Stafford loan''.

F. In newly redesignated paragraph (f)(5)(v), adding the words '', or student borrowers with Stafford and PLUS loans, depending on the types of loans the borrower has obtained,'' immediately after the words ''Stafford loan borrowers''.

G. In paragraph (g)(2)(i), removing the words ''Stafford or SLS loans'' and adding, in their place, ''Stafford loans, or student borrowers who have obtained Stafford and PLUS loans, depending on the types of loans the student borrower has obtained,''.

The revision and additions read as follows:

§ 682.604 Processing the borrower's loan proceeds and counseling borrowers.

* * * * *

(f) *Initial counseling.* (1) A school must ensure that initial counseling is conducted with each Stafford Loan borrower prior to its release of the first disbursement unless the student borrower has received a prior Federal Stafford, Federal SLS, or Direct subsidized or unsubsidized loan.

(2) A school must ensure that initial counseling is conducted with each graduate or professional student PLUS loan borrower prior to its release of the first disbursement, unless the student has received a prior Federal PLUS loan or Direct PLUS loan. The initial counseling must—

(i) Inform the student borrower of sample monthly repayment amounts based on a range of student levels of indebtedness or on the average indebtedness of graduate or professional student PLUS loan borrowers, or student borrowers with Stafford and PLUS loans, depending on the types of loans the borrower has obtained, at the same school or in the same program of study at the same school;

(ii) For a graduate or professional student who has received a prior Federal Stafford, or Direct subsidized or unsubsidized loan, provide the information specified in paragraph (d)(1)(i) through (d)(1)(iii) of this section; and

(iii) For a graduate or professional student who has not received a prior Federal Stafford, or Direct subsidized or unsubsidized loan, provide the information specified in paragraph (f)(5)(i) through (f)(5)(iv) of this section.

(3) Initial counseling must be conducted either in person, by audiovisual presentation, or by interactive electronic means.

(4) A school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions regarding those programs. As an alternative, prior to releasing the proceeds of a loan in the case of a student borrower enrolled in a correspondence program or a student borrower enrolled in a study-abroad program that the home institution approves for credit, the counseling may be provided through written materials.

(5) Initial counseling for Stafford Loan borrowers must—

* * * * *

30. Section 682.705 is amended by adding new paragraph (c) to read as follows:

§ 682.705 Suspension proceedings.

* * * * *

(c) In any action to suspend a lender based on a violation of the prohibitions in section 435(d)(5) of the Act, if the Secretary, the designated Department official, or hearing official finds that the lender provided or offered the payments or activities listed in paragraph (5)(i) of the definition of *lender* in § 682.200(b), the Secretary or the official applies a rebuttable presumption that the payments or activities were offered or provided to secure applications for FFEL loans or to secure FFEL loan volume. To reverse the presumption, the lender must present evidence that the activities or payments were provided for a reason unrelated to securing applications for FFEL loans or securing FFEL loan volume.

31. Section 682.706 is amended by adding new paragraph (d) to read as follows:

§ 682.706 Limitation or termination proceedings.

* * * * *

(d) In any action to limit or terminate a lender's eligibility based on a violation of the prohibitions in section 435(d)(5) of the Act, if the Secretary, the designated Department official or hearing official finds that the lender provided or offered the payments or activities listed in paragraph (5)(i) of the definition of *Lender* in § 682.200(b), the Secretary or the official applies a rebuttable presumption that the payments or activities were offered or provided to secure applications for FFEL loans. To reverse the presumption, the lender must present evidence that the activities or payments were provided for a reason unrelated to securing applications for FFEL loans or securing FFEL loan volume.

* * * * *

PART 685—WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM

32. The authority citation for part 685 continues to read as follows:

Authority: 20 U.S.C. 1087a et. seq., unless otherwise noted.

33. Section 685.204 is amended by:

A. In paragraph (b)(1)(iii)(A) introductory text, removing the words ''(b)(1)(i)'' and adding, in their place, the words ''(b)(1)(i)(A)''.

B. In paragraph (d)(1), removing the word ''the'' and adding, in its place, the word ''The''.

C. In paragraph (d)(2), removing the word ''the'' and adding, in its place, the word ''The''.

D. Adding new paragraph (g).

The addition reads as follows:

§ 685.204 Deferments.

* * * * *

(g)(1) To receive a deferment, except as provided under paragraph (b)(1)(i)(A) of this section, the borrower must request the deferment and provide the Secretary with all information and documents required to establish eligibility for the deferment. In the case of a deferment granted under paragraph (e)(1) of this section, a borrower's representative may request the deferment and provide the required information and documents on behalf of the borrower.

(2) After receiving a borrower's written or verbal request, the Secretary may grant a deferment under paragraphs (b)(1)(i)(B), (b)(1)(i)(C), (b)(2)(i), (b)(3)(i), and (e)(1) of this section if the Secretary confirms that the borrower has received a deferment on a Perkins or FFEL Loan for the same reason and the same time period.

(3) The Secretary relies in good faith on the information obtained under paragraph (g)(2) of this section when determining a borrower's eligibility for a deferment, unless the Secretary, as of the date of determination, has information indicating that the borrower does not qualify for the deferment. The Secretary resolves any discrepant information before granting a deferment under paragraph (g)(2) of this section.

(4) If the Secretary grants a deferment under paragraph (g)(2) of this section, the Secretary notifies the borrower that

the deferment has been granted and that the borrower has the option to cancel the deferment and continue to make payments on the loan.

(5) If the Secretary grants a military service deferment based on a request from a borrower's representative, the Secretary notifies the borrower that the deferment has been granted and that the borrower has the option to cancel the deferment and continue to make payments on the loan. The Secretary may also notify the borrower's representative of the outcome of the deferment request.

* * * * *

34. Section 685.212 is amended by revising paragraph (a)(1) and (2) to read as follows:

§ 685.212 Discharge of a loan obligation.

(a) * * * (1) If a borrower (or a student on whose behalf a parent borrowed a Direct PLUS Loan) dies, the Secretary discharges the obligation of the borrower and any endorser to make any further payments on the loan based on an original or certified copy of the borrower's (or student's in the case of a Direct PLUS loan obtained by a parent borrower) death certificate, or an accurate and complete photocopy of the original or certified copy of the borrower's (or student's in the case of a Direct PLUS loan obtained by a parent borrower) death certificate.

(2) If an original or certified copy of the death certificate, or an accurate and complete photocopy of the original or certified copy of the death certificate is not available, the Secretary discharges the loan only if other reliable documentation establishes, to the Secretary's satisfaction, that the borrower (or student) has died. The Secretary discharges a loan based on documentation other than an original or certified copy of the death certificate, or an accurate and complete photocopy of the original or certified copy of the death certificate only under exceptional circumstances and on a case-by-case basis.

* * * * *

35. Section 685.213 is revised to read as follows:

§ 685.213 Total and permanent disability.

(a) *General.* A borrower's Direct Loan is discharged if the borrower becomes totally and permanently disabled, as defined in § 682.200(b), and satisfies the additional eligibility requirements contained in this section.

(b) *Discharge application process.* (1) To qualify for a discharge of a Direct Loan based on a total and permanent disability, a borrower must submit to the Secretary a certification by a physician, who is a doctor of medicine or osteopathy legally authorized to practice in a State, that the borrower is totally and permanently disabled as defined in § 682.200(b). The certification must be on a form approved by the Secretary. The borrower must submit the application to the Secretary within 90 days of the date the physician certifies the application.

(2) Upon receipt of the borrower's application, the Secretary notifies the borrower that—

(i) No payments are due on the loan; and

(ii) The borrower, in order to remain eligible for the discharge from the date the physician completes and certifies the borrower's total and permanent disability on the application until the date the Secretary makes an initial eligibility determination—

(A) Cannot work and earn money or receive any new title IV loans; and

(B) Must, on any loan received prior to the date the physician completed and certified the application, ensure that the full amount of any title IV loan disbursement made to the borrower on or after the date the physician completed and certified the application is returned to the holder within 120 days of the disbursement date.

(c) *Initial determination of eligibility.* (1) The borrower must continue to meet the conditions in paragraph (b)(2)(ii) of this section from the date the physician completes and certifies the borrower's total and permanent disability on the application until the Secretary makes an initial determination of the borrower's eligibility in accordance with paragraph (c)(2) of this section.

(2) If, after reviewing the borrower's application, the Secretary determines that the certification provided by the borrower supports the conclusion that the borrower meets the criteria for a total and permanent disability discharge, the borrower is considered totally and permanently disabled as of the date the physician completes and certifies the borrower's application.

(3) The Secretary suspends collection activity and notifies the borrower that the loan will be in a conditional discharge status for a period of up to three years upon making an initial determination that the borrower is totally and permanently disabled, as defined in § 682.200(b). This notification identifies the conditions of the conditional discharge period specified in paragraph (d)(1) of this section. The conditional discharge period begins on the date the Secretary makes the initial determination that the borrower is totally and permanently disabled.

(4) If the Secretary determines that the certification provided by the borrower does not support the conclusion that the borrower meets the criteria for a total and permanent disability discharge, the Secretary notifies the borrower that the application for a disability discharge has been denied, and that the loan is due and payable under the terms of the promissory note.

(d) *Eligibility requirements for total and permanent disability.* (1) A borrower meets the eligibility requirements for a total and permanent disability discharge if, during and at the end of the three-year conditional discharge period—

(A) The borrower's annual earnings from employment do not exceed 100 percent of the poverty line for a family of two, as determined in accordance with the Community Service Block Grant Act;

(B) The borrower does not receive a new loan under the Perkins, FFEL or Direct Loan programs, except for a FFEL or Direct Consolidation Loan that does not include any loans that are in a conditional discharge status; and

(C) The borrower ensures, on any loan received prior to the date the physician completed and certified the application, that the full amount of any title IV loan disbursement made on or after the date of the Secretary's initial eligibility determination is returned to the holder within 120 days of the disbursement date.

(2) During the conditional discharge period, the borrower or, if applicable, the borrower's representative—

(A) Is not required to make any payments on the loan;

(B) Is not considered past due or in default on the loan, unless the loan was past due or in default at the time the conditional discharge was granted;

(C) Must promptly notify the Secretary of any changes in address or phone number;

(D) Must promptly notify the Secretary if the borrower's annual earnings from employment exceed the amount specified in paragraph (d)(1)(A) of this section; and

(E) Must provide the Secretary, upon request, with additional documentation or information related to the borrower's eligibility for a discharge under this section.

(3) If the borrower continues to meet the eligibility requirements for a total and permanent disability discharge during and at the end of the three-year conditional discharge period, the Secretary—

(i) Discharges the obligation of the borrower and any endorser to make any

further payments on the loan at the end of that period; and

(ii) Returns any payments received after the date the physician completed and certified the borrower's loan discharge application.

(4) If, at any time during or at the end of the three-year conditional discharge period, the borrower does not continue to meet the eligibility requirements for a total and permanent disability discharge, the Secretary resumes collection activity on the loan. The Secretary does not require the borrower to pay any interest that accrued on the loan from the date of the Secretary's initial determination described in paragraph (c)(2) of this section through the end of the conditional discharge period.

* * * * *

36. Section 685.301 is amended by:

A. In paragraph (a)(1), removing the words ''in the application by the student'' and adding, in their place, the words, ''by the borrower and, in the case of a parent PLUS loan borrower, the student and the parent borrower.''

B. Redesignating paragraphs (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), and (a)(9) as (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9), and (a)(10), respectively.

C. Adding new paragraph (a)(3).

D. Revising newly redesignated paragraph (a)(10)(ii)(A).

The addition and revisions read as follows:

§ 685.301 Determining eligibility and loan amount.

(a) * * *

(3) Before originating a Direct PLUS Loan for a graduate or professional student borrower, the school must determine the borrower's eligibility for a Direct Subsidized and a Direct Unsubsidized Loan. If the borrower is eligible for a Direct Subsidized or Direct Unsubsidized Loan but has not requested the maximum Direct Subsidized or Direct Unsubsidized Loan amount for which the borrower is eligible, the school must—

(i) Notify the graduate or professional student borrower of the maximum Direct Subsidized or Direct Unsubsidized Loan amount that he or she is eligible to receive and provide the borrower with a comparison of—

(A) The maximum interest rate for a Direct Subsidized Loan and a Direct Unsubsidized Loan and the maximum interest rate for a Direct PLUS Loan;

(B) Periods when interest accrues on a Direct Subsidized Loan and a Direct Unsubsidized Loan, and periods when interest accrues on a Direct PLUS Loan; and

(C) The point at which a Direct Subsidized Loan and a Direct Unsubsidized Loan enters repayment, and the point at which a Direct PLUS Loan enters repayment; and

(ii) Give the graduate or professional student borrower the opportunity to request the maximum Direct Subsidized or Direct Unsubsidized Loan amount for which the borrower is eligible.

* * * * *

(10) * * *

(ii) * * *

(A) Generally an academic year, as defined by the school in accordance with 34 CFR 668.3, except that the school may use a longer period of time corresponding to the period to which the school applies the annual loan limits under § 685.203; or

* * * * *

37. Section 685.304 is amended by:

A. In paragraph (a)(1) removing the words ''(a)(4)'' and adding, in their place, the words ''(a)(5)''.

B. Redesignating paragraphs (a)(2), (a)(3), (a)(4), (a)(5), and (a)(6) as paragraphs (a)(3), (a)(4), (a)(5), (a)(6), and (a)(7), respectively.

C. Adding a new paragraph (a)(2).

D. Revising newly redesignated paragraph (a)(4) introductory text.

E. In newly redesignated paragraph (a)(4)(iv) removing the words ''Direct Unsubsidized Loan borrowers'' and adding, in their place, the words ''Direct Unsubsidized Loan borrowers, or student borrowers with Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans, depending on the types of loans the borrower has obtained,''.

F. In newly redesignated paragraph (a)(5) introductory text, removing the words ''(a)(1)–(3)'' and adding, in their place, the words ''(a)(1) through (4)''.

G. In newly redesignated paragraph (a)(5)(i), removing the words ''(a)(1)'' and adding, in their place, the words ''(a)(1) or (a)(2)'', and removing the words ''(a)(3)'' and adding in their place the words ''(a)(4)''.

H. In paragraph (b)(4)(i), removing the words ''Direct Subsidized Loan and Direct Unsubsidized Loan borrowers'' and adding, in their place, the words ''student borrowers who have obtained Direct Subsidized Loans and Direct Unsubsidized Loans, or student borrowers who have obtained Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans, depending on the types of loans the student borrower has obtained, for attendance''.

The addition reads as follows:

§ 685.304 Counseling borrowers.

(a) * * *

(2) Except as provided in paragraph (a)(5) of this section, a school must ensure that initial counseling is conducted with each graduate or professional student Direct PLUS Loan borrower prior to making the first disbursement of the loan unless the student borrower has received a prior Direct PLUS Loan or Federal PLUS Loan. The initial counseling must—

(i) Inform the student borrower of sample monthly repayment amounts based on a range of student levels or indebtedness or on the average indebtedness of graduate or professional student PLUS loan borrowers, or student borrowers with Direct PLUS Loans and Direct Subsidized Loans or Direct Unsubsidized Loans, depending on the types of loans the borrower has obtained, at the same school or in the same program of study at the same school;

(ii) For a graduate or professional student who has received a prior Federal Stafford, or Direct Subsidized or Unsubsidized Loan provide the information specified in paragraph (a)(3)(i) of this section; and

(iii) For a graduate or professional student who has not received a prior Federal Stafford, or Direct Subsidized or Direct Unsubsidized Loan, provide the information specified in paragraph (a)(4)(i) through (a)(4)(iv) of this section.

* * * * *

(4) Initial counseling for Direct Subsidized Loan and Direct Unsubsidized Loan borrowers must—

* * * * *

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Federal Register

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June 12, 2007

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Proposed Revised Designation of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*); Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AU37

Endangered and Threatened Wildlife and Plants; Proposed Revised Designation of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to revise the critical habitat designation for the northern spotted owl (*Strix occidentalis caurina*) under the Endangered Species Act of 1973, as amended (Act). In 1992, we designated critical habitat for the northern spotted owl on 6,887,000 acres (ac) (2,787,070 hectares (ha)) of Federal lands in California, Oregon, and Washington. In this document we propose revised critical habitat for the northern spotted owl on a total of approximately 5,337,839 acres (ac) (2,160,194 hectares (ha)) of Federal lands in California, Oregon, and Washington. If adopted, this action would result in a net decrease of approximately 1,549,161 ac (626,915 ha) of designated critical habitat for the northern spotted owl.

DATES: We will accept comments from all interested parties until August 13, 2007. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by July 27, 2007.

ADDRESSES: If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods:

1. You may mail or hand-deliver written comments and information to Kemper McMaster, Field Supervisor, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE 98th Ave., Suite 100, Portland, OR 97266.

2. You may send comments by electronic mail (e-mail) to *northernspottedowlCH@fws.gov*. Please see the Public Comments Solicited section below for file format and other information about electronic filing.

3. You may fax your comments to our Oregon Fish and Wildlife Office at 503–231–6195.

4. You may go to the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions provided for submitting comments.

Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the Oregon Fish and Wildlife Office, at the address above; the Western Washington Fish and Wildlife Office, 510 Desmond Drive SE., Suite 101, Lacey, WA 98503; and the Yreka Fish and Wildlife Office, 1829 S. Oregon St., Yreka, CA 96097.

FOR FURTHER INFORMATION CONTACT: Kemper McMaster, Field Supervisor, Oregon Fish and Wildlife Office (see **ADDRESSES**) (telephone 503–231–6179); Ken Berg, Field Supervisor, Western Washington Fish and Wildlife Office (see **ADDRESSES**) (telephone 360–753–9440); or Phillip Detrich, Field Supervisor, Yreka Fish and Wildlife Office (see **ADDRESSES**) (telephone 530–842–5763). People who use a telecommunications device for the deaf (TTD) may call the Federal Information Relay Service (FIRS) at 800–877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) The reasons why habitat should or should not be designated as critical habitat as provided by section 4 of the Act (16. U.S.C. 1531 *et seq.*), including whether the benefit of designation would outweigh threats to the species caused by designation such that the designation of critical habitat is prudent;

(2) Specific information on the amount and distribution of northern spotted owl habitat, what areas should be included in the revised designation that were occupied at the time of listing that contain the features that are essential for the conservation of the species and why, and what areas that were not occupied at the time of listing are essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised critical habitat;

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposed revised designation and, in particular, any impacts on small entities; and the benefits of including or excluding areas that exhibit these impacts; and

(5) Whether any areas should or should not be excluded from the revised designation under section 4(b)(2) of the Act and why; and

(6) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES** section). Please submit e-mail comments to *northernspottedowlCH@fws.gov* in ASCII file format and avoid the use of special characters or any form of encryption. Please also include ''Attn: northern spotted owl critical habitat'' in your e-mail subject header. If you do not receive a confirmation from the system that we have received your message, contact us directly by calling our Oregon Fish and Wildlife Office at 503–231–6179. Please note that the e-mail address *nor0thernspottedowlCH@fws.gov* will be closed out at the termination of the public comment period.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Background

Ecological Considerations

Physical Description and Taxonomy

The northern spotted owl is a medium-sized owl and the largest of the three subspecies of spotted owls currently recognized by the American Ornithologists' Union (Gutiérrez *et al.* 1995, p. 2). It is dark brown with a barred tail and white spots on the head and breast, and has dark brown eyes that are surrounded by prominent facial disks. The taxonomic separation of these three subspecies is supported by varied characteristics (reviewed in Courtney *et al.* 2004, pp. 3–3 to 3–31), including genetic (Barrowclough and Gutiérrez 1990, p. 739; Barrowclough *et al.* 1999, p. 922; Haig *et al.* 2004b, p. 1353; Barrowclough *et al.* 2005, p.

1113), morphological (Gutiérrez *et al.* 1995, pp. 2 to 3), behavioral (Van Gelder 2003, p. 30) and biogeographical information (Barrowclough *et al.* 1999, p. 928).

Distribution

The current range of the northern spotted owl extends from southwest British Columbia through the Cascade Mountains, coastal ranges, and intervening forested lands in Washington, Oregon, and California, as far south as Marin County, California (USFWS 1990, pp. 13, 60; June 26, 1990). The subspecies is listed as threatened under the Act throughout its range (55 FR 26114). Within the United States, the northern spotted owl ranges across 12 physiographic provinces, based on recognized landscape subdivisions exhibiting different physical and environmental features (Franklin and Dyrness 1988, pp. 5 to 26; Thomas *et al.* 1990, p. 61; USDA and USDI 1994b, p. A–3). These include the Olympic Peninsula, Western Washington Lowlands, Western Washington Cascades, Eastern Washington Cascades, Oregon Coast Ranges, Western Oregon Cascades, Willamette Valley, Eastern Oregon Cascades, Oregon Klamath, California Klamath, California Coast Ranges, and California Cascades Provinces (based on USDA and USDI 1994b, p. A–3). Very few northern spotted owls are found in the Western Washington Lowlands or Willamette Valley, however, therefore the subspecies is restricted primarily to 10 of the 12 provinces within its range.

Population Status and Trends

Demographic data, from studies initiated as early as 1985, have been analyzed every few years to estimate northern spotted owl population trends (Anderson and Burnham 1992; Burnham *et al.* 1994; Franklin *et al.* 1999; Anthony *et al.* 2006). The most current evaluation of population status and trends is based on data through 2003 (Anthony *et al.* 2006). Based on this analysis, populations on 8 of 12 study areas (Wenatchee, Cle Elum, Rainier, Olympic Peninsula, Oregon Coast Ranges, Warm Springs, H.J. Andrews, and Simpson) were declining (Anthony *et al.* 2006, p. 23). Estimates of realized population change (cumulative population change across all study years) indicated that, in the more rapidly declining populations (Wenatchee, Cle Elum, Rainier, and Warm Springs), the 2003 populations were 50 to 70 percent of the population sizes observed in 1994 or 1995 (Anthony *et al.* 2006, pp. 25 to 26). Populations in the remaining four study areas (Tyee, Klamath, South Oregon Cascades, and Hoopa) appear to have remained stable through 2003 (Anthony *et al.* 2006, p. 25). A meta-analysis combining data from all 12 study areas indicates that rangewide the population declined at a rate of about 3.7 percent per year from 1985 to 2003. Northern spotted owl populations on Federal lands had better demographic rates than elsewhere, but still declined at a mean annual rate of about 2.4 percent (Anthony *et al.* 2006, pp. 33 to 34).

The barred owl (*Strix varia*) has recently emerged as a greater threat to the northern spotted owl than was previously recognized. The range of the barred owl has expanded in recent years and now completely overlaps that of the northern spotted owl (Crozier *et al.* 2006, p. 761). The presence of barred owls has significant negative effects on northern spotted owl reproduction (Olson *et al.* 2004), survival (Anthony *et al.* 2006), and number of territories occupied (Kelly *et al.* 2003, p. 51; Olson *et al.* 2005). The determination of population trends for the northern spotted owl has become complicated by the finding that northern spotted owls are less likely to call when barred owls are also present, therefore they are likely to be undetected by standard survey methods (Olson *et al.* 2005; Crozier *et al.* 2006). It is therefore difficult to determine whether northern spotted owls no longer occupy a site, or whether they may still be present but are not detected. The 2007 Draft Recovery Plan for the Northern Spotted owl concludes that ''barred owls are exacerbating the spotted owl population decline, particularly in Washington, portions of Oregon, and the northern coast of California'' (USFWS 2007, p. 126).

British Columbia has a small population of northern spotted owls. This population has declined at least 49 percent since 1992 (Courtney *et al.* 2004, p. 8–14), and by as much as 90 percent since European settlement (Chutter *et al.* 2004, p. 6) to a current breeding population estimated at about 23 birds (Sierra Legal Defence [sic] Fund and Western Canada Wilderness Committee 2005, p. 16) on 15 sites (Chutter *et al.* 2004, p. 26).

Life History and Ecology

Northern spotted owls are highly territorial (Courtney *et al.* 2004, p. 2–7), though overlap between the outer portions of the home ranges of adjacent pairs is common (Forsman *et al.* 1984, pp. 5, 17, 22 to 24; Solis and Gutiérrez 1990, p. 742; Forsman *et al.* 2005, p. 374). Pairs are non-migratory and remain on their home range throughout the year, though they often increase the area used for foraging during fall and winter (Forsman *et al.* 1984, p. 21; Sisco 1990, p. 9), likely in response to potential depletion of prey in the core of their home range (Carey *et al.* 1992, p. 245; Carey 1995a, p. 649; but see Rosenberg *et al.* 1994, pp. 1512 to 1515). The northern spotted owl shows strong year-round fidelity to its breeding site, even when not nesting (Solis 1983, pp. 23 to 28; Forsman *et al.* 1984, pp. 52 to 53) or after natural disturbance alters habitat characteristics within the home range (Bond *et al.* 2002, pp. 1024 to 1026). A discussion of northern spotted owl home range size and use is included in the Primary Constituent Elements section of this proposed rule.

Reproductive success of northern spotted owls has been characterized as a multi-stage process (Carey and Peeler 1995, p. 236) in which natal dispersal and survival to reproductive age are the most vulnerable stages. Nomadic adults and juveniles dispersing from their natal area serve as sources of replacements for resident northern spotted owls that die or leave their home range (Thomas *et al.* 1990, p. 295). Habitat supporting movements of northern spotted owls between large blocks limits the potentially adverse genetic effects of inbreeding and provides demographic support to declining populations (Thomas *et al.* 1990, pp. 271 to 272). A discussion of northern spotted owl dispersal is included in the Primary Constituent Elements section of this proposed rule.

Prey

Northern spotted owls forage primarily on arboreal and semi-arboreal mammals (summarized in Courtney *et al.* 2004, pp. 4–31 to 4–32). The primary prey species utilized depends on geographic area, but may include northern flying squirrels (*Glaucomys sabrinus*), two species of woodrats (*Neotoma* spp.), two species of red-backed voles (*Clethrionomys* spp.), red tree voles (*Arborimus longicaudus*), two species of deer mice (*Peromyscus* spp.), and two species of lagomorphs (rabbits and hares) (Courtney *et al.* 2004, p. 4–5). Northern spotted owls are also known to prey on insects, other terrestrial mammals, birds, and juveniles of larger mammals (*e.g.*, mountain beaver (*Aplodontia rufa*), although the use of these prey species is more seasonal (mainly spring, summer, and early fall) (Forsman *et al.* 2001, p. 146; Forsman *et al.* 2004, p. 223).

There is a clear geographic pattern to the northern spotted owl diet that varies with distribution and abundance of prey and habitat type (Thomas *et al.* 1990, p.

201; Forsman *et al.* 2001, p. 146; Courtney *et al.* 2004, p. 4–7). Northern flying squirrels are the dominant prey species in the northern Western Hemlock/Douglas-fir forests. Dusky-footed woodrats (*Neotoma fuscipes*) are more important in the southern drier, mixed-conifer/mixed-evergreen forests. Both prey species are co-dominant through the southwest interior of Oregon (Courtney *et al.* 2004, pp. 4–7 to 4–8).

Northern flying squirrels are nocturnal arboreal rodents and the primary prey of northern spotted owls in the northern provinces. Forests that support northern flying squirrels provide den sites, usually cavities in large snags, but northern flying squirrels may also use cavities in live trees, hollow branches of fallen trees, crevices in large stumps, stick nests of other species, and lichen and twig nests they construct (Carey 1995b, p. 658). Fungi (mychorrhizal and epigeous types) are prominent in their diet, however seeds, fruits, nuts, vegetation matter, insects, and lichens may also represent a significant proportion of their diet (summarized in Courtney *et al.* 2004, App. 3–12). Northern flying squirrel densities tend to be higher in older forest stands with ericaceous shrubs (*e.g.*, rhododendron) and an abundance of large snags (Carey 1995b, p. 654), likely because these older forests produce a higher forage biomass. Flying squirrel density tends to increase with stand age (Carey 1995b, pp. 653 to 654; Carey 2000, p. 252), although managed and second-growth stands sometimes also show high densities of squirrels, especially when canopy cover is high (*e.g.*, Rosenberg and Anthony 1992, p. 163; Lehmkuhl *et al.* 2006, pp. 589 to 591). The main factors that may limit northern flying squirrel densities are the availability of den structures and food, especially hypogeous fungi (Gomez *et al.* 2005, pp. 1677 to 1678).

For northern spotted owls in northern California, southwestern Oregon, and the Willamette Valley, dusky-footed woodrats constitute the primary prey (Carey *et al.* 1999, p. 65). Habitats that support dusky-footed woodrats usually include early seral mixed-conifer/mixed evergreen forests close to water (Carey *et al.* 1999, p. 77). Dusky-footed woodrats reach high densities in both old forests with openings and closed-canopy young forests (Sakai and Noon 1993, pp. 376 to 378; Carey *et al.* 1999, p. 73), and use hardwood stands in mixed evergreen forests (Carey *et al.* 1999, p. 73). Dense woodrat populations in shrubby areas are likely a source of colonists to surrounding forested areas (Sakai and Noon 1997, p. 347), therefore forested areas with nearby open, shrubby vegetation generally support high numbers of dusky-footed woodrats. The main factors that may limit dusky-footed woodrats are access to stable, brushy environments that provide food, cover from predation, materials for nest construction, dispersal ability, and appropriate climatic conditions (Carey *et al.* 1999, p. 78).

Home Range, Forest Condition, Survival, and Reproduction

Territorial northern spotted owls remain resident on their home range throughout the year, therefore, these home ranges must provide all of the habitat components needed for the survival and successful reproduction of a pair of owls. The home range is composed of a core area, the area of most intensive use and nesting, and the remainder of the home range which is utilized for additional foraging and roosting. In nearly all studies of northern spotted owl nesting habitat, the amount of mature and old-growth forest was greater within northern spotted owl sites than at random sites at the home range and core area scale (Courtney *et al.* 2004, pp. 5–6, 5–13), and forests were less fragmented (Hunter *et al.* 1995, p. 688). The amount of quality habitat at the core area scale shows the strongest relationships with home range occupancy (Meyer *et al.* 1998, p. 34; Zabel *et al.* 2003, p. 1036), survival (Franklin *et al.* 2000, p. 567; Dugger *et al.* 2005, p. 873), and reproductive success (Ripple *et al.* 1997, pp. 155 to 156; Dugger *et al.* 2005, p. 871). A more complete description of the home range is presented in the Primary Constituent Elements section of this proposed rule.

The size, configuration, and characteristics of vegetation patches within core areas affect northern spotted owl survival and reproduction, a concept referred to as habitat fitness potential (Franklin *et al.* 2000, p. 542). Among studies that have estimated habitat fitness potential, the effects of forest fragmentation and heterogeneity vary geographically. In the California Klamath Province, locations for nesting and roosting tend to be centered in larger patches of old forest, but edges between forest types may provide increased prey abundance and availability (Franklin *et al.* 2000, p. 579). In the central Oregon Coast Range, northern spotted owls appear to benefit from a mixture of older forests with younger forest and non-forested areas in their home range (Olson *et al.* 2004, pp. 1049 to 1050), a pattern similar to that found in the California Klamath Province. In contrast, studies conducted in the Oregon Cascades found that habitat characteristics were not good predictors of northern spotted owl survival or reproduction (Anthony *et al.* 2002, p. 49). Courtney *et al.* (2004, p. 5–23) suggest that although in general large patches of older forest appear to be necessary to maintain stable populations of northern spotted owls, core areas composed predominantly of old forest may not be optimal for northern spotted owls in the California Klamath Province and Oregon Coast Ranges Province.

Habitat Use

Habitat for northern spotted owls has traditionally been described as consisting of four functional types: nesting, roosting, foraging, and dispersal habitats. Recent studies continue to support the practical value of discussing northern spotted owl habitat usage by classifying it into these functional habitat types (Lint 2005; Buchanan 2004; Forsman *et al.* 2005; Zabel *et al.* 2003; Irwin *et al.* 2000) and data from studies are available to describe areas used for these types of activities, so we retain it here to structure our discussion of the essential features of suitable habitat for the northern spotted owl. Detailed characterizations of each of these functional habitat types and their relative distribution are described in the Primary Constituent Elements section of this proposed rule.

Summary of Conservation Strategies for the Northern Spotted Owl

Prior and subsequent to the listing of the northern spotted owl (FR 55 26175), many committees, task forces, and work groups were formed to find biologically and socially acceptable solutions to the dilemma of halting its decline (Meslow 1993, entire document), commencing in 1982 with the development of a regional guide for management of the northern spotted owl (Courtney *et al.* 2004, p. 9–3). Today, northern spotted owl conservation on Federal lands within the range of the northern spotted owl in Washington, Oregon, and California is largely accomplished through the Forest Service's Land and Resource Management Plans (LRMP) and Bureau of Land Management's (BLM) Resource Management Plans (RMP), as amended by the Record of Decision for Amendments to Forest Service and BLM Planning Documents within the Range of the Northern Spotted Owl (USDA and USDI 1994a, p. 31; USDA and USDI 1994b). The LRMPs/RMPs were considered to be, in part, the Federal contribution to recovery for the northern spotted owl (USDA and USDI 1994a, Appendix G). The work of the

Interagency Scientific Committee to Address Conservation of the Northern Spotted Owl (ISC) in 1990 and its resulting core strategies has served as the foundation for subsequent conservation planning, including the 1992 Final Draft Recovery Plan for the Northern Spotted Owl (Courtney *et al.* 2004, p. 9–3), the original designation of critical habitat for the northern spotted owl (57 FR 1796; January 15, 1992), and the 2007 Draft Recovery Plan for the Northern Spotted Owl (USFWS 2007).

Interagency Scientific Committee (ISC)—1990

The Interagency Scientific Committee (ISC), was chartered in 1989 by four Federal agencies, the U.S. Department of Agriculture's Forest Service (FS) and U.S. Department of the Interior's Bureau of Land Management (BLM), Fish and Wildlife Service, and National Park Service, to develop a scientific conservation strategy for the northern spotted owl (Thomas *et al.* 1990). In 1992, the Forest Service formally adopted the ISC Conservation Strategy for the Northern Spotted Owl as a basis for its planned management. However, for a variety of reasons, the plan was never implemented (Courtney *et al.* 2004, p. 9–4).

The ISC's Conservation Strategy was built on a foundation of five conservation biology principles. In general, the ISC favors the protection of large blocks of habitat capable of supporting multiple pairs of northern spotted owls spaced closely enough to facilitate dispersal between the blocks. The results of applying these principles were of key importance to the development of this revised critical habitat proposal, and are summarized below:

(1) Large Block Size. The ISC strategy emphasizes the importance of managing large and well-distributed blocks of northern spotted owl habitat, called Habitat Conservation Areas (HCAs), which are sufficiently connected to maintain a stable and well-distributed population throughout the northern spotted owl's range. The target population for HCAs was derived from empirical data and modeling results supporting the conclusion that clusters of 20 pairs of northern spotted owls should be stable over the long term, given the rates of dispersal among them by juveniles (Thomas *et al.* 1990, pp. 24, App. O). At the time of selection, some HCAs contained sufficient habitat and resident northern spotted owls to meet or exceed the 20-pair target, while others were deficient in both habitat and pairs. The ISC anticipated that northern spotted owl habitat, and therefore the target number of pairs, would be recruited over time (Thomas *et al.* 1990, p. 23). Large block size was determined based on the target number of northern spotted owl pairs and the median provincial home range size of pairs. Based on habitat use studies, the median home range used was larger in the north (14,271 ac (5,775 ha)) and smaller in the south (2,955 ac (1,196 ha)) (Thomas *et al.* 1990, App. I). Overall, the large habitat blocks are considered sufficiently large so that they can remain stable over the long run, with low to moderate dispersal from adjacent blocks (Thomas *et al.* 1990, p. 24).

In areas where the actual habitat conditions, future capability of lands to develop into northern spotted owl habitat, and northern spotted owl densities did not allow for the large block approach, smaller habitat blocks were identified in strategic locations (Thomas *et al.* 1990, p. 28). The ISC recognized that the northern spotted owl populations in these smaller blocks were relatively less stable, but would still contribute to the metapopulation structure across the subspecies' range (Thomas *et al.* 1990, pp. 27 to 30, 308). The term metapopulation refers to a set of local populations linked by dispersing individuals. The ISC adopted a metapopulation approach to management as an attempt to provide the northern spotted owl with habitat distributed across the landscape in a fashion most similar to the historical configuration, given existing patterns of fragmentation. This approach was considered the best hedge against future extinction (Thomas *et al.* 1990, p. 23).

(2) Distance Between Habitat Blocks. The success of a northern spotted owl conservation strategy based on metapopulation structure depends, in part, on dispersal between habitat blocks. Therefore, the ISC developed habitat blocks separated by distances well within the known dispersal range of juveniles (Thomas *et al.* 1990, p. 307). For the northern spotted owl, the ISC indicates that the distance between large habitat blocks should be within the known median dispersal distances of at least two-thirds of all juveniles. This translated into a maximum allowable distance of 12 mi (19.3 km) between the nearest points of contact of neighboring large habitat blocks (Thomas *et al.* 1990, p. 307, Table P1).

Populations in small habitat blocks are inherently less stable and more prone to local extinctions than those in large blocks and are therefore more reliant on immigration from neighboring blocks to remain extant (Thomas *et al.* 1990, pp. 262, 266, 308). To provide an additional measure of population security for the small habitat blocks, the ISC set a shorter distance of 7 mi (11.2 km) to the adjacent blocks. This was less than the median dispersal distance estimate from banded northern spotted owls, and is within the dispersal range of more than 75 percent of all radio-marked juveniles (Thomas *et al.* 1990, p. 308). This shorter distance was intended to improve the likelihood of successful dispersal from adjacent blocks, thereby reducing the potential for local extinctions within small habitat blocks (Thomas *et al.* 1990, p. 308).

(3) Rangewide Distribution. A primary reason for designating habitat blocks throughout the northern spotted owl's range was to ensure that stochastic events such as large fires or windstorms that may occur in a portion of the range would not negatively impact the entire population (Thomas *et al.* 1990, p. 294). The ISC's rangewide distribution of large habitat blocks offered some resiliency to maintain the subspecies and habitat variation across provinces and offered some protection against stressors such as stochastic events (*e.g.*, large fires). This conservation principle provides a hedge against extinction of the northern spotted owl due to either small or large catastrophic events. In addition, large, well-distributed blocks of unfragmented habitat may assist the northern spotted owl in responding to the barred owl, which has recently expanded its range and now overlaps with the range of the northern spotted owl (Herter and Hicks 2000, p. 284).

(4) Contiguous Habitat. The ISC Strategy states that the less fragmented the habitat within blocks is, the better habitat will function for northern spotted owls. Habitat fragmentation may cause habitat deterioration from edge effects, increased risk of predation, and potential displacement by barred owls (Thomas *et al.* 1990, p. 22 to 23). At the time, information such as that provided by the more recent studies in the California Klamath and Oregon Coast Range provinces regarding the potential benefits of heterogeneity and forest edge in these areas (Franklin *et al.* 2000, Olson *et al.* 2004) was not known.

(5) Dispersal Habitat. Stability of the northern spotted owl population under the ISC Conservation Strategy is dependent on the movement of individuals among habitat blocks for population support (Thomas *et al.* 1990, p. 26). To facilitate the movement of northern spotted owls between blocks, the ISC requires intervening forest lands to be managed in a manner that will support dispersing northern spotted owls (Thomas *et al.* 1990, p. 326 to 327).

Designation of Critical Habitat—1992

The original designation of critical habitat for the northern spotted owl was finalized in 1992 (57 FR 1796; January 15, 1992). Critical habitat was identified based on the conservation principles set forth in the ISC Conservation Strategy for the Northern Spotted Owl (Thomas *et al.* 1990), including the development and maintenance of large contiguous blocks of habitat to support multiple reproducing pairs of owls; minimizing fragmentation and edge effect to improve habitat quality; minimizing distance between blocks to facilitate dispersal; and maintaining rangewide distribution of habitat to facilitate recovery (57 FR 1803–1804; January 15, 1992). The emphasis on large, continuous blocks of habitat relied on the ISC's identification of HCAs as a starting point (Thomas *et al.* 1990; p. 315). Category 1 HCAs were those with the potential to support 20 or more pairs, and category 2 HCAs were those with the potential to support fewer than 20 pairs. Although the ISC had also identified category 3 HCAs, areas capable of supporting only a single pair of owls, the critical habitat concentrated on areas of sufficient size to support at least two pairs. The final critical habitat designation included 6,887,000 ac (2,787,070 ha) of Federal lands within the range of the northern spotted owl. Of those acres, approximately 5,700,000 ac (2,317,073 ha) were within the HCA system proposed by the ISC, and an additional 1,887,000 ac (767,073 ha) were designated as a measure to further enhance the HCAs already identified (57 FR 1804–1805; January 15, 1992).

Northern Spotted Owl Final Draft Recovery Plan—1992

The Department of the Interior began development of a recovery plan for the northern spotted owl in 1990. After reviewing a number of conservation strategies, the 1992 Recovery Team settled on the ISC reserve design (*i.e.*, size and spacing of habitat blocks) as a basis for the 1992 Final Draft Northern Spotted Owl Recovery Plan (USDI 1992, p. 357). HCAs were renamed Designated Conservation Areas (DCAs), but the category designations remained the same (*i.e.*, a category 1 DCA was designed to support at least 20 pairs of northern spotted owls, and a category 2 DCA supports from 2 to 19 pairs). The 1992 Recovery Team's objective in remapping the HCAs was to provide a level of habitat protection in the DCAs that was at least equal to that provided by HCAs, while increasing the biological and economic efficiency of the network. The fundamental sizing and spacing criteria from Thomas *et al.* (1990) were applied during mapping of the DCAs. The overall structural elements developed by the ISC remained, although the draft recovery plan was never finalized.

Forest Ecosystem Management Assessment Team—1993

The Forest Ecosystem Management Assessment Team (FEMAT) (USDA *et al.* 1993) was created to provide a review of scientific issues and options for a regional plan to manage Federal forests. The primary concepts of the FEMAT Option 9 were adopted through the Record of Decision for Amendments to Forest Service and BLM Planning Documents within the Range of the Northern Spotted Owl, signed in 1994, and amended the Forest Service LRMPs and BLM RMPs within the range of the northern spotted owl relative to the management of habitat for late-successional and old-growth forest species (USDA and USDI 1994b). The principal components that contribute to conserving the northern spotted owl include the concepts of large reserve blocks of habitat (managed for forests resembling northern spotted owl habitat), connectivity, and silviculture treatments to accelerate habitat development, all of which were founded on the ISC concepts (Courtney *et al.* 2004, 9–7).

The LRMPs/RMPs include a network of reserve allocations called Late-Successional Reserves (LSRs) designed, in part, to support clusters of reproducing northern spotted owl pairs across the range of the subspecies. It should be noted that LSRs are managed to meet the need of multiple species that depend on late-successional forests, and are not exclusive to management for northern spotted owls. Therefore although many LSRs benefit northern spotted owls, not all LSRs necessarily represent optimal habitat for northern spotted owls since they are intended to provide for other species as well.

Silvicultural treatment of young forest (less than 80 years of age) is allowed within LSRs for the purpose of accelerating the development of late-successional habitat. This provision was included because the LSRs initially included a significant amount of area that had been logged and were in young, plantation-style forests. Because the development of large contiguous, unfragmented, blocks of late-successional forest was a key element of the ISC's strategy, activities designed to accelerate restoration of simplified young stands were viewed as appropriate.

The LRMPs/RMPs allow for silvicultural treatments of older forests in LSRs on sites characterized by frequent, light to moderate intensity fire, such as pine and mixed-conifer dominated forests on the eastern slopes of the Cascade Range and in the Siskiyou-Klamath region. This provision was included because of the potential for uncharacteristically intense wildfire on sites where higher than normal amounts of fuel have accumulated. Such fires pose a high risk of temporary or even long-term loss of old-growth conditions, including northern spotted owl habitat, and treatments may help reduce this risk.

2006/2007 Recovery Planning Process for the Northern Spotted Owl

In April 2006, the Service convened an interdisciplinary Northern Spotted Owl Recovery Team to incorporate the most recent scientific information into a current recovery plan for the species. The Recovery Team sought input from northern spotted owl experts on the main threats to the rangewide northern spotted owl population: competition from barred owls, loss of habitat amount and distribution from past activities and disturbances, and ongoing habitat loss to timber harvest. The Draft Recovery Plan for the Northern Spotted Owl (USFWS 2007) provides two options to address the threats posed by habitat loss and modification. Both options are based on the same underlying science, much of which is from the ISC (Thomas *et al.* 1990). Option 1 maps the specific conservation area boundaries where most of the recovery actions and criteria will be targeted. These conservation areas are called Managed Owl Conservation Areas, or MOCAs, and are mapped in the 2007 Draft Recovery Plan (USFWS 2007). Option 2 of the 2007 Draft Recovery Plan provides a rule set that defines the size and distance of the conservation areas needed for recovery, while recognizing that the habitat demands of the northern spotted owl vary across its range. The rule set is designed to help guide the Federal land management agencies when undertaking conservation actions for the northern spotted owl.

The network of habitat blocks stemming from both options is based on the conservation biology strategies of the ISC (Thomas *et al.* 1990, p. 23) and provides the basis for this proposed revised critical habitat designation. The 2007 Draft Recovery Plan suggests that the recovery of the northern spotted owl can be achieved by managing for appropriate habitat on Federal lands within the range of the northern spotted owl in the United States, drawing on

voluntary recovery measures on intervening non-Federal lands. Conservation contributions by private, State, and other landowners in areas between or adjacent to habitat blocks are expected to increase the likelihood of northern spotted owl recovery. Consistent with the 1992 designation, we have identified only Federal lands as proposed revised critical habitat for the northern spotted owl.

Previous Federal Actions

A description of previous Federal actions up to the time of listing on June 26, 1990, can be found in the final rule listing the northern spotted owl (55 FR 26114). On January 15, 1992, we published the final rule designating critical habitat for the northern spotted owl (57 FR 1796). In December 1992, we completed the Final Draft Recovery Plan for the Northern Spotted Owl in Washington, Oregon, and California (USDI 1992).

On April 21, 2003, we published a notice of review initiating a 5-year review of the northern spotted owl (68 FR 19569). We then published a second information request for the 5-year review on July 25, 2003 (68 FR 44093). We contracted a comprehensive status review of the northern spotted owl to provide the best available scientific information for the 5-year review. The status review report was completed in September 2004 and continues to serve as the most current comprehensive summary of scientific information on the northern spotted owl (Courtney *et al.* 2004). We completed the 5-year review on November 15, 2004, concluding that the northern spotted owl should remain listed as a threatened species under the Act.

On January 13, 2003, we entered into a settlement agreement with the American Forest Resource Council, Western Council of Industrial Workers, Swanson Group Inc., and Rough & Ready Lumber Company to conduct a rulemaking to consider potential revisions to critical habitat for the northern spotted owl that includes a revised consideration of economic impacts and any other relevant aspects of designation. The dates for completion of this review have been extended and currently call for the Service to submit a proposed revised critical habitat designation to the **Federal Register** by June 1, 2007, and to submit a final revised critical habitat designation to the **Federal Register** by June 1, 2008.

Critical Habitat

Critical habitat is defined in section 3 of the Act as: (i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. Conservation, as defined under section 3 of the Act, means to use all methods and procedures necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in effects to critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands. Section 7 is a purely protective measure and does not require implementation of restoration, recovery, or enhancement measures.

To be included in a critical habitat designation, the habitat within the area occupied by the species must first have features that are essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Habitat occupied at the time of listing may be included in critical habitat only if its essential features may require special management or protection. An area currently occupied by the species but not known to be occupied at the time of listing will likely, but not always, be essential to the conservation of the species and, therefore, typically included in the critical habitat designation. When the best available scientific data do not demonstrate that the conservation needs of the species require additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific data available. They require Service biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are eligible for consideration as critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by

the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b)(2) of the Act, we use the best scientific data available in determining areas that contain the features that are essential to the conservation of the northern spotted owl. For this critical habitat revision, we relied upon a variety of information sources to identify those areas, as well as to assess the habitat requirements of the species, including the 2007 Draft Recovery Plan for the Northern Spotted Owl (USFWS 2007), the 2004 Status Review for the Northern Spotted Owl (Courtney *et al.* 2004), the Northern Spotted Owl 5-year Review (USFWS 2004), the Final Supplemental Environmental Impact Statement and Record of Decision for Amendments to Forest Service and BLM Planning Documents within the Range of the Northern Spotted Owl (USDA and USDI 1994 a, b), the 1992 final critical habitat designation (57 FR 1796; January 15, 1992), Interagency Scientific Committee Conservation Strategy for the Northern Spotted Owl (Thomas *et al.* 1990), and GIS data layers, including those for northern spotted owl habitat, Federal land use allocations, land ownership, and northern spotted owl occupancy data. This proposed rule only addresses revisions to the current designation. For discussion of the methods used for the existing designation, please refer to that final designation (57 FR 1796; January 15, 1992).

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we consider physical and biological features (primary constituent elements, or PCEs) that are essential to the conservation of the species, and within the area occupied by the species at the time of listing, that may require special management considerations and protection. These include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific primary constituent elements required for the northern spotted owl are derived from the biological needs of the species as described in the Background section of this proposal and the following information.

Space for Population Growth and for Normal Behavior

Northern spotted owls remain on their home range throughout the year therefore this area must provide all the habitat components and prey needed to provide for the survival and successful reproduction of a territorial pair. The home range of a northern spotted owl is relatively large and varies in size among and within provinces, generally increasing to the north (Courtney *et al.* 2004, p. 5–24; 55 FR 25117) where home range size ranges from 2,955 ac (1,196 ha) in the Oregon Cascades (Thomas *et al.* 1990, p. 194) to 14,271 ac (5,775 ha) on the Olympic Peninsula (USDI 1992, p. 23; USFWS 1994 in litt., p. 1). Northern spotted owl home ranges are generally larger where northern flying squirrels are the predominant prey and smaller where woodrats are the predominant prey (Zabel *et al.* 1995, p. 436). Home range size also increases with increasing forest fragmentation (Carey *et al.* 1992, p. 235; Franklin and Guti?rrez 2002, p. 212; Glenn *et al.* 2004, p. 45) and decreasing proportions of nesting habitat on the landscape (Carey *et al.* 1992, p. 235; Forsman *et al.* 2005, p. 374), suggesting that northern spotted owls increase the size of their home ranges to encompass adequate amounts of suitable forest types (Forsman *et al.* 2005, p. 374).

Northern spotted owl home ranges contain two distinct use areas: the core area, which is the area that is used most intensively and usually includes the nesting area (Bingham and Noon 1997, pp. 134 to 135), and the remainder of the home range which is used for foraging and roosting. The size of core areas varies considerably across the subspecies? geographic range following a pattern similar to that of home range size (Bingham and Noon 1997, p. 133), varying from over 4,057 ac (1,642 ha) in the northernmost (flying squirrel prey) provinces (Forsman *et al.* 2005, pp. 370, 375) to less than 500 ac (202 ha) in the southernmost (dusky-footed woodrat prey) provinces (Pious 1995, pp. 9 to 10, Table 2; Zabel *et al.* 2003, pp. 1036 to 1038).

Core areas contain greater proportions of mature/old forest than random or non-use areas (Courtney *et al.* 2004, p. 5–13), and the quality of habitat at the core area scale shows the strongest relationships with occupancy (Meyer *et al.* 1998, p. 34; Zabel *et al.* 2003, pp. 1027, 1036), survival (Franklin *et al.* 2000, p. 567; Dugger *et al.* 2005, p. 873), and reproductive success (Ripple *et al.* 1997, pp. 155 to 156; Dugger *et al.* 2005, p. 871). In some areas, edges between forest types within northern spotted owl home ranges may provide increased prey abundance and availability (Franklin *et al.* 2000, p. 579). For successful reproduction, core areas need to contain one or more forest stands that have both the structural attributes and the location relative to other features in the home range that allow them to fulfill nesting, roosting, and foraging functions (Carey and Peeler 1995, pp. 233 to 236; Rosenberg and McKelvey 1999, pp. 1035 to 1037).

The primary function of the remainder of the home range outside the core area is to provide subsidiary roosting and foraging opportunities for the resident pair that are essential to the year-round survival of the resident pair if they partially deplete the prey populations in the core area.

Sites for Breeding, Reproduction, and Rearing of Offspring (Nesting)

Nesting habitat provides structural features for nesting, protection from adverse weather conditions, and cover to reduce predation risks for adults and young. Nesting stands typically include a moderate to high canopy closure (60 to 80 percent); a multi-layered, multi-species canopy with large (greater than 30 inches (in) (76 centimeters (cm)) diameter at breast height (dbh)) overstory trees; a high incidence of large trees with various deformities (e.g., large cavities, broken tops, mistletoe infections, and other evidence of decadence); large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for northern spotted owls to fly (Thomas *et al.* 1990, p. 164; 57 FR 1798).

Recent studies found that northern spotted owl nest stands tend to have greater tree basal area, number of canopy layers, density of broken-top trees, number or basal area of decadent snags, and volume of decadent logs (Courtney *et al.* 2004, pp. 5–16 to 5–19, 5–23). In some forest types, northern

spotted owls nest in younger forest stands that contain structural characteristics of older forests. Nesting northern spotted owls consistently occupy stands having high canopy cover that may provide thermoregulatory benefits (Weathers *et al.* 2001, p. 686), allowing northern spotted owls a wider range of choices for locating thermally-neutral roosts near the nest site. High canopy closure may also conceal northern spotted owls, reducing potential predation.

To support northern spotted owl reproduction, a home range requires appropriate amounts of nesting, roosting, and foraging habitat arrayed so that nesting pairs can use it efficiently and safely. In the northern parts of the range where nesting, roosting, and foraging habitat have similar attributes, nesting is generally associated with increasing old forest in the core area (Swindle *et al.* 1999, p. 1216). In some portions of the range in the south, northern spotted owl survival is positively associated with the area of old forest habitat in the core, but reproductive output is positively associated with amount of edge between older forest and other habitat types in the home range (Franklin *et al.* 2000, pp. 573, 579). This pattern suggests that where dusky-footed woodrats are the primary prey species, core areas that have nesting habitat stands interspersed with varied types of foraging habitat may be optimal for northern spotted owl survival and reproduction. The appropriate amount and spatial distribution of nesting habitat is essential for successful reproduction of northern spotted owls.

Cover or Shelter (Roosting)

The primary functions of roosting habitat are to facilitate thermoregulation in summer or winter, shelter northern spotted owls from precipitation, and provide cover to reduce predation risk while resting or foraging. Studies of roosting locations found that northern spotted owls tended to use stands with greater vertical canopy layering (Mills *et al.* 1993, pp. 318 to 319), canopy closure (King 1993, p. 45), snag diameter (Mills *et al.* 1993, pp. 318 to 319), diameter of large trees (Herter *et al.* 2002, pp. 437, 441), and amounts of large woody debris (Chow 2001, p. 24; reviewed in Courtney *et al.* 2004, pp. 5–14 to 4–16, 5–23). The characteristics of roosting habitat differ from those of nesting habitat only in that roosting habitat need not contain the specific structural features used for nesting (Thomas *et al.* 1990, p. 62).

Food or Other Nutritional or Physiological Requirements (Foraging)

The primary function of foraging habitat is to provide a food supply for survival and reproduction. Foraging activity is positively associated with tree height diversity (North *et al.* 1999, p. 524), canopy closure (Irwin *et al.* 2000, p. 180; Courtney *et al.* 2004, p. 5–15), snag volume, density of snags greater than 20 in (50 cm) dbh (North *et al.* 1999, p. 524; Irwin *et al.* 2000, pp. 179 to 180; Courtney *et al.* 2004, p. 5–15), density of trees greater than or equal to 31 in (80 cm) dbh (North *et al.* 1999, p. 524), volume of woody debris (Irwin *et al.* 2000, pp. 179 to 80), and young forests with some structural characteristics of old forests (Carey *et al.* 1992, pp. 245 to 247; Irwin *et al.* 2000, pp. 178 to 179). Northern spotted owls select old forests for foraging in greater proportion than its availability at the landscape scale (Carey *et al.* 1992, pp. 236 to 237; Carey and Peeler 1995, p. 235; Forsman *et al.* 2005, pp. 372 to 373), but will forage in younger stands with high prey densities and access to prey (Carey *et al.* 1992, p. 247; Rosenberg and Anthony 1992, p. 165; Thome *et al.* 1999, pp. 56 to 57).

Because northern spotted owls show a clear geographic pattern in diet, and different prey species prefer different habitat types, prey distribution contributes to differences in northern spotted owl foraging habitat selection across the range. In the northern portion of their range, northern spotted owls forage heavily in older forests or forests with similar structure that support northern flying squirrels (Rosenberg and Anthony 1992, p. 165; Carey *et al.* 1992, p. 233). In the southern portion of their range, where woodrats are a major component of their diet, northern spotted owls are more likely to use a variety of stands, including younger stands, brushy openings in older stands, and edges between forest types in response to higher prey density in some of these areas (Solis 1983, pp. 89 to 90; Sakai and Noon 1993, pp. 376 to 378; Carey *et al.* 1999, p. 73; Sakai and Noon 1997, p. 347; Franklin *et al.* 2000, p. 579). An adequate amount and distribution of foraging habitat within the home range is essential to the survival and reproduction of northern spotted owls.

Habitats That Are Representative of the Historical Geographical and Ecological Distributions of the Northern Spotted Owl

The northern spotted owl inhabits most of the major types of coniferous forests across its geographic range, including Sitka spruce, western hemlock, mixed conifer and mixed evergreen, grand fir, Pacific silver fir, Douglas-fir, redwood/Douglas-fir (in coastal California and southwestern Oregon), white fir, Shasta red fir, and the moist end of the ponderosa pine zone (Forsman *et al.* 1984; Franklin and Dyrness 1988; Thomas *et al.* 1990). Vegetative composition of northern spotted owl habitat changes from north to south and from west to east within the subspecies' range. The lower elevation limit of subalpine vegetation types defines the uppermost elevation used by northern spotted owls. This elevation varies with latitude from about 3,000 feet (ft) (914 meters (m)) above sea level near the northern edge of the range to about 6,000 ft (1,828 m) above sea level at the southern edge (Lint 2005, p. 32).

Historically, forest types occupied by the northern spotted owl were fairly continuous, particularly in the wetter parts of its range in coastal northern California and most of western Oregon and Washington. Suitable forest types in the drier parts of the range (interior northern California, interior southern Oregon, and east of the Cascade crest in Oregon and Washington) occur in a mosaic pattern interspersed with infrequently used vegetation types such as open forests, shrubby areas, and grasslands. In the Klamath Mountains Provinces in Oregon and California, and to a lesser extent in the Coast and Cascade Provinces of California, large areas of serpentine soils exist that are typically not capable of supporting northern spotted owl habitat (Lint 2005, pp. 31 to 33).

Conditions Supporting Non-Resident Owls

Landscapes with northern spotted owl habitat likely contain non-resident (non-breeding) northern spotted owls, sometimes referred to as ''floaters'' (Forsman *et al.* 2002, pp. 15, 26). These habitats contribute to stable or increasing populations of northern spotted owls by maintaining sufficient individuals to quickly fill territorial vacancies when residents die or leave their territories. Where large blocks of habitat with multiple breeding pairs occur, the opportunities for this integration are enhanced due to the within-block production of potential replacement birds (Thomas *et al.* 1990, p. 295, 307).

Intervening habitats are important in supporting the successful dispersal of northern spotted owls that is essential to maintaining the genetic and demographic connection among populations both within and across

provinces. Habitats that support movements between larger blocks providing nesting, roosting, and foraging habitats for northern spotted owls act to limit the adverse genetic effects of inbreeding and provide demographic support to declining populations (Thomas *et al.* 1990, pp. 271 to 272). Dispersing juvenile northern spotted owls experience high mortality rates (more than 70 percent in some studies (Miller 1989, pp. 32 to 41; Franklin *et al.* 1999, pp. 25, 28; 55 FR 26115)) from starvation, predation, and accidents (Miller 1989, pp. 41 to 44; Forsman *et al.* 2002, pp. 18 to 19). Juvenile dispersal is thus a highly vulnerable life stage for northern spotted owls, and enhancing the survivorship of juveniles during this period could play an important role in maintaining stable populations of northern spotted owls.

Juvenile dispersal occurs in steps (Forsman *et al.* 2002, pp. 13 to 14) between which dispersing juveniles settle into temporary home ranges for up to several months (Forsman *et al.* 2002, p. 13). During the transience (movement) phase, dispersers used mature and old-growth forest slightly more than its availability; during the colonization phase, mature and old-growth forest was used at nearly twice its availability (Miller *et al.* 1997, p. 144). Closed pole-sapling-sawtimber habitat was used roughly in proportion to availability in both phases and may represent the minimum condition for movement. Open sapling and clearcuts were used less than expected based on availability during colonization (Miller *et al.* 1997, p. 145).

Successful juvenile dispersal may depend on locating unoccupied suitable habitat in close proximity to other occupied sites (LaHaye *et al.* 2001, pp. 697 to 698). Natal dispersal distances, measured from natal areas to eventual home range, tend to be larger for females (about 15 mi (24 km)) than males (about 8.5 mi (13.7 km)) (Courtney *et al.* 2004, p. 8–5). Approximately 68 percent of radio-marked juveniles of both sexes dispersed greater than 12 mi (19 km) from their natal areas, which was also the average dispersal distance. Approximately 80 percent dispersed greater than 7 mi (11 km) from their natal areas (Thomas *et al.* 1990, pp. 305 to 306). Northern spotted owls regularly disperse through highly fragmented forested landscapes that are typical of the mountain ranges in western Washington and Oregon (Forsman *et al.* 2002, p. 22), and have dispersed from the Coastal Mountains to the Cascades Mountains in the broad forested regions between the Willamette, Umpqua, and Rogue Valleys of Oregon (Forsman *et al.* 2002, p. 22). Corridors of forest through fragmented landscapes serve primarily to support relatively rapid movement through such areas, rather than colonization.

Primary Constituent Elements for the Northern Spotted Owl

Under our regulations, we are required to identify the known physical and biological features (PCEs) essential to the conservation of the northern spotted owl. All areas proposed as revised critical habitat for the northern spotted owl are within the geographic area occupied by the species and contain sufficient PCEs to support at least one life history function. Much of the recent research on northern spotted owl biology supports the PCEs described in the previous critical habitat designation; based on our current knowledge, the PCEs described here are more detailed and specific, where possible. Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that the northern spotted owl's PCEs are:

(1) Forest types known to support the northern spotted owl across its geographic range. These forest types include Sitka spruce, western hemlock, mixed conifer and mixed evergreen, grand fir, Pacific silver fir, Douglas-fir, white fir, Shasta red fir, redwood/Douglas-fir (in coastal California and southwestern Oregon), and the moist end of the ponderosa pine coniferous forests zones at elevations up to 3,000 ft (914 m) near the northern edge of the range and up to about 6,000 ft (1,828 m) at the southern edge.

This PCE provides the biotic communities that are known to support the northern spotted owl across its geographic range. The northern spotted owl and some of its primary prey species do not reproduce successfully outside these biotic communities.

(2) Forest types as described in PCE 1 of sufficient area, quality, and configuration, or that have the ability to develop these characteristics, to meet the home range needs of territorial pairs of northern spotted owls throughout the year. A home range must provide all of the habitat components and prey needed to provide for the survival and successful reproduction of a resident breeding pair of northern spotted owls. As detailed earlier, home range and core area sizes vary widely both within and among physiographic provinces across the range of the northern spotted owl (Courtney *et al.* 2004, p. 5–24). Core areas, which usually include the nesting habitat, may range from over 4,057 ac (1,642 ha) in the north (Forsman *et al.* 2005, pp. 369 to 370) to fewer than 500 ac (202 ha) in the south (Pious 1995, pp. 9 to 10, Table 2; Meyer *et al.* 1998, p. 34; Zabel *et al.* 2003, pp. 1036 to 1038; Glenn *et al.* 2004, p. 41). Home range sizes range from 2,955 ac (1,196 ha) in the Oregon Cascades (Thomas *et al.* 1990, p. 194) to 14,271 ac (5,775 ha) on the Olympic Peninsula (USDI 1992, p. 23; USFWS 1994, in litt., p. 1). Many factors may influence the size of the home range utilized by northern spotted owls, including the degree of habitat fragmentation, proportion of available nesting habitat, and primary prey species. The three habitat components required within the home range of a northern spotted owl include:

(a) Nesting Habitat. Habitat that includes a moderate to high canopy closure (60 to 80 percent); a multi-layered, multi-species canopy with large (generally greater than 30 in (76 cm) dbh) overstory trees; a high incidence of large trees with various deformities (*e.g.*, large cavities, broken tops, mistletoe infections, and other platforms); large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for northern spotted owls to fly. Patches of nesting habitat, in combination with roosting habitat (PCE 2-(b)) need to be sufficiently large and contiguous to maintain northern spotted owl core areas and home ranges, and be in a spatial arrangement with foraging habitat (PCE 2-(c)) that allows efficient provisioning of young at the nest.

(b) Roosting Habitat. Roosting habitat differs from nesting habitat in that it need not contain those specific structural features used for nesting (cavities, broken tops, and mistletoe platforms). As such, it generally includes moderate to high canopy closure; a multi-layered, multi-species canopy; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for northern spotted owls to fly.

(c) Foraging Habitat. Foraging habitat provides a food supply for survival and reproduction of northern spotted owls and includes a wider array of forest types than nesting and roosting habitat, particularly more open and fragmented forests. While some foraging habitat has attributes that closely resemble those of nesting and roosting habitat, especially in the northern portions of the subspecies' range, some younger stands without all these attributes are used for foraging, especially in the southern portion of the range. Some younger stands may have high prey abundance

and some structural attributes similar to those of older forests, such as moderate tree density, subcanopy perches at multiple levels, multi-layered vegetation, or residual older trees. To be fully functional for northern spotted owls, foraging habitat generally contains some roosting habitat attributes.

This PCE includes all three habitat types (nesting, roosting, and foraging) and provides the forest structural characteristics needed for successful nesting, reproduction, and survival of northern spotted owls on their home ranges. These are primarily characteristics of old and mature forests, or younger forests with some structural and microclimatic characteristics of mature forests. These forests provide the specific structures required for nesting; shelter from adverse weather conditions; cover that reduces predation risk while nesting, after young fledge, and while roosting; and microclimatic conditions that enhance thermoregulation. This PCE also provides the forest structure necessary to provide accessible prey for the survival and reproduction of northern spotted owls on their home ranges. This habitat supports the abundance, diversity, and availability of prey necessary for feeding both adults and young.

(3) Dispersal habitat. The successful dispersal of northern spotted owls between habitat blocks is required to maintain stable populations and provide for adequate gene flow across the range of the species. The dispersal of juveniles requires habitat supporting both the transience and colonization phases. Habitat supporting the transience phase of dispersal includes, at a minimum, stands with adequate tree size and canopy closure to provide protection from avian predators and at least minimal foraging opportunities. This may include younger and less diverse forest stands than foraging habitat, such as even-aged, pole-sized stands. These stands still require the interspersion of some roosting structures and foraging habitat to allow for temporary resting and feeding during the movement phase. Settling of juveniles may be temporary (a few months) or extended (colonization). Small openings in forest habitat do not appear to hinder the dispersal of northern spotted owls (they are known to disperse through highly fragmented forests), but large, non-forested valleys, such as the Willamette Valley apparently serve as barriers to both natal and breeding dispersal (Forsman *et al.* 2002, p. 22). Habitat supporting colonization is generally equivalent to roosting and foraging habitat and is described in PCEs 2-(b) and 2-(c), although it may be in smaller amounts than that needed to support nesting pairs (PCE 2-(a)). Dispersal habitats will typically occur in the intervening areas between larger blocks of forest that provide nesting, foraging, and roosting habitats for resident northern spotted owls, and are essential in providing for successful movement of both juveniles and adults between these blocks.

This PCE describes the features of habitats that allow for the successful dispersal of northern spotted owls between habitat blocks to maintain genetic variability and promote stable or increasing populations across the subspecies' range, including habitat supporting safe movement, foraging, and roosting. As dispersing northern spotted owls, particularly juveniles, experience high levels of mortality, the provision of adequate habitat to provide for successful dispersal is essential to the conservation of the species.

This proposed revised designation is designed for the conservation of PCEs necessary to support the life history functions that are the basis for the proposal. Because not all life history functions require all the PCEs, not all proposed revised critical habitat will contain all the PCEs.

Units are proposed for designation based on sufficient PCEs being present to support one or more of the species' life history functions. Some units contain all PCEs and support multiple life processes, while some units contain only a portion of the PCEs necessary to support the species' particular use of that habitat.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we used the best scientific data available in determining areas that contain the features that are essential to the conservation of the northern spotted owl. This proposed revision to critical habitat relies upon on the biology and information discussed in the final rule designating the current critical habitat for northern spotted owl (57 FR 1796; January 15, 1992), the Record of Decision for Amendments to Forest Service and BLM Planning Documents within the Range of the Northern Spotted Owl (USDA and USDI 1994b), and the 2007 Draft Recovery Plan for the Northern Spotted Owl (USFWS 2007). These planning efforts were based on creating and managing large blocks of northern spotted owl habitat to support local populations spaced in a manner that allows for the successful movement of dispersing individuals between these blocks. We do not propose to designate areas outside the geographical area presently occupied by the species since the species currently occurs throughout its historical range, albeit in very low numbers in some areas.

We used the following criteria to select specific areas as revised critical habitat:

(1) Focus on Federal Lands. The foundation of the current recovery strategy, as set forth in the 2007 Draft Recovery Plan for the Northern Spotted Owl (USFWS 2007), is a network of owl conservation areas (i.e., habitat blocks) located on Federal lands. Therefore, we considered only Federal lands to be essential to the conservation of the northern spotted owl for the purposes of designating critical habitat. Wilderness Areas, National Parks and many other lands under various Federal land use allocations contribute to the conservation of the northern spotted owl, but the majority of management for northern spotted owls on Federal lands in Washington, Oregon, and California is largely accomplished through the Forest Service's LRMPs and the BLM's RMPs, as amended by the Record of Decision for Amendments to Forest Service and BLM Planning Documents within the Range of the Northern Spotted Owl (USDA and USDI 1994a, b).

We are not proposing to modify the decision made in our 1992 designation that Wilderness Areas and National Parks do not meet the statutory definition of critical habitat under section 3(5)(A) of the Act, therefore these areas are not proposed as critical habitat here. Due to data and time constraints, some of the mapped critical habitat units in California include newly designated Wilderness Areas (PL 109–362, October 17, 2006). However, all critical habitat units in California will be adjusted to be consistent with our approach to Wilderness Areas in Oregon and Washington and will be removed from the final critical habitat designation.

In some areas of limited Federal ownership, private and State lands may help to expedite the recovery of the northern spotted owl by providing demographic support and connectivity to facilitate dispersal among habitat blocks. These voluntary habitat contributions are expected to increase the likelihood that northern spotted owl recovery will be achieved, shorten the time needed to achieve recovery, and reduce management risks associated with the recovery strategy and recovery actions. Consistent with the 1992 designation, we did not include non-Federal lands in the proposed revised designation of critical habitat.

(2) Lands Supporting the Primary Constituent Elements. We selected only lands that contain one or more of the PCEs described above, using Federal agency maps of nesting, roosting, or foraging habitat for northern spotted owls. Dispersal habitats were identified as necessary to meet the requisite spacing between habitat blocks to allow for the successful dispersal of northern spotted owls, as identified in the 2007 Draft Recovery Plan.

(3) Occupied Habitat. Consistent with the 1992 designation, we included only lands within the geographical area occupied by the species in the revised designation since the most recent assessments do not indicate that any presently unoccupied habitat is essential to the conservation of the species (Courtney *et al.* 2004, USFWS 2007).

(4) Large and Small Habitat Blocks. We relied on the 2007 Draft Recovery Plan recommendations regarding contiguity, habitat quality, spacing, and distribution within the range of the northern spotted owl to select large contiguous blocks of quality habitat, where possible, for critical habitat units (USFWS 2007). The 2007 Draft Recovery Plan recommends that habitat blocks need to be large enough to support clusters of at least 20 pairs of northern spotted owls, where possible. The size of such blocks was derived from empirical data and modeling results concluding that clusters of northern spotted owls approximating 20 pairs should be stable over the long term, given the rate of juvenile dispersal between clusters (Thomas *et al.* 1990, p. 24 and Appendix O). The size of such large blocks will vary based on the provincial home range size (see PCE 2). In some areas, existing conditions precluded designation of relatively large habitat blocks, and some smaller blocks are proposed for designation to provide habitat for fewer than 20 northern spotted owl pairs. These blocks were delineated to accommodate juvenile dispersal distance and to provide options for resident northern spotted owls. In some cases they may provide ''stepping stones'' where northern spotted owls dispersing from one large block may settle, produce young, and those young may then disperse to another large block, thereby facilitating genetic transfer between more distant large habitat blocks. The smaller blocks are intended to assist the populations in these areas by reducing the potential for local extinction and supporting the adjacent larger blocks thereby providing an interacting network of northern spotted owl populations (Thomas *et al.* 1990, pp. 285, 320).

(5) Dispersal Distance Between Blocks. As described in the 2007 Draft Recovery Plan, the success of the conservation strategy for the northern spotted owl depends on the relatively frequent dispersal of individuals between large habitat blocks; therefore the blocks must be separated by distances within the known dispersal distance of juveniles (Thomas *et al.* 1990, p. 307). Based on the observed dispersal distances of juveniles, the maximum allowable distance between the nearest points of contact of neighboring large habitat blocks is 12 mi (19 km) (Thomas *et al.* 1990, p. 307, Table P1). To provide an additional measure of successful dispersal security for the smaller blocks, a shorter distance of 7 mi (11 km) (Thomas *et al.* 1990, p. 308) was used. Current available scientific information continues to support the principles applied by the ISC (Courtney *et al.* 2004).

(6) Habitats Representative of the Historical Geographical and Ecological Distribution of the Northern Spotted Owl. Habitats that are representative of the historic geographical and ecological distributions of the northern spotted owl are more likely to sustain the species over time. The northern spotted owl has historically occupied a wide range of forested habitat types across the various physiographic provinces within its range. Therefore, this revision proposes to define critical habitat units distributed at appropriate dispersal distances throughout the range of the northern spotted owl in order to conserve and maintain the variation represented by these provincial populations rangewide.

We worked closely with the BLM and Forest Service to identify blocks of habitat within their management jurisdiction that would meet all of the criteria specified above. As a result of this coordination, we are proposing that the Managed Owl Conservation Areas as defined in Option 1 of the 2007 Draft Recovery Plan for the Northern Spotted Owl (USFWS 2007, p. 140) constitute the critical habitat units on Forest Service lands. On BLM lands in Oregon, we are proposing the location of critical habitat units consistent with Option 2 of the 2007 Draft Recovery Plan for the Northern Spotted Owl which employs a habitat selection rule-set to define areas needed for long-term conservation (USFWS 2007, p. 158). These mapping strategies are based on the Interagency Scientific Committee's report ''A Conservation Strategy for the Northern Spotted Owl'' (Thomas *et al.* 1990). The 2004 Scientific Evaluation of the Status of the Northern Spotted Owl (Courtney *et al.* 2004) confirmed the continuing scientific validity of this conservation strategy. BLM lands in the range of the northern spotted owl in California were mapped based on Managed Owl Conservation Areas identified in the 2007 Draft Recovery Plan, similar to that applied on Forest Service lands throughout the range of the northern spotted owl.

When determining proposed revised critical habitat boundaries, we made every effort to avoid including developed areas such as buildings, paved areas, and other structures that lack PCEs for the northern spotted owl. The scale of the maps prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. Any such structures and the land under them left inside revised critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, Federal actions limited to these areas would not trigger section 7 consultation, unless they affect the species or primary constituent elements in adjacent critical habitat.

We are proposing to designate revised critical habitat within the geographical area occupied by the northern spotted owl, and in areas that contain sufficient primary constituent elements to support life history functions essential for the conservation of the species.

Critical habitat units are proposed for revised designation based on sufficient PCEs being present to support northern spotted owl life processes. Some units contain all PCEs and support multiple life processes. Some units contain only a portion of the PCEs necessary to support the northern spotted owl's particular use of that habitat.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing and contain the primary constituent elements may require special management considerations or protections. The primary threats to the northern spotted owl include competition with barred owls and the loss, degradation, and fragmentation of habitat.

The 2007 Draft Recovery Plan for the Northern Spotted Owl (Plan) identifies competition from the barred owl as one of the most significant threats currently facing the northern spotted owl (USFWS 2007). The Plan expresses the need for urgency in addressing the barred owl threat, and actions associated with

addressing the barred owl threat were the only actions to be given recovery priority number 1, meaning the action ''must be taken to prevent extinction or prevent the species from declining irreversibly in the foreseeable future.''

For at least the past 50 years the barred owl has been expanding its range from eastern North America across Canada, and into the northern Rockies and Pacific States where it has invaded the range of the northern spotted owl (Courtney *et al.* 2004, p. 7–3). Being larger and more aggressive, barred owls may compete for habitat, nest sites, and prey (Courtney *et al.* 2004, p. 7–3), may hybridize with northern spotted owls, and may occasionally prey on northern spotted owls (Leskiw and Gutiérrez 1998, p. 226). Given the experimental nature of direct removal as a technique for barred owl control and the absence of any known habitat-based approach that has successfully favored northern spotted owls, special management considerations for barred owls will need to be developed. Since barred owls can apparently utilize all habitats known to be used by northern spotted owls, even if those areas are managed for the structural features preferred by northern spotted owls, if they are colonized by barred owls the value of those areas to northern spotted owls will be reduced or even eliminated.

The loss, degradation, and fragmentation of habitat for the northern spotted owl occur primarily as a result of timber harvest or natural disturbances such as fire and wind storms (55 FR 26177; June 26, 1990). Northern spotted owls disproportionately use older forests that are typically characterized by large-diameter trees, multiple canopy layers, high levels of standing and down woody material, and generally complex structure. All of these habitat components can be lost as a consequence of timber harvest, fire, or other stochastic events.

Timber harvest has contributed significantly to habitat loss, degradation, and fragmentation for the northern spotted owl, and was the basis for the original listing of the species (55 FR 26114; June 26, 1990). As a result of the listing, and the implementation of the LRMPs/RMPs as amended by the Record of Decision for Amendments to Forest Service and BLM Planning Documents within the Range of the Northern Spotted Owl (USDA and USDI 1994b), the threat posed by timber harvest on Federal lands has been greatly reduced since 1994. While reduced as a threat, timber harvest clearly has the potential to remove, degrade, or fragment northern spotted owl habitat.

Timber management within critical habitat units should maintain or enhance the individual habitat components important to nesting, roosting, foraging, and dispersal, as well as provide adequate amounts and juxtapositions of nesting, roosting, foraging, and dispersal habitat. In general, timber management in critical habitat units should seek to maintain or enhance the characteristics of older forest, and provide large blocks of older forest and associated interior forest conditions. In southern portions of the range, harvest plans should carefully consider the mix of prey production habitat, interior old forest, and the edges between them (Courtney *et al.* 2004, p. 5–23). Any timber management intended to maintain or enhance northern spotted owl habitat must take into account regional variation in habitat use and associations across the range.

Habitat losses due to increased wildfire intensity and size may be due to excessive fuel buildup resulting from many decades of fire suppression. Northern spotted owl habitat is particularly vulnerable in some drier eastside forests such as those in the Eastern Washington Cascades and the Eastern and Southern Oregon Cascades, as well as other provinces such as the Klamath Mountains. In these provinces, recent fire losses have been higher than the range of historical variability (Courtney *et al.* 2004, p. 6–32). Fuels reduction treatments, such as clearing vegetation, thinning, or prescribed fire, can themselves result in the loss, degradation, and fragmentation of northern spotted owl habitat. Thus, special management is necessary relative to fire management. Fire suppression will likely occur within critical habitat units, and fuel treatments should balance the short-term impacts of fire hazard reduction projects with the long-term risk of catastrophic loss of northern spotted owl habitat (Courtney *et al.* 2004, p. 6–28).

Other stochastic events can contribute to loss, degradation, and fragmentation of northern spotted owl habitat. Some areas within the range of the northern spotted owl have already been negatively impacted by these factors, including the east Cascades provinces (wildfire), eastern Washington Cascades (insects), southern Oregon (wildfire), and eastern Oregon Cascades (insects, disease, wildfire) (Courtney *et al.* 2004, p. 6–25). Forest managers have no control over weather events, but some factors, such as blowdown or windthrows, can be minimized in some areas by management that maintains large, contiguous blocks of older forest.

The loss of large areas of habitat may lead to reduced dispersal capability or, in the worst case, barriers to dispersal, which in turn can result in small, isolated subpopulations. Recent studies show no indication of reduced genetic variation in Washington, Oregon, or California (Barrowclough *et al.* 1999, pp. 927 to 928; Courtney *et al.* 2004, p. 11–9; Haig *et al.* 2004a, p. 683), although Henke *et al.* (2005 pp. i, 14) found ''especially low'' genetic diversity in northern spotted owls. Any isolation problems that northern spotted owls are experiencing today may not be evident in the genetic record for some time. Areas of concern for isolation include the northern spotted owl's range in Canada, the Olympic Peninsula in Washington, and Marin County in California (Courtney *et al.* 2004, p. 8–24). Because dispersal is an essential function for northern spotted owls, fragmentation between local populations can have negative effects. We considered the distances between critical habitat units and northern spotted owl dispersal ecology during proposed revised critical habitat unit selection. Special management is required to assure that the recommended maximum dispersal distances between blocks of habitat for northern spotted owls are not exceeded.

Summary of Changes From Previously Designated Critical Habitat

In 1992, we designated 6,887,000 ac (2,787,070 ha) of Federal lands as critical habitat for the northern spotted owl (57 FR 1796; January 15, 1992). In this revision, we are proposing that a total of 5,337,839 ac (2,160,194 ha) be designated as critical habitat for the northern spotted owl. We have proposed the revised designation of critical habitat for the northern spotted owl to be consistent with the most current assessment of the conservation needs of the species, as described in the 2007 Draft Recovery Plan for the Northern Spotted Owl (USFWS 2007). Although the recovery plan for the northern spotted owl has not yet been finalized, it nonetheless represents the most current conservation guidance for the species, therefore we looked to the recommendations of the 2007 draft recovery plan to inform this proposed revised designation of critical habitat. Of the proposed designation, 4,468,200 ac (1,808,256 ha) are the same as in the 1992 designation. Of the current proposed designation, 869,639 ac (351,938 ha) are lands that were not formerly designated, and 2,399,490 ac (971,060 ha) of lands that were included

in the former designation are not proposed here, for reasons detailed below.

The new delineation of areas determined to be essential for the conservation of the northern spotted owl was based, in part, on an improved understanding of the limits of habitat usage by northern spotted owls combined with refinements in mapping technology. Using rangewide elevation isopleths (based on a linear regression representing the elevation of 99 percent of the known owl-pair activity centers and latitude) and geologic maps of serpentine soil distribution (forests on such soils do not attain the requisite tree size and canopy closure), Davis and Lint (2005, pp. 30–32) identified ''habitat-capable'' areas on Federal lands within the range of the northern spotted owls. These are lands that currently provide nesting, roosting, and foraging habitat for northern spotted owls, or that have the biological capacity to do so under appropriate management, and that therefore have the ability to provide the PCEs for the northern spotted owls. The modeling of habitat-capable lands also took into account spotted owl presence location data, based on surveys and demographic monitoring (Davis and Lint 2005, p. 26). The improved modeling and mapping of lands that are habitat-capable with regard to northern spotted owls allowed for the refined definition of owl conservation areas, as presented in the 2007 Draft Recovery Plan, which in turn served as the basis for this critical habitat proposal.

Option 1 of the 2007 Draft Recovery Plan for the Northern Spotted Owl (USFWS 2007) identifies specific owl conservation areas based on a modification of the DCAs identified in the 1992 Final Draft Recovery Plan for the Northern Spotted Owl (USDI 1992), which were based on the habitat conservation areas (HCAs) first defined by the ISC (Thomas *et al.* 1990). The DCAs were chosen as the starting point for the delineation of the managed conservation areas (MOCAs) in the 2007 Draft Recovery Plan because they represent the best scientific delineation of areas needed specifically for the conservation of the northern spotted owl. Option 2 of the 2007 Draft Recovery Plan presents a habitat rule-set for defining alternative conservation areas designed to provide a network of habitat blocks to support clusters of reproducing northern spotted owls and allow for dispersal between blocks and provinces, and is also based on the conservation strategy set forth by the ISC (Thomas *et al.* 1990).

The strategy of the 2007 Draft Recovery Plan attempts to maximize the efficiency of the network of habitat blocks by making use of existing land use allocations that benefit the conservation of the northern spotted owl (for example, LSRs that are managed for late-successional forest species or other Federal lands that are administratively withdrawn from regularly scheduled timber harvest). Because the land use management plans of the Forest Service and BLM are designed and implemented, in part, to provide for the conservation of the northern spotted owl on Federal lands (USDA and USDI 1994b), the 2007 Draft Recovery Plan looks specifically to lands within the Federal management plan reserves for the habitat-capable acres needed to support the recovery objectives. This strategy accounts for many of the changes in the proposed critical habitat, since the location of conservation areas for northern spotted owls may have shifted to take advantage of various land use allocations, and some land use allocations, such as LSRs, did not come about until after the development of the DCAs and the original critical habitat designation for the northern spotted owl, under the Record of Decision for Amendments to Forest Service and BLM Planning Documents within the Range of the Northern Spotted Owl (USDA and USDI 1994b). (As noted earlier, LSRs were not designated solely to meet the needs of the northern spotted owl, but may include areas designated for other late-successional forest species. Therefore not all LSRs are necessarily identified as conservation areas for northern spotted owls). The placement of conservation areas in the 2007 Draft Recovery Plan are also designed to take advantage of contiguous areas of designated Wilderness or National Park lands, which provide large areas of additional habitat under management consistent with the objectives of the recovery plan.

Maps showing the difference between the 1992 designation and the 2007 proposed revised designation of critical habitat are provided by physiographic province (Maps 1 through 11), and a table is provided that details the acreage differences by province (Table 1). A map of the Willamette Valley province is not included, since no critical habitat is currently designated within that province and revised critical habitat is similarly not proposed within that province. On all Forest Service lands and on BLM lands in California, the proposed revised critical habitat is consistent with the MOCAs identified under Option 1 in the 2007 Draft Recovery Plan (USFWS 2007, pp. 140–155). The almost 200 DCAs were examined and MOCAs were delineated using the following principles:

(1) The original DCA was retained with no boundary change under one of the following conditions—(a) The original DCA boundary fell completely within a LRMP reserve and no revision of the DCA adjustment of the boundary was needed; or (b) The original DCA boundary did not fall completely within a LRMP reserve, but there was no need to change the boundary to move all or a portion of the DCA into the reserve.

(2) The original DCA was retained with a boundary change under one of the following conditions—(a) The DCA boundary fell completely within a LRMP reserve and a boundary adjustment was made to match all or a portion of the original DCA boundary with the boundary of the reserve; (b) The DCA boundary fell completely within a LRMP reserve and a boundary adjustment was made to include better habitat conditions within the new MOCA boundary; (c) All or a portion of the DCA was outside a LRMP reserve and the DCA was moved to match the reserve as much as possible, resulting in fewer acres of non-reserve land in the DCA; (d) All or a portion of the DCA was outside a LRMP reserve and the DCA was moved to match the reserve as much as possible, resulting in no change to the acres of non-reserve land in the DCA; or (e) Non-Federal lands within the DCA boundary were removed or redesignated as a conservation support area (CSA). Conservation support areas are lands between or adjacent to MOCAs where habitat contributions by private, State, and Federal lands are expected to increase the likelihood of northern spotted owl recovery.

(3) The original DCA was dropped under one of the following conditions—(a) The original DCA was not needed to satisfy the maximum spacing of 12 miles (closest edge to closest edge) between category 1 DCAs and 7 miles between category 2 DCAs (Thomas *et al.* 1990); (b) The original DCA was not needed to provide for a cluster of reproducing owls; or (c) The DCA was redesignated as a CSA. In most cases, the redesignation of DCAs to CSAs was intended to acknowledge the demonstrated contributions to northern spotted owl recovery made by State or private management on intervening lands.

In Oregon, the location of critical habitat units on BLM lands is based on the habitat rule-set presented under Option 2 of the Draft Recovery Plan (USFWS 2007, pp. 65–66). The rule set is intended to create a network of habitat blocks to support clusters of reproducing northern spotted owls, and

are tied directly to the recovery criteria identified in the 2007 Draft Recovery Plan. For the physiographic provinces in Oregon, the rule set provided for the following:

(1) Large habitat blocks, designed to support 20 pairs of spotted owls, no farther apart than 12 miles from their nearest large-block neighbor at their nearest points.

(2) Small habitat blocks, designed to support 1–19 pairs, no farther than 7 miles from their nearest neighbor at their nearest points. Smaller habitat blocks are closer to other habitat blocks to increase the likelihood that dispersing spotted owls find the smaller blocks.

(3) A large habitat block was established whenever possible, when the geographic vicinity for adding a habitat block to the network was met using the spacing criteria above. If adding a large habitat block was not possible, a small habitat block was established with as large a carrying capacity as the available habitat-capable acres and spacing requirements allow.

(4) Block-spacing as described above was the primary factor in determining the geographic vicinity for location of a given block in the network. Once in the vicinity of where a block was located, the specific locations of individual habitat blocks followed these prioritized rules:

a. Include habitat-capable acres that occur within Congressionally Reserved Areas or Administratively Withdrawn Areas (e.g., designated Wilderness Areas, National Parks, Natural Areas), if present; and

b. The habitat blocks are compact (i.e., have the smallest perimeter) and contiguous as the pattern of habitat-capable acres in the vicinity allows, given Rule 3(a); and

c. Include as many as possible acres of currently suitable habitat in Federal lands and as many known locations of spotted owls as possible, given Rule 3(a).

(5) At least 60% of the large and small habitat blocks are within the distance limits of at least three other habitat blocks, and at least one of the other three blocks is a large habitat block. This is to assure distribution of the habitat block network across the range of the spotted owl. The ability to create large habitat blocks in these excepted areas is restricted given the limited amount of available Federal lands.

(6) Where there are two adjoining provinces, establish two habitat blocks, which meet the prescribed distance limits from each other, and at least one of the two habitat blocks is a large block. Strive for multiple connections between adjacent provinces. This is to provide for spotted owl movement between provinces, facilitating demographic interaction and genetic interchange among provinces.

One example of a change resulting from the recommendations of the 2007 Draft Recovery Plan is that we are not proposing any critical habitat within the Western Washington Lowlands physiographic province. The 2007 Draft Recovery Plan for the Northern Spotted Owl no longer considers the management of forest habitat on Fort Lewis in Washington as a necessary component of northern spotted owl recovery, since no northern spotted owls are known to occur there. Thus the 60,506 ac (24,486 ha) of critical habitat designated on Fort Lewis in 1992 are not included in this revision. Since Fort Lewis is the only critical habitat currently designated within the Western Washington Lowlands, this change results in no critical habitat within that province under this proposal.

In sum, although the overarching biological objectives of achieving the recovery of the northern spotted owl remain the same, the 2007 Draft Recovery Plan proposes an alternative configuration of habitat blocks intended to be a more efficient strategy for attaining those objectives, which is reflected in the revised critical habitat designation proposed here. The number, size, and configuration of critical habitat units has thus changed, based on the recommendations of the 2007 Draft Recovery Plan for the Northern Spotted Owl with regard to the placement of conservation areas (USFWS 2007), in combination with the application of the rule set defining habitat block size and distance (Thomas *et al.* 1990) and the refined modeling of habitat-capable lands (Davis and Lint 2005). The reduction in number of critical habitat units is a reflection, in part, of our decision to aggregate multiple blocks into single units (Table 3). The current designation includes 190 critical habitat units; the proposed revision includes 29 critical habitat units. As an example of how blocks were consolidated, in the current proposal the Olympic Peninsula Unit (Unit 1) includes 10 of the units under the current designation (Units 43 through 52). As provided in the unit descriptions, each of the critical habitat units may include several large and small habitat blocks.

Finally, in this proposed rule we provide a more detailed and specific characterization of the PCEs for the northern spotted owl. Although described in more detail in the preamble, the actual rulemaking section of the 1992 designation described the PCEs only as ''forested areas that are used or potentially used by northern spotted owl for nesting, roosting, foraging, or dispersing'' (57 FR 1838; January 15, 1992). Research since the 1992 designation of critical habitat has largely confirmed our understanding of the PCEs as presented in the discussion section of that final rule (Courtney *et al.* 2004), but this revision seeks to incorporate the specific description of those PCEs, as described earlier in the Primary Constituent Elements section of this document, into the Proposed Regulation Promulgation Section of the rule. For example, the proposed rule describing the PCEs now includes a list of the specific forest types used by northern spotted owls, as well as a description of the particular habitat components (tree size, canopy closure, nest platforms, etc.) used by northern spotted owls for nesting, roosting, foraging, and dispersal.

BILLING CODE 4310–55–P

- Map 1 -
Eastern Washington
Cascades Province

Distribution of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*) comparing the 1992 and 2007 designations

Map Key

NSO Critical Habitat

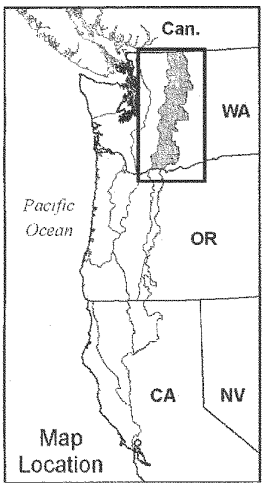
- 1992 designation only
- 2007 designation only
- Both 1992 and 2007

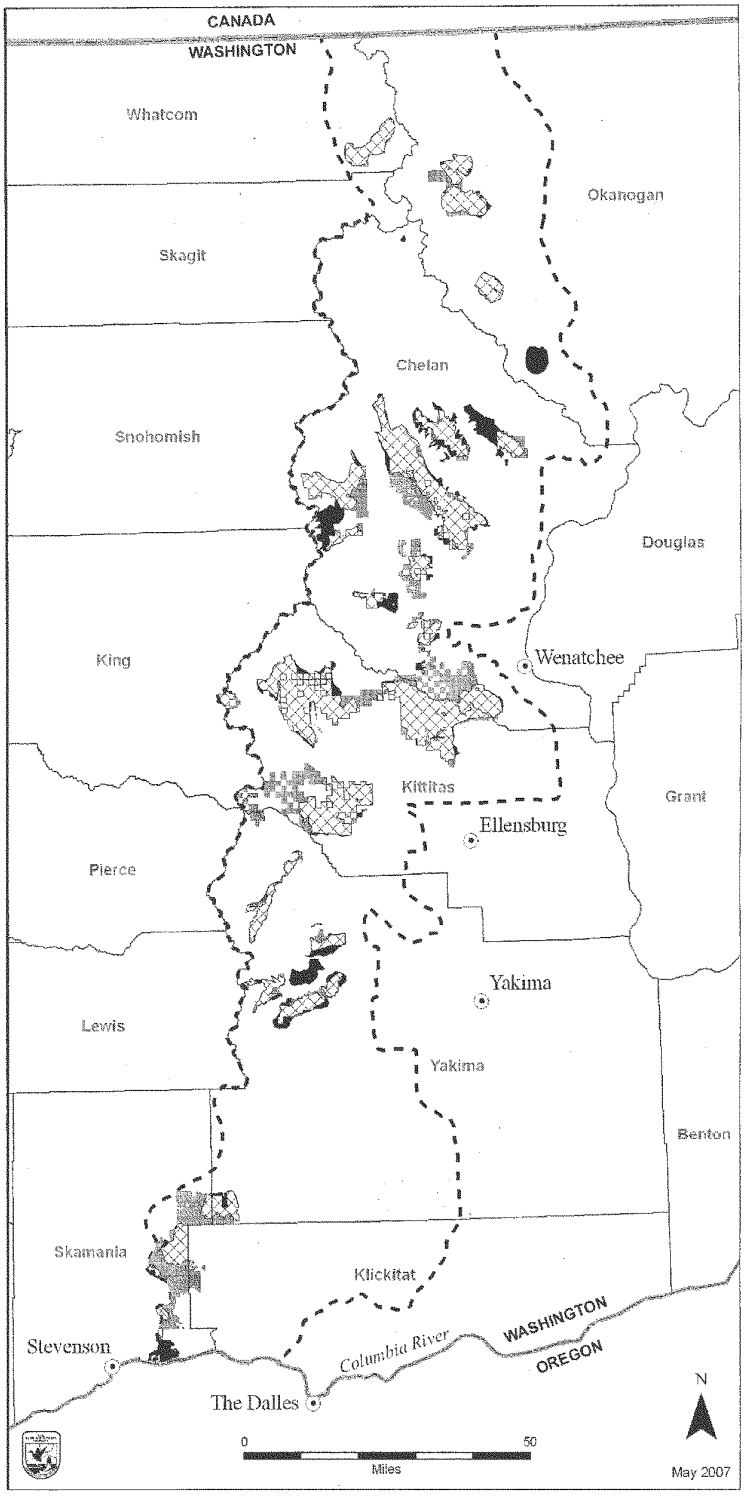
NWFP Boundaries

- Physiographic Province

Political boundaries

- County
- State
- International
- City or town





- Map 2 -
Olympic Peninsula Province

Distribution of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*) comparing the 1992 and 2007 designations

Map Key

NSO Critical Habitat

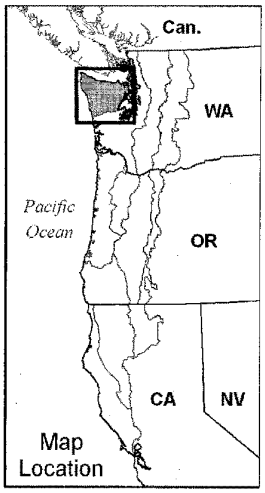
- 1992 designation only
- 2007 designation only
- Both 1992 and 2007

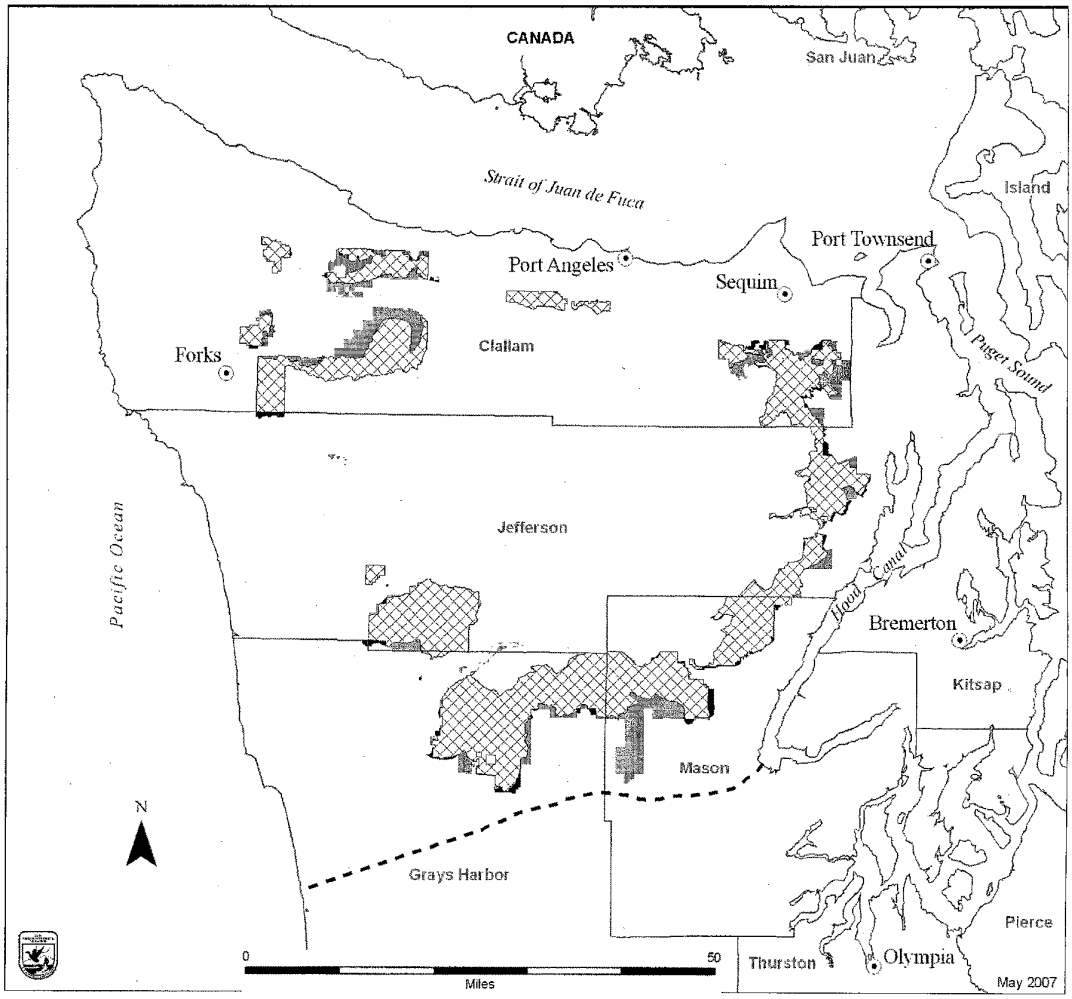
NWFP Boundaries

- Physiographic Province

Political boundaries

- County
- State
- City or town





- Map 3 -
Western Washington Cascades Province

Distribution of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*) comparing the 1992 and 2007 designations

Map Key

NSO Critical Habitat

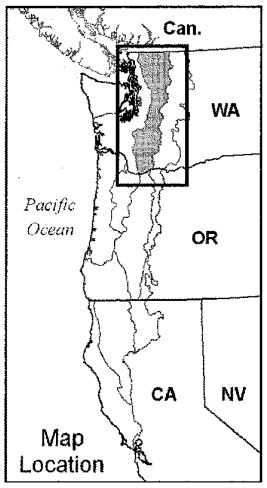
- 1992 designation only
- 2007 designation only
- Both 1992 and 2007

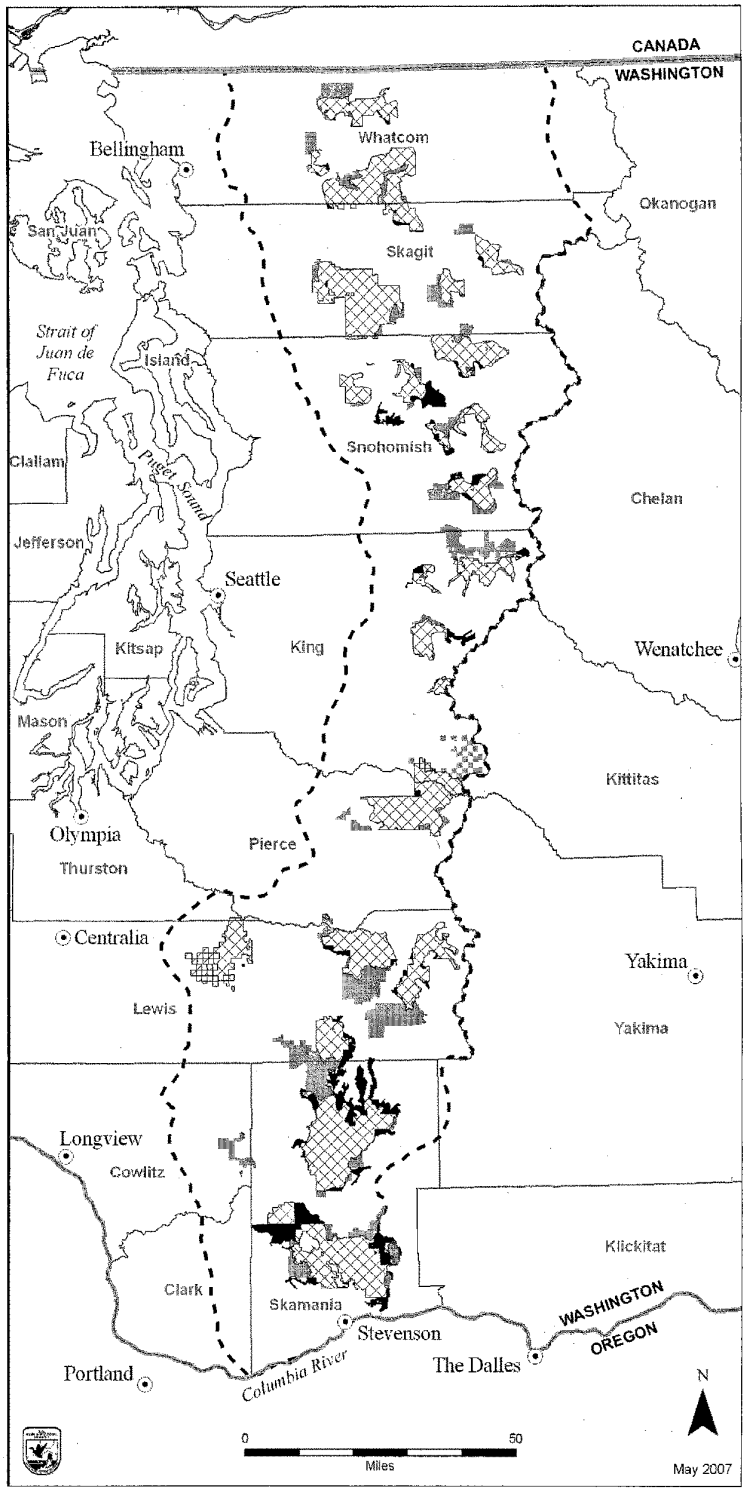
NWFP Boundaries

- Physiographic Province

Political boundaries

- County
- State
- International
- City or town





- Map 4 -
Western Washington Lowlands Province

Distribution of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*) comparing the 1992 and 2007 designations

Map Key

NSO Critical Habitat

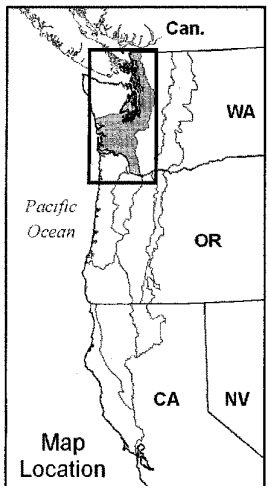
- 1992 designation only
- 2007 designation only
- Both 1992 and 2007

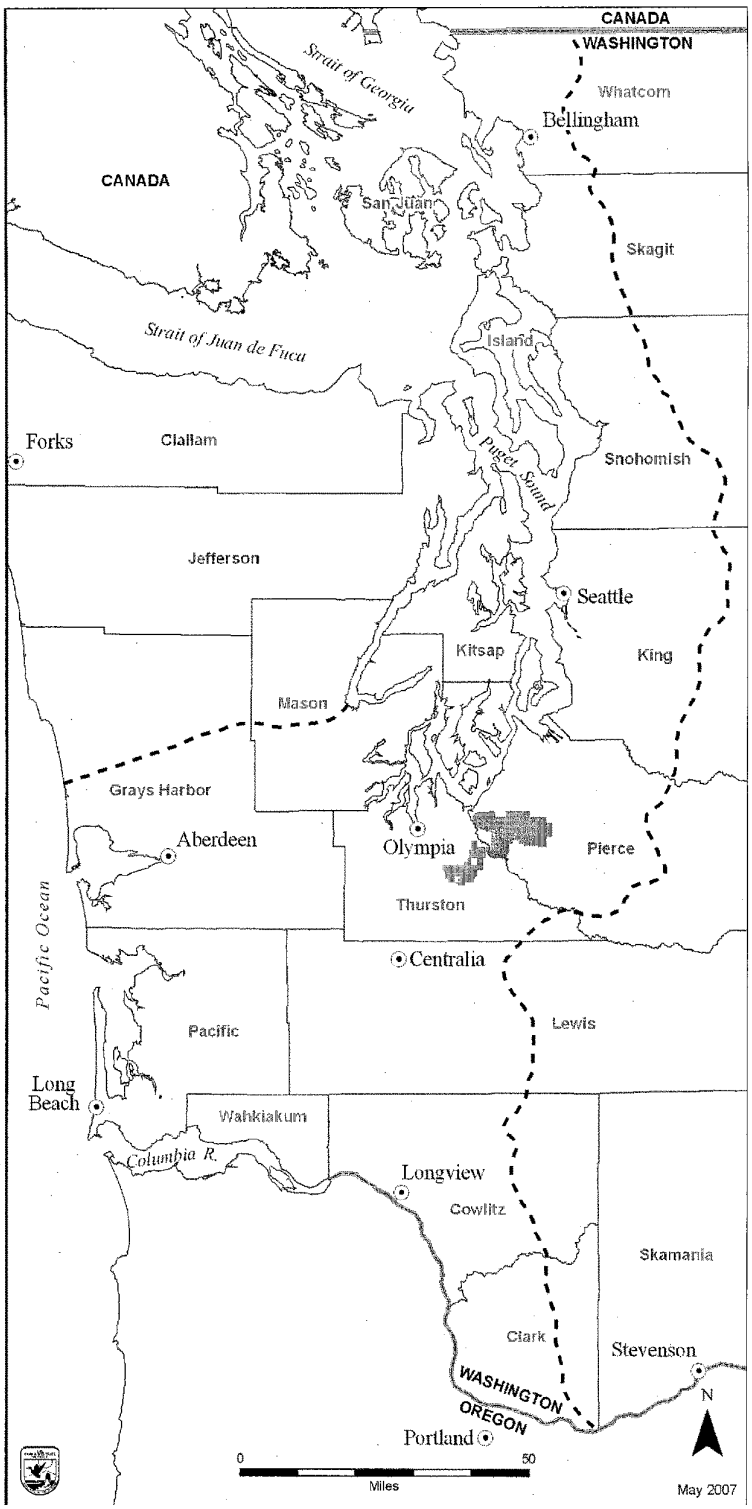
NWFP Boundaries

- Physiographic Province

Political boundaries

- County
- State
- International
- City or town





- Map 5 -
Eastern Oregon
Cascades Province

Distribution of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*) comparing the 1992 and 2007 designations

Map Key

NSO Critical Habitat

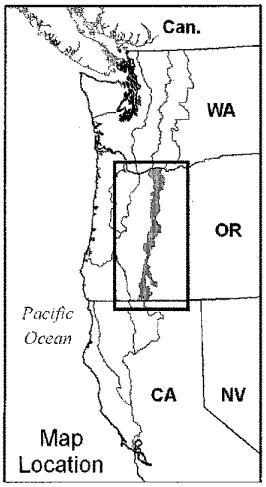
- 1992 designation only
- 2007 designation only
- Both 1992 and 2007

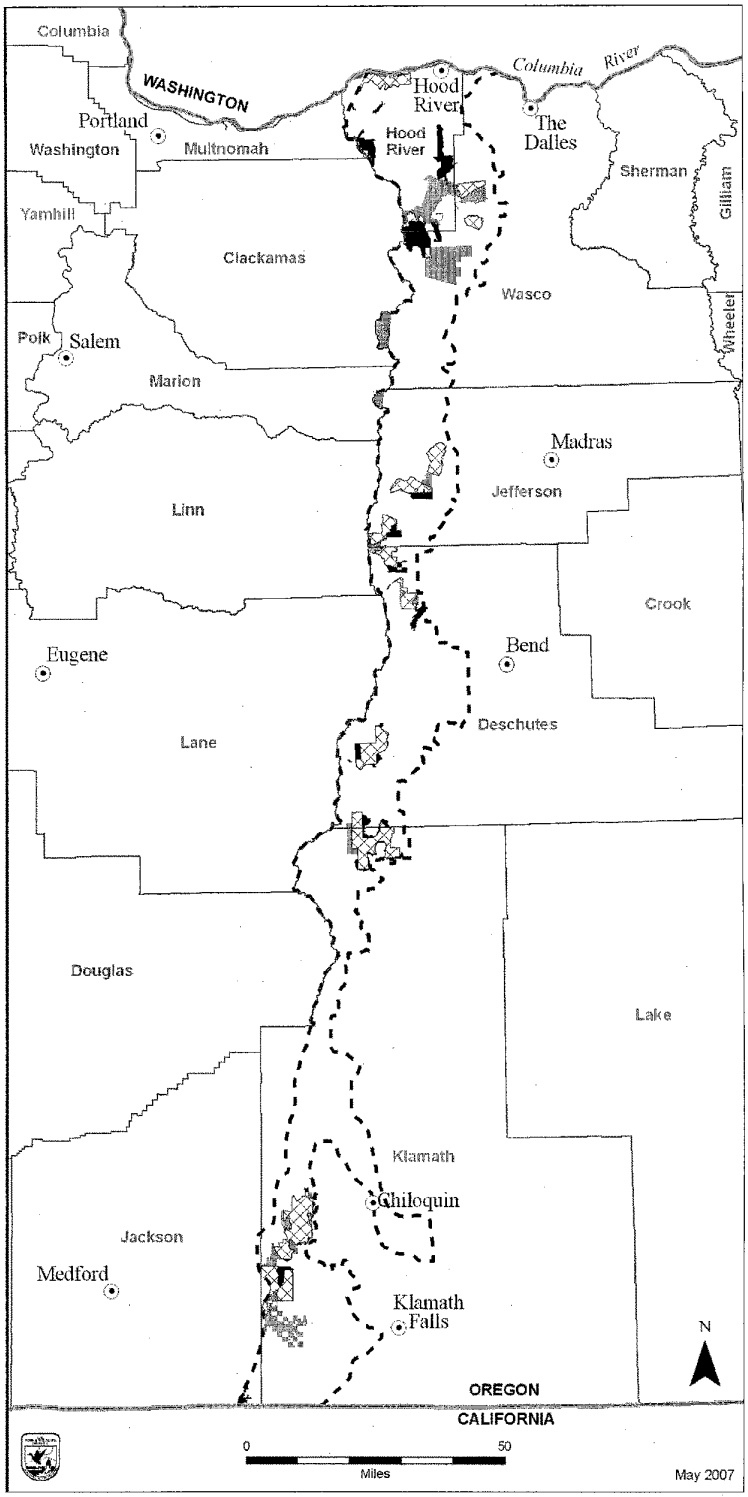
NWFP Boundaries

- Physiographic Province

Political boundaries

- County
- State
- City or town





- Map 6 -
Western Oregon
Cascades Province

Distribution of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*) comparing the 1992 and 2007 designations

Map Key

NSO Critical Habitat

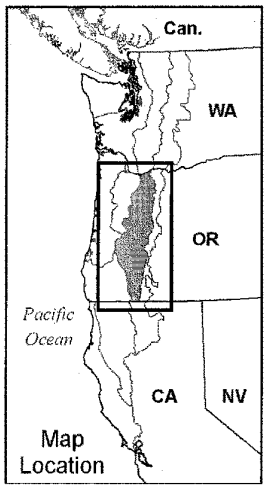
- 1992 designation only
- 2007 designation only
- Both 1992 and 2007

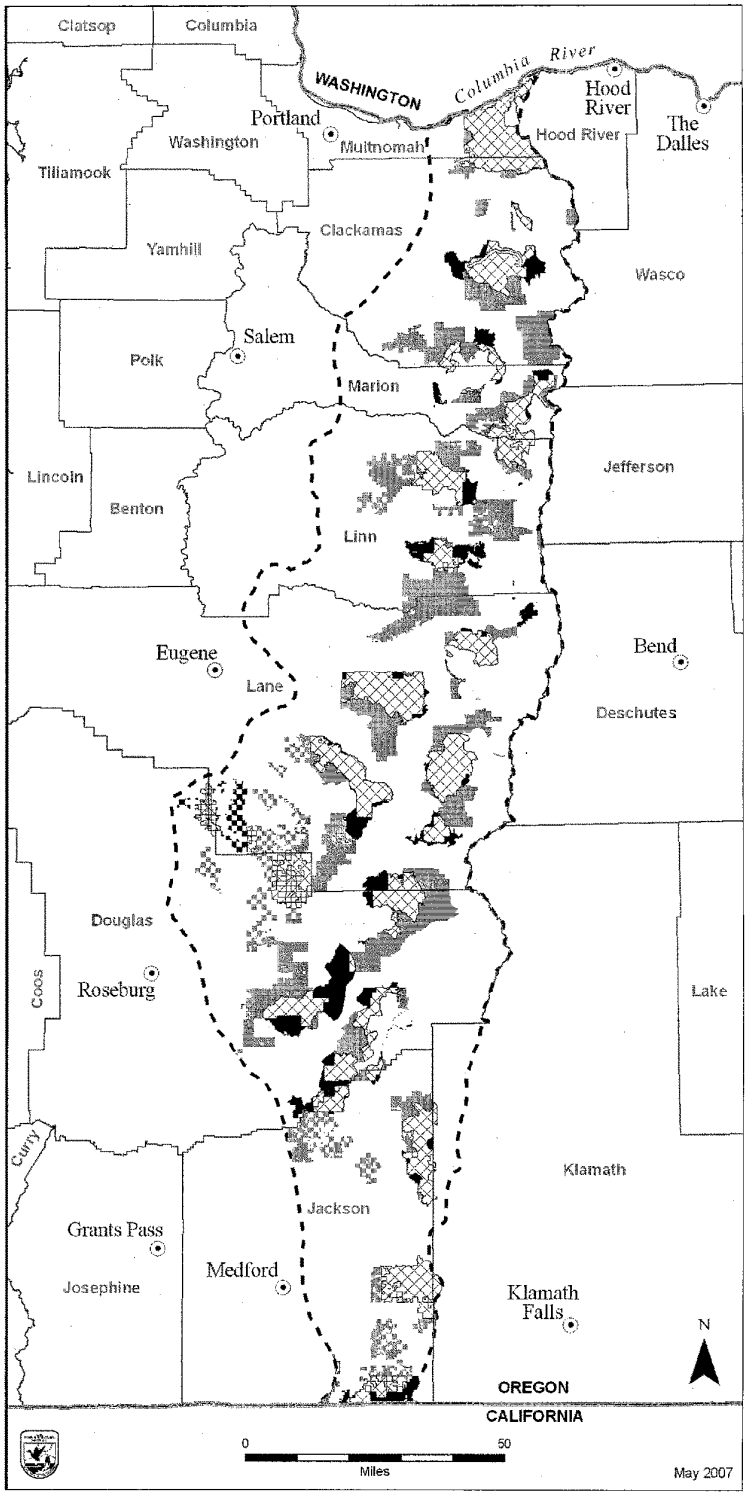
NWFP Boundaries

- Physiographic Province

Political boundaries

- County
- State
- City or town





- Map 7 -
Oregon Coast Ranges Province

Distribution of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*) comparing the 1992 and 2007 designations

Map Key

NSO Critical Habitat

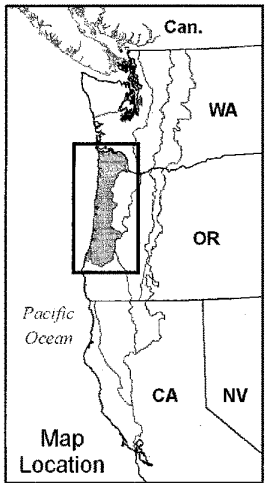
- 1992 designation only
- 2007 designation only
- Both 1992 and 2007

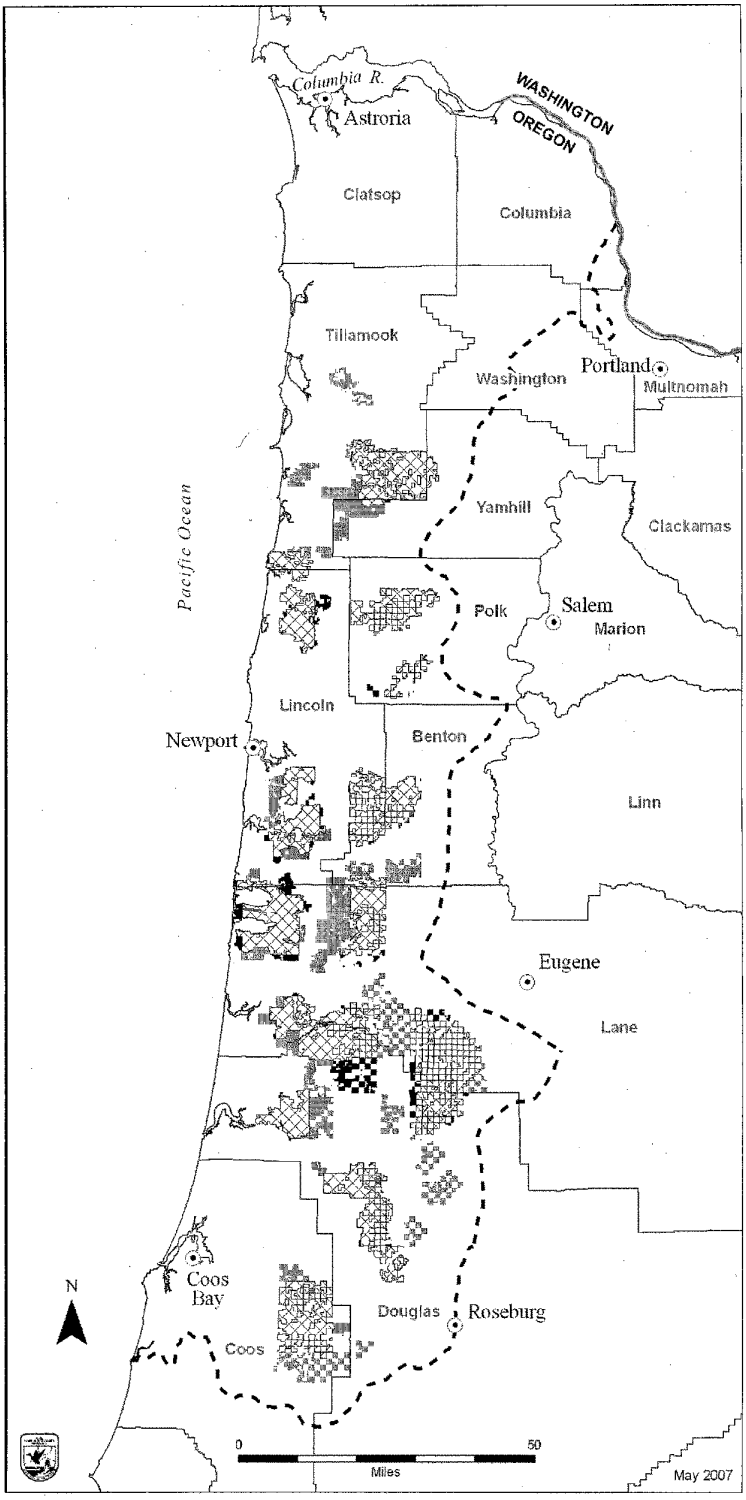
NWFP Boundaries

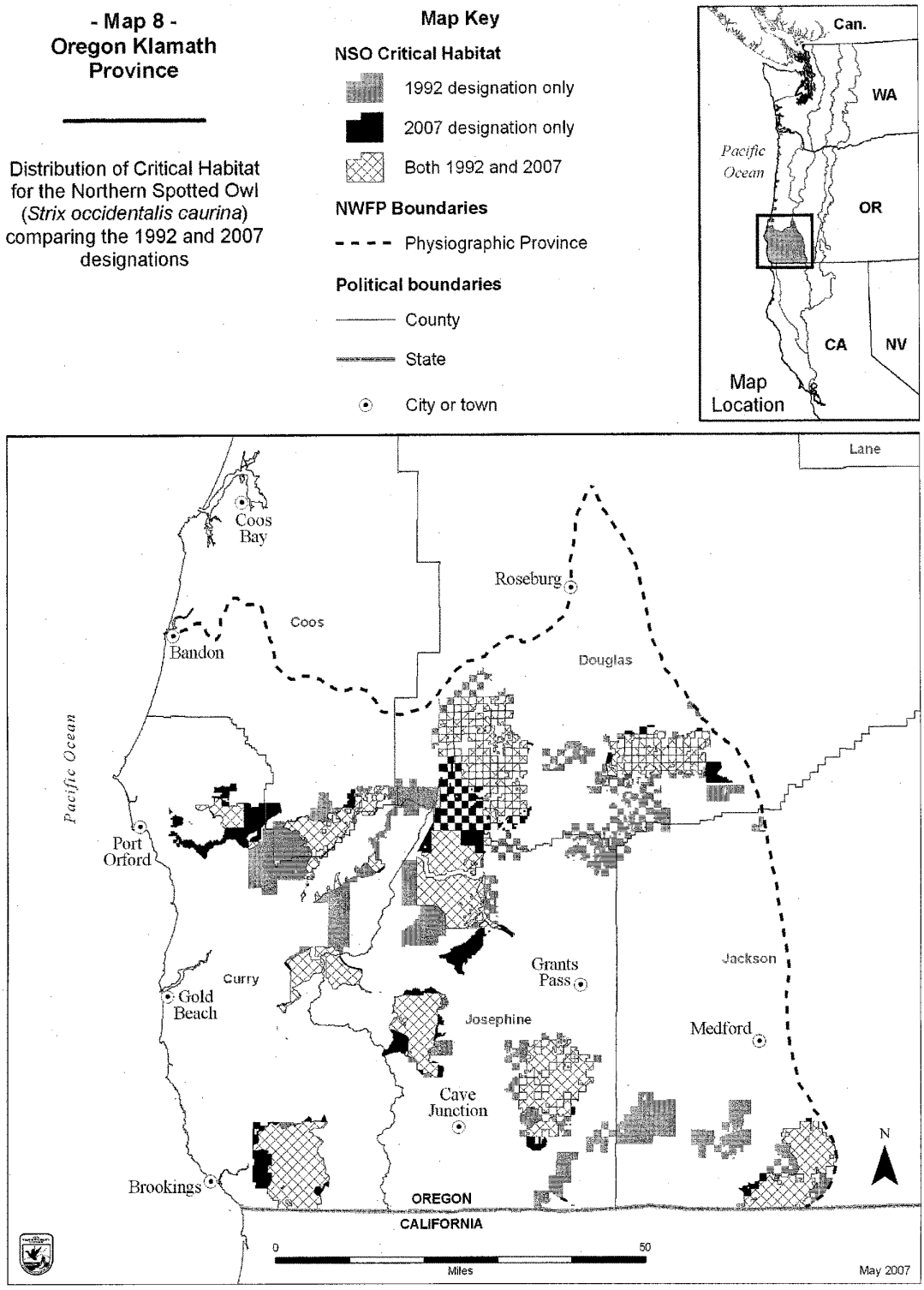
- Physiographic Province

Political boundaries

- County
- State
- City or town






- Map 8 -
Oregon Klamath Province
Distribution of Critical Habitat for the Northern Spotted Owl (Strix occidentalis caurina) comparing the 1992 and 2007 designations
Map Key
NSO Critical Habitat
1992 designation only
2007 designation only
Both 1992 and 2007
NWFP Boundaries
Physiographic Province
Political boundaries
County
State
City or town
Can.
WA
OR
CA
NV
Pacific Ocean
Map Location
Lane
Coos Bay
Roseburg
Coos
Bandon
Douglas
Pacific Ocean
Port Orford
Curry
Gold Beach
Grants Pass
Jackson
Josephine
Medford
Cave Junction
Brookings
OREGON
CALIFORNIA
N
0
50
Miles
May 2007

- Map 9 -
California Cascades Province

Distribution of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*) comparing the 1992 and 2007 designations

Map Key

NSO Critical Habitat

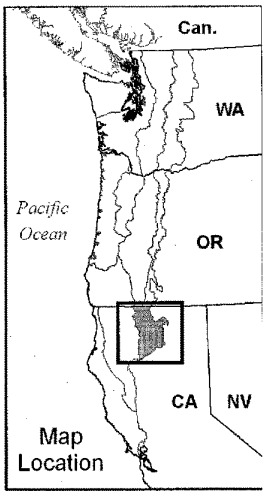
- 1992 designation only
- 2007 designation only
- Both 1992 and 2007

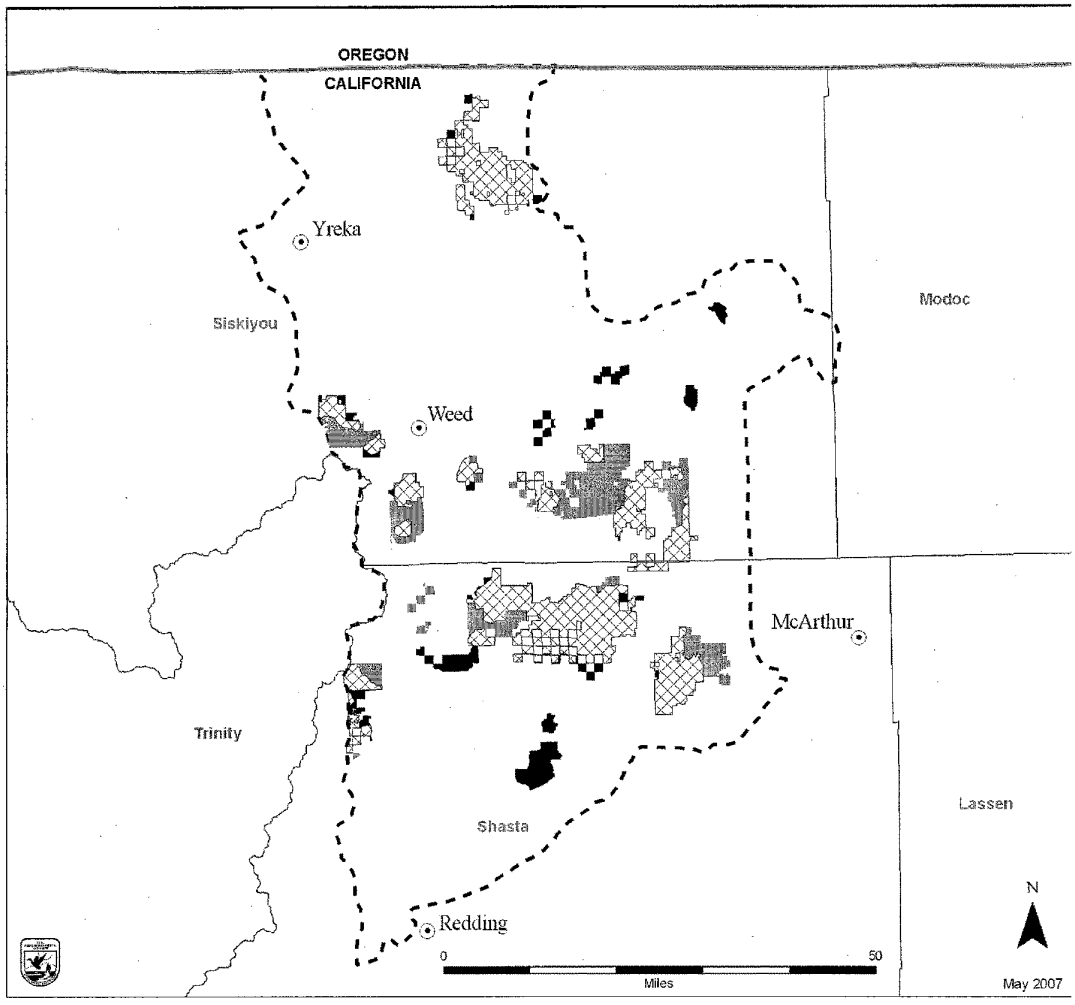
NWFP Boundaries

- Physiographic Province

Political boundaries

- County
- State
- City or town





- Map 10 -
California Coast Ranges Province

Distribution of Critical Habitat for the Northern Spotted Owl (*Strix occidentalis caurina*) comparing the 1992 and 2007 designations

Map Key

NSO Critical Habitat

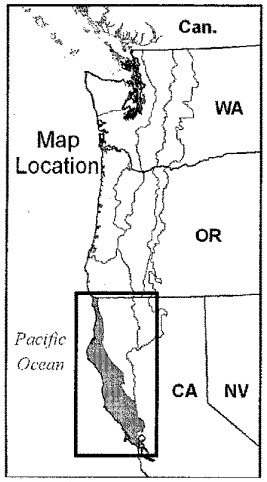
- 1992 designation only
- 2007 designation only
- Both 1992 and 2007

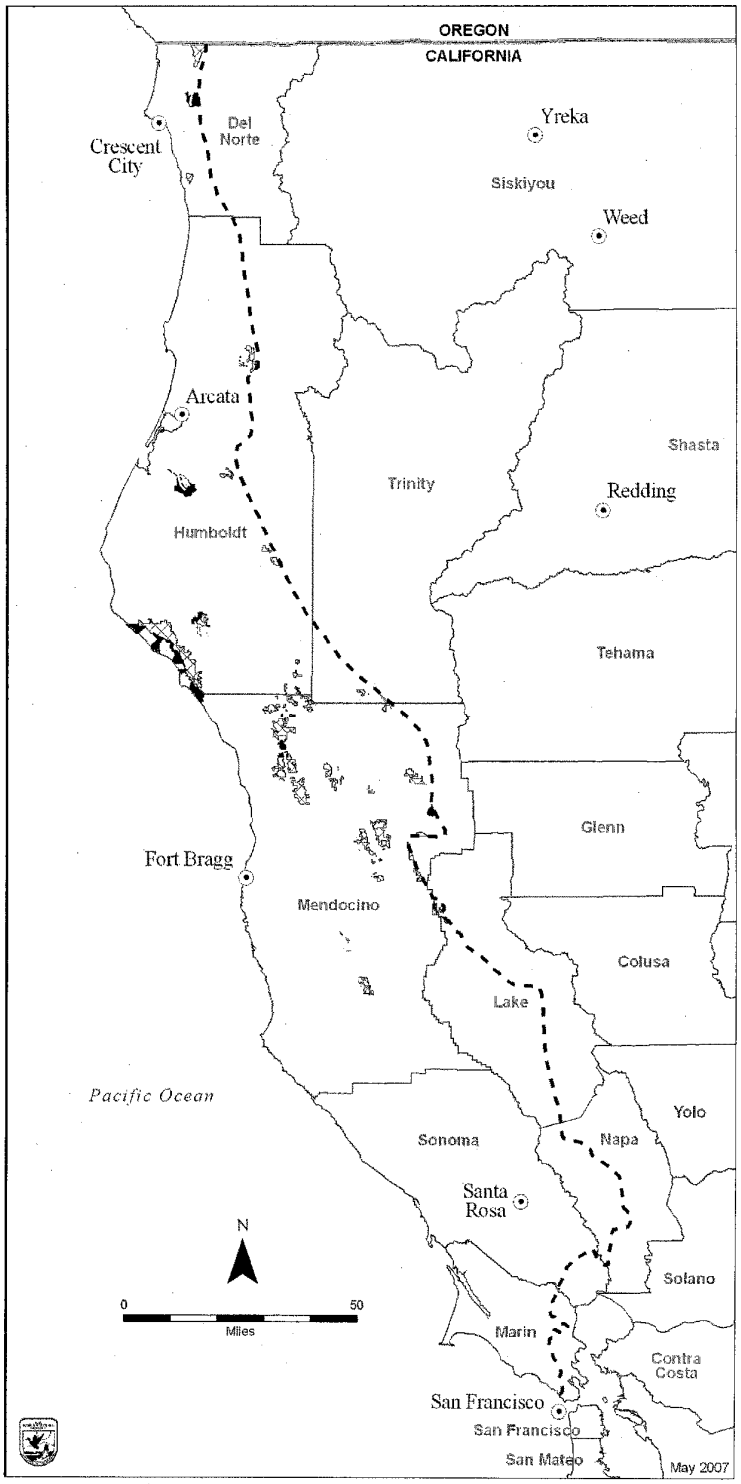
NWFP Boundaries

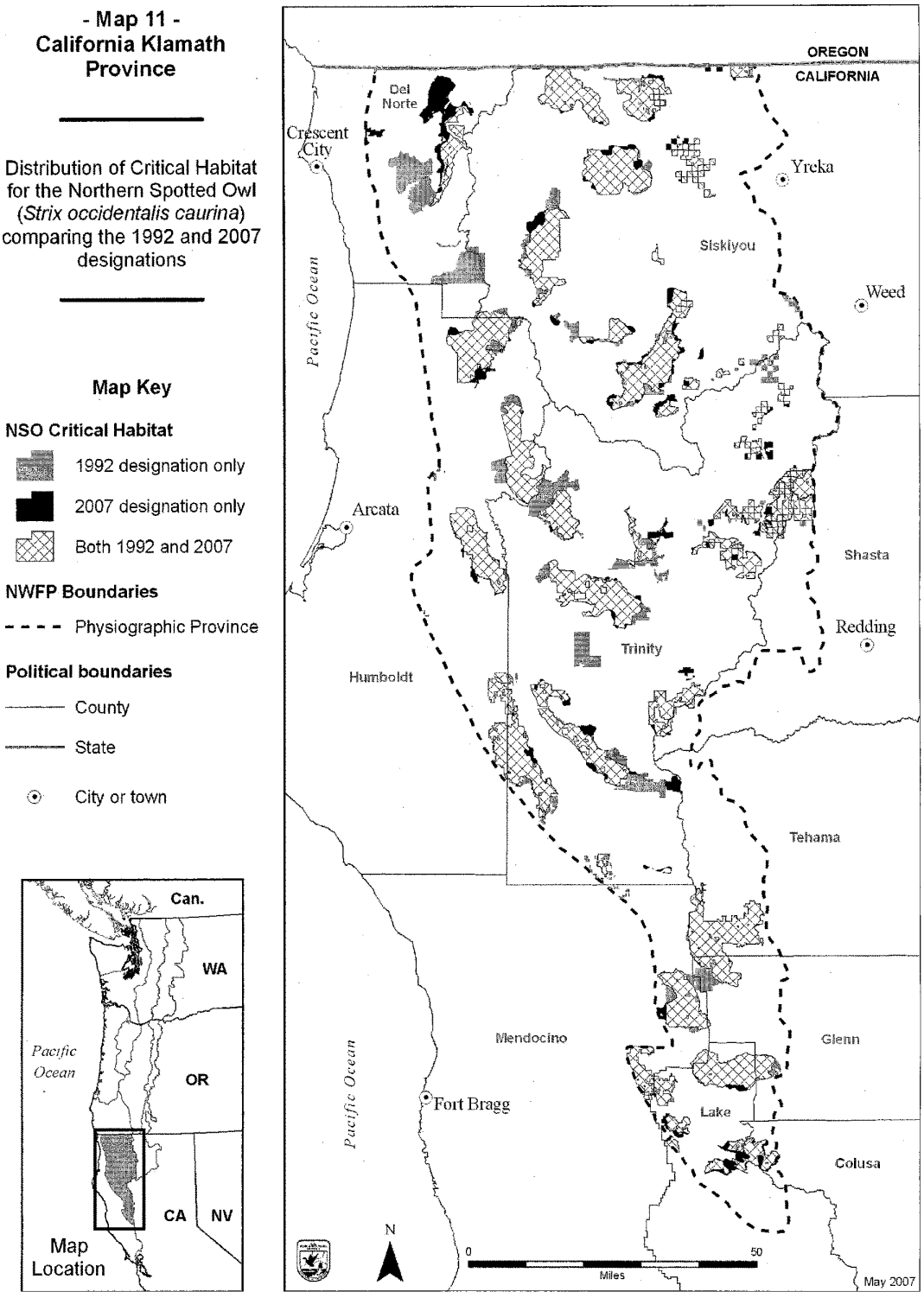
- Physiographic Province

Political boundaries

- County
- State
- City or town







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Areas of overlap (1992 and 2007) and differences between the current (1992) designation of critical habitat for the northern spotted owl and the proposed revised designation (2007) by physiographic province and State. Those areas designated in 1992 that are not included in the proposed revision are labeled as ''1992 only,'' and those areas in the proposed revision that are not currently designated are labeled as ''2007 only.'' All acreages are approximate. Note that the acreage totals for the 1992 designation do not precisely match those originally published (57 FR 1809; January 15, 1992). This discrepancy is due to the

increased accuracy of data coverages and mapping capabilities since 1992, some changes in acreage of congressionally reserved lands since 1992, and the fact that the acreages reported in 1992 were rounded to the nearest 1,000 acres.

TABLE 1.

State	Physiographic province	Critical habitat designation	Acres	Hectares
Washington	Eastern Washington Cascades	1992 and 2007	468,624	189,650
		1992 only	210,992	85,387
		2007 only	111,857	45,268
		1992 total	679,616	275,037
		2007 total	580,481	234,917
	Olympic Peninsula	1992 and 2007	319,810	129,425
		1992 only	65,007	26,308
		2007 only	11,933	4,829
		1992 total	384,817	155,733
		2007 total	331,742	134,254
	Western Washington Cascades	1992 and 2007	796,984	322,535
		1992 only	260,875	105,575
		2007 only	120,972	48,957
		1992 total	1,057,859	428,110
		2007 total	917,956	371,492
	Western Washington Lowlands	1992 and 2007	0	0
		1992 only	60,503	24,485
		2007 only	0	0
		1992 total	60,503	24,485
		2007 total	0	0
	Washington Total	1992	2,182,796	883,365
		2007	1,830,179	740,663
Oregon	Eastern Oregon Cascades	1992 and 2007	159,887	64,706
		1992 only	117,346	47,489
		2007 only	66,288	26,826
		1992 total	277,233	112,195
		2007 total	226,176	91,532
	Western Oregon Cascades	1992 and 2007	733,006	296,644
		1992 only	864,942	350,037
		2007 only	217,590	88,057
		1992 total	1,597,949	646,681
		2007 total	950,596	384,701
	Oregon Coast Ranges	1992 and 2007	538,477	217,919
		1992 only	248,126	100,415
		2007 only	50,478	20,428
		1992 total	786,604	318,334
		2007 total	588,956	238,347
	Oregon Klamath	1992 and 2007	350,098	141,683
		1992 only	278,295	112,624
		2007 only	94,253	38,144
		1992 total	628,392	254,307
		2007 total	444,350	179,826
	Oregon Total	1992	3,290,178	1,331,517
		2007	2,210,078	894,406
California	California Cascades	1992 and 2007	190,986	77,291
		1992 only	87,649	35,471
		2007 only	44,484	18,003
		1992 total	278,635	112,762
		2007 total	235,470	95,293
	California Coast Ranges	1992 and 2007	95,883	38,803
		1992 only	4,026	1,629
		2007 only	35,983	14,562
		1992 total	99,909	40,433
		2007 total	131,866	53,365
	California Klamath	1992 and 2007	814,444	329,601
		1992 only	201,727	81,638
		2007 only	115,802	46,864
		1992 total	1,016,172	411,239
		2007 total	930,246	376,465
	California Total	1992	1,394,716	564,434
		2007	1,297,582	525,124

TABLE 1.—Continued

State	Physiographic province	Critical habitat designation	Acres	Hectares
Total		1992 and 2007	4,468,200	1,808,256
		1992 only	2,399,490	971,060
		2007 only	869,639	351,938
		1992 total	6,867,690	2,779,316
		2007 total	5,337,839	2,160,194

Proposed Revised Critical Habitat Designation

The proposed revised critical habitat areas described below constitute our best assessment currently of areas within the geographic area occupied by the species that contain the primary constituent elements and may require special management. Table 2 below provides the approximate area (ac/ha) determined to meet the definition of critical habitat for the northern spotted owl by State.

TABLE 2.—AREAS DETERMINED TO MEET THE DEFINITION OF CRITICAL HABITAT FOR THE NORTHERN SPOTTED OWL

State	Proposed revised critical habitat	
	Acres	Hectares
Washington	1,830,179	740,650
Oregon	2,210,078	894,390
California	1,297,582	525,115

TABLE 2.—AREAS DETERMINED TO MEET THE DEFINITION OF CRITICAL HABITAT FOR THE NORTHERN SPOTTED OWL—Continued

State	Proposed revised critical habitat	
	Acres	Hectares
Total	5,337,839	2,160,155

The approximate area encompassed within each revised critical habitat unit is shown in Table 3.

TABLE 3.—REVISED CRITICAL HABITAT UNITS PROPOSED FOR THE NORTHERN SPOTTED OWL

Critical habitat unit by state	Forest service	BLM
Washington:		
Unit 1—Olympic Peninsula	331,742 ac (134,251 ha)	0.
Unit 2—Northwest Washington Cascades	410,872 ac (166,274 ha)	0.
Unit 3—Okanogan	115,638 ac (46,797 ha)	0.
Unit 4—Entiat	304,817 ac (123,355 ha)	0.
Unit 5—Southwest Washington Cascades	523,710 ac (211,938 ha)	0.
Unit 6—Southeast Washington Cascades	143,400 ac (58,031 ha)	0.
Oregon:		
Unit 7—Northern Oregon Coast Ranges	187,562 ac (75,904 ha)	133,858 ac (54,170 ha).
Unit 8—Southern Oregon Coast Ranges	67,751 ac (27,418 ha)	136,525 ac (55,250 ha).
Unit 9—Western Oregon Cascades North	334,738 ac (135,464 ha)	0.
Unit 10—Hood River	42,683 ac (17,273 ha)	0.
Unit 11—Eastern Oregon Cascades	106,665 ac (43,166 ha)	0.
Unit 12—Western Oregon Cascades South	448,324 ac (181,430 ha)	79 ac (32 ha).
Unit 13—Willamette/North Umpqua	0	119,638 ac (48,416 ha).
Unit 14—Rogue-Umpqua	13,147 ac (5,320 ha)	152,357 ac (61,657 ha).
Oregon and California:		
Unit 15—Oregon Klamath Mountains	194,745 ac (78,810 ha)	466 ac (188 ha).
Unit 16—Klamath Intra-Province	57,977 ac (23,462 ha)	38,595 ac (15,619 ha).
Unit 17—Southern Cascades	191,612 ac (77,543 ha)	34,818 ac (14,090 ha).
Unit 25—Scott and Salmon Mountains	242,450 ac (98,116 ha)	0.
California:		
Unit 18—Coastal Redwoods	6,937 ac (2,807 ha)	0.
Unit 19—Coastal Humboldt	0	49,308 ac (19,954 ha).
Unit 20—King Range	0	40,308 ac (16,312 ha).
Unit 21—South Fork Mountain Divide	141,054 ac (57,082 ha)	4,126 ac (1,670 ha).
Unit 22—Eel-Russian River	0	21,940 ac (8,879 ha).
Unit 23—Mendocino Coast Ranges	215,105 ac (87,050 ha)	0.
Unit 24—Western Klamath/Siskiyou Mountains	236,460 ac (95,692 ha)	3,670 ac (1,485 ha).
Unit 26—Trinity Divide	13,870 ac (5,613 ha)	0.
Unit 27—Shasta-Trinity Lakes	85,730 ac (34,694 ha)	1,090 ac (441 ha).
Unit 28—Eastern Klamath Mountains	110,756 ac (44,821 ha)	0.
Unit 29—Shasta/McCloud	73,316 ac (29,670 ha)	0.

We present brief descriptions of the proposed revised critical habitat units below. All units are within the geographic area occupied (see Criteria Used to Identify Critical Habitat for methods) and all contain one or more of the features essential to the conservation of the northern spotted owl, as described in the PCEs. As provided under section 4(b)(2) of the Act, these units will be considered for exclusion from critical habitat when this rule is finalized. Exclusions are considered based on the relative costs and benefits of designating critical habitat, including

information contained in the forthcoming economic analysis.

Unit 1. Olympic Peninsula

The Olympic Peninsula Unit consists of 331,742 ac (134,251 ha) in Clallam, Jefferson, Mason, and Grays Harbor Counties, Washington, and is comprised of lands managed by the Olympic National Forest. This unit includes one area that, with the associated Wilderness and Olympic National Park, meets the size requirement of a large habitat block, and two areas that, with the associated Wilderness and Olympic National Park, meet the size requirement of small habitat blocks.

Unit 2. Northwest Washington Cascades

The Northwest Washington Cascades Unit consists of 410,872 ac (166,274 ha) in Whatcom, Skagit, Snohomish, King, and Kittitas Counties, Washington, and is comprised of lands managed by the Mt. Baker-Snoqualmie and Wenatchee National Forests. This unit includes 2 areas that, with associated Wilderness and the North Cascades National Park, meet the size requirement of large habitat blocks, and 13 areas that, with associated Wilderness and the North Cascades National Park, meet the size requirement of small habitat blocks.

Unit 3. Okanogan

The Okanogan Unit consists of 115,638 ac (46,797 ha) in Whatcom, Okanogan, and Chelan Counties, Washington, and is comprised of lands managed by the Okanogan and Wenatchee National Forests. This unit includes seven areas that, with associated Wilderness and the North Cascades National Park, meet the size requirement of small habitat blocks.

Unit 4. Entiat

The Entiat Unit consists of 304,817 ac (123,355 ha) in Chelan and Kittitas Counties, Washington, and is comprised of lands managed by the Wenatchee and Mt. Baker-Snoqualmie National Forests. This unit includes three areas that, with associated Wilderness, meet the size requirement of large habitat blocks and four areas that, with associated Wilderness, meet the size requirement of small habitat blocks.

Unit 5. Southwest Washington Cascades

The Southwest Washington Cascades Unit consists of 523,710 ac (211,938 ha) in King, Pierce, Thurston, Lewis, Skamania, Cowlitz, Kittitas, and Yakima Counties, Washington, and is comprised of lands managed by the Mt. Baker-Snoqualmie, Gifford Pinchot, and Wenatchee National Forests. This unit includes four areas that, with associated Wilderness and Mount Rainier National Park, meet the size requirement of large habitat blocks and two areas that, with associated Wilderness and the Mount Rainier National Park, meet the size requirement of small habitat blocks.

Unit 6. Southeast Washington Cascades

The Southeast Washington Cascades Unit consists of 143,400 ac (58,031 ha) in Kittitas, Yakima, and Skamania Counties, Washington, and is comprised of lands managed by the Wenatchee and Gifford Pinchot National Forests. This unit includes six areas that, with associated Wilderness, meet the size requirement of small habitat blocks.

Unit 7. Northern Oregon Coast Ranges

The Northern Oregon Coast Ranges Unit consists of 321,420 ac (130,074 ha) in Tillamook, Yamhill, Polk, Lincoln, Benton, and Lane Counties, Oregon, and is comprised of lands managed by the Siuslaw National Forest (187,562 ac (75,904 ha)) and Salem and Eugene BLM Districts (133,858 ac (54,170 ha)). This unit includes one area that, with associated Wilderness, meets the size requirement of a large habitat block and seven areas that, with associated Wilderness, meet the size requirement of small habitat blocks.

Unit 8. Southern Oregon Coast Ranges

The Southern Oregon Coast Ranges Unit consists of 204,276 ac (82,668 ha) in Lane, Coos, and Douglas Counties, Oregon, and is comprised of lands managed by the Siuslaw National Forest (67,751 ac (27,418 ha)) and Eugene, Roseburg and Coos Bay BLM Districts (136,525 ac (55,250 ha)). This unit includes one area that meets the size requirement of a large habitat block and three areas that, with associated Wilderness, meet the size requirement of small habitat blocks.

Unit 9. Western Oregon Cascades North

The Western Oregon Cascades North Unit consists of 334,738 ac (135,464 ha) in Linn, Marion, Clackamas, Hood River, and Multnomah Counties, Oregon, and is comprised of lands managed by the Mt. Hood and Willamette National Forests. This unit includes five areas that, with associated Wilderness, meet the size requirement of large habitat blocks and one area that meets the size requirement of a small habitat block.

Unit 10. Hood River

The Hood River Unit is comprised of 42,863 ac (17,273 ha) in Hood River and Wasco Counties, Oregon, and is comprised of lands managed by the Mt. Hood National Forest. This unit includes one area that, with its associated Wilderness, meets the size requirement of a large habitat block.

Unit 11. Eastern Oregon Cascades

The Eastern Oregon Cascades Unit is comprised of 106,665 ac (43,166 ha) in Jefferson, Deschutes, and Klamath Counties, Oregon, and is comprised of lands managed by the Deschutes National Forest. This unit includes seven areas that, with associated Wilderness and Crater Lake National Park, meet the size requirement of small habitat blocks.

Unit 12. Western Oregon Cascades South

The Western Oregon Cascades South Unit consists of 448,403 ac (181,463 ha) in Jackson, Douglas, Lane, and Linn Counties, Oregon, and is comprised of lands managed by the Willamette, Umpqua, and Rogue River National Forests (448,324 ac (181,406 ha)) and Eugene BLM Districts (79 ac (32 ha)). This unit includes eight areas that, with associated Wilderness, meet the size requirement of large habitat blocks.

Unit 13. Willamette/North Umpqua

The Willamette/North Umpqua Unit is comprised of 119,637 ac (48,415 ha) of lands in Lane and Douglas Counties, Oregon, and is comprised of lands managed by the Eugene and Roseburg BLM Districts. This unit includes three areas that meet the size requirement of small habitat blocks. These areas provide for habitat connectivity and northern spotted owl movement via the inter-provincial connection from the western Cascades to the Oregon Coast Ranges.

Unit 14. Rogue/Umpqua

The Rogue/Umpqua Unit consists of 165,504 ac (66,977 ha) in Douglas and Josephine Counties, Oregon, and is comprised of lands managed by the Umpqua National Forest (13,147 ac (5,320 ha)) and Roseburg and BLM Medford Districts (152,357 ac (61,657 ha)). This unit includes one area that meets the size requirement of a large habitat block, and one area that meets the size requirement of a small habitat block. These areas provide for habitat connectivity and northern spotted owl movement via the inter-provincial connection from the western Cascades to the Oregon Coast Ranges across the Rogue-Umpqua divide.

Unit 15. Oregon Klamath Mountains

The Oregon Klamath Mountains Unit is a total of 195,211 ac (79,215 ha), including 189,424 ac (76,657 ha) in Coos, Curry, and Josephine Counties,

Oregon, and 5,787 ac (2,342 ha) in the northernmost portion of Del Norte County, California. It is comprised of lands managed by the Siskiyou and Six Rivers National Forests (194,745 ac (78,810 ha)) and Coos Bay BLM District (466 ac (188 ha)). This unit includes three areas that, with associated Wilderness, meet the size requirement of large habitat blocks, and one area that, with its associated Wilderness, meets the size requirement of a small habitat block. The northern spotted owl population in the Klamath Province is the major population link between the Oregon Coast Ranges and western Oregon Cascades Provinces. It also provides the primary connection between northern spotted owl populations in Oregon and California.

Unit 16. Klamath Intra-Province

The Klamath Intra-Province Unit is a total of 96,572 ac (39,081 ha), including 90,437 ac (36,598 ha) in Josephine and Jackson Counties, Oregon, and 6,135 ac (2,483 ha) in the northern portion of Siskiyou County, California. It is comprised of lands managed by the Rogue-Siskiyou and Klamath National Forests (57,977 ac (23,462 ha)) and Medford BLM District (38,595 ac (15,619 ha)). This unit includes one area that meets the size requirement of a large habitat block and one area that meets the size requirement of a small habitat block. These areas provide essential habitat connections through an area of limited habitat in the Klamath Province.

Unit 17. Southern Cascades

The Southern Cascades Unit is a total of 226,430 ac (91,634 ha), including 186,732 ac (75,568 ha) in Jackson and Klamath Counties, Oregon, and 39,698 ac (16,065 ha) in the northern portion of Siskiyou County, California. It is comprised of lands managed by Rogue-Siskiyou, Winema, and Klamath National Forests (191,612 ac (77,543 ha)) and Medford and Lakeview BLM Districts (34,818 ac (14,090 ha)). This unit includes two areas that, with associated Wilderness, meet the size requirement of large habitat blocks and three areas that, with associated Wilderness, meet the size requirement of small habitat blocks.

Unit 18. Coastal Redwoods

The Coastal Redwoods Unit consists of 6,937 ac (2,807 ha) in Del Norte County, California, and is comprised of lands managed by Six Rivers National Forest. This unit includes one area that, with associated portions of Redwood National Park, meets the size requirement of a small habitat block.

Unit 19. Coastal Humboldt

The Coastal Humboldt Unit consists of 49,308 ac (19,954 ha) in Humboldt and Mendocino Counties, California, and is comprised of lands managed by the BLM Arcata Field Office. This unit includes four areas that, with associated Congressionally-Reserved Areas, meet the size requirement of small habitat blocks.

Unit 20. King Range

The King Range Unit consists of 40,308 ac (16,312 ha) in Humboldt and Mendocino Counties, California, and is comprised of lands managed by the BLM Arcata Field Office. This unit includes one area that meets the size requirement of a small habitat block.

Unit 21. South Fork Mountain Divide

The South Fork Mountain Divide Unit consists of 141,180 ac (58,752 ha) in Humboldt and Trinity Counties, California, and is comprised of lands managed by the Six Rivers and Shasta-Trinity National Forests (141,054 ac (57,082 ha)) and BLM Arcata Field Office (4,126 ac (1,670 ha)). This unit includes three areas that meet the size requirement of large habitat blocks, and one area that meets the size requirement of a small habitat block.

Unit 22. Eel-Russian River

The Eel-Russian River Unit consists of 21,940 ac (8,879 ha) in Mendocino and Trinity Counties, California, and is comprised of lands managed by the BLM Ukiah and Arcata Field Offices. This unit includes 16 areas that meet the size requirement of small habitat blocks for northern spotted owls.

Unit 23. Mendocino Coast Ranges

The Mendocino Coast Ranges Unit consists of 215,105 ac (87,050 ha) in Mendocino, Lake, Colusa, Glenn, Tehama, and Trinity Counties, California, and is comprised of lands managed by the Mendocino National Forest. This unit includes two areas that, with associated Wilderness, meet the size requirement of large habitat blocks and five areas that meet the size requirement of small habitat blocks.

Unit 24. Western Klamath-Siskiyou Mountains

The Western Klamath-Siskiyou Mountains Unit consists of 240,130 ac (87,178 ha) in Del Norte, Humboldt, Trinity, Shasta, and Siskiyou Counties, California, and is comprised of lands managed by the Six Rivers and Shasta-Trinity National Forests (236,460 ac (95,692 ha)) and BLM Redding Field Office (3,670 ac (1,485 ha)). This unit includes five areas that, with associated Wilderness, meet the size requirement of large habitat blocks, and one area that meets the size requirement of a small habitat block.

Unit 25. Scott and Salmon Mountains

The Scott and Salmon Mountains Unit is a total of 242,450 ac (98,116 ha), including 242,292 ac (98,052 ha) in Siskiyou County, California, and 158 ac (64 ha) in Josephine County, Oregon, and is comprised of lands managed by the Klamath National Forest. This unit includes four areas that, with associated Wilderness, meet the size requirement of large habitat blocks and two areas that, with associated Wilderness, meet the size requirement of small habitat blocks.

Unit 26. Trinity Divide

The Trinity Divide Unit consists of 13,870 ac (5,613 ha) in Siskiyou County, California, and is comprised of lands managed by the Klamath National Forest. This unit includes four areas that, with associated Wilderness, meet the size requirement of small habitat blocks with one to two pairs of northern spotted owls each, forming a ''stepping-stone'' string of small areas providing connectivity to the eastern Klamath Mountains.

Unit 27. Shasta-Trinity Lakes

The Shasta/Trinity Lakes Unit consists of 86,819 ac (35,134 ha) in Shasta and Trinity Counties, California, and is comprised of lands managed by the Shasta-Trinity National Forest (85,730 ac (34,694 ha)) and BLM Redding Field Office (1,090 ac (441 ha)). This unit includes six areas that, with associated Wilderness, meet the size requirement of small habitat blocks.

Unit 28. Eastern Klamath Mountains

The Eastern Klamath Mountains Unit consists of 110,756 ac (44,821 ha) in Shasta and Siskiyou Counties, California, and is comprised of lands managed by the Shasta-Trinity and Klamath National Forests. This unit includes five areas that meet the size requirement of small habitat blocks.

Unit 29. Shasta/McCloud

The Shasta/McCloud Unit consists of 73,316 ac (29,670 ha) in Siskiyou and Shasta Counties, California, and is comprised of lands managed by the Klamath and Shasta-Trinity National Forests. This unit includes 13 areas that meet the size requirement of small habitat blocks.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as ''a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' However, recent decisions by the 5th and 9th Circuit Courts of Appeals have invalidated this definition (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir 2001)). Pursuant to current national policy and the statutory provisions of the Act, destruction or adverse modification is determined on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally re-established in situations where the critical habitat was temporarily destroyed or degraded) to serve the intended conservation role for the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a species proposed to be listed or result in destruction or adverse modification of proposed critical habitat. This is a procedural requirement only. However, once a species becomes listed, or proposed critical habitat is designated as final, the full prohibitions of section 7(a)(2) apply to any Federal action. The primary utility of the conference procedures is to maximize the opportunity for a Federal agency to adequately consider species proposed for listing and proposed critical habitat and avoid potential delays in implementing their proposed action as a result of the section 7(a)(2) compliance process, if those species are listed or the critical habitat designated.

Under conference procedures, the Service may provide advisory conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The Service may conduct either informal or formal conferences. Informal conferences are typically used if the proposed action is not likely to have any adverse effects to the species proposed to be listed or proposed critical habitat. Formal conferences are typically used when the Federal agency or the Service believes the proposed action is likely to cause adverse effects to species proposed to be listed or critical habitat, inclusive of those that may cause jeopardy or adverse modification.

The results of an informal conference are typically transmitted in a conference report, while the results of a formal conference are typically transmitted in a conference opinion. Conference opinions on proposed critical habitat are typically prepared according to 50 CFR 402.14 as if the proposed critical habitat were designated. We may adopt the conference opinion as the biological opinion when the critical habitat is designated if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). As noted above, any conservation recommendations in a conference report or opinion are strictly advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. If, after informal consultation, the action agency determines that the action is not likely to adversely affect the species or critical habitat, it may request concurrence from the Service and complete the section 7(a)(2) process without formal consultation. If the action is likely to adversely affect the species or critical habitat, the agency shall request formal consultation and the Service will issue a biological opinion.

When we issue a biological opinion concluding that a project is likely to result in jeopardy to a listed species or the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable, to avoid that outcome. ''Reasonable and prudent alternatives'' are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid jeopardy to the listed species or destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances when a new species is listed or critical habitat is subsequently designated that may be affected and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or initiation of conference with us on actions for which formal consultation has been completed, if those actions may affect subsequently listed species or designated critical habitat or adversely modify or destroy proposed critical habitat.

Federal activities that may affect the northern spotted owl or its designated critical habitat require section 7 consultation under the Act. Activities on State, Tribal, local or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act or a permit under section 10(a)(1)(B) of the Act from the Service) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are also be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or permitted, do not require section 7 consultation. In addition, currently designated northern spotted owl critical habitat (see 50 CFR 17.95(b)) remain in place, and therefore be subject to section 7, until our final determination on this proposal is made.

Application of the Jeopardy and Adverse Modification Standards for Actions Involving Effects to the Northern Spotted Owl and Its Critical Habitat

Jeopardy Standard

The Service has applied an analytical framework for northern spotted owl jeopardy analyses that relies heavily on a northern spotted owl conservation strategy developed in the Standards and Guidelines of the Record of Decision for Amendments to Forest Service and BLM Planning Documents within the Range of the Northern Spotted Owl (USDA and USDI 1994b) and adopted by the Forest Service and BLM in their land management plans (LRMPs/RMPs); this habitat-based strategy also applies to National Park Service lands. The section 7(a)(2) analysis focuses on how the proposed Federal action comports with the habitat-based, rangewide conservation plan for the northern spotted owl.

Adverse Modification Standard

The analytical framework described in the Director's December 9, 2004, memorandum is used to complete section 7(a)(2) analyses for Federal actions affecting northern spotted owl critical habitat. The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally re-established in situations where the critical habitat was temporarily destroyed or degraded) to serve its intended conservation role for the species. Generally, the conservation role of northern spotted owl critical habitat units is to support viable populations at the physiographic province level. The parameters for the habitat that is understood to fulfill this role are set forth in the recovery criteria in the 2007 Draft Recovery Plan for the Northern Spotted Owl (USFWS 2007).

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the species.

Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that the intended conservation function of critical habitat for the northern spotted owl is appreciably reduced. Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in informal or formal consultation for the northern spotted owl include, but are not limited to:

(1) Actions that would remove or modify potential nest structures, such as large (generally greater than 30 in (76 cm) dbh) broken-topped trees, snags, platforms, or mistletoe infestations. Such activities could remove nesting opportunities, potentially preventing or suppressing reproduction. Activities that could remove or modify these features are listed below.

(2) Actions that would remove or modify forest conditions supporting nesting, foraging, and roosting, such as large trees, canopy closure, multi-layered and multi-species canopies, the presence of flight room under the canopy, and in some areas, the presence of hardwoods in stands. Such activities could increase the risk of predation of adults or young, increase thermal stress, decrease foraging success, or decrease survival resulting from extreme weather. Activities that could remove or modify these features are listed below.

(3) Actions that would fragment northern spotted owl nesting, roosting, foraging, or dispersal habitat within critical habitat blocks, so that connectivity within or between blocks, units, or provinces is reduced or eliminated. Concentrated removal or modification of forested areas within individual blocks could increase the distance northern spotted owls must travel to reach suitable forest conditions in another critical habitat block, which can result in an increased risk of predation, increased stress, and reduction in foraging opportunities. Activities that could remove or modify these features are listed below.

(4) Actions that would eliminate the potential for an area to support the forest types that develop into nesting, roosting, foraging and dispersal habitat. Ground disturbances that disrupt the ability for the landscape to grow forested communities to their full potential could decrease nesting and foraging opportunities, while increasing the distance between blocks of intact habitat, which could result in an increased risk of predation and increased stress. Activities that could remove the potential for these forest types to exist are listed below.

The types of activities that may affect northern spotted owl critical habitat as described above include, but are not limited to: Timber harvest; salvage of dead trees from healthy forest stands and post-wildfire burn areas; snag creation or removal; hazard tree removal; fuels reduction treatments; wildland fire management and fire suppression activities, such as back-burning and felling trees; personal use and commercial firewood collection; land disturbance activities associated with construction and maintenance of power transmission line corridors, highways, hydroelectric facilities, mines, or oil, gas, geothermal or telecommunications leases; sand, gravel, or rock extraction; and construction of ski areas and associated resort facilities or other large-scale recreational developments.

Some silvicultural activities designed to improve the habitat for northern spotted owls over the long term may have short-term negative impacts.

We consider all of the units proposed as revised critical habitat to contain features essential to the conservation of the northern spotted owl. All units are within the geographic range of the species and are likely to be used by the northern spotted owl. Federal agencies already consult with us on activities in areas currently occupied by the northern spotted owl to ensure that their actions do not jeopardize the continued existence of the northern spotted owl.

Application of Section 3(5)(A) and Exclusions Under Section 4(b)(2) of the Act

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographic area occupied by the species on which are found physical and biological features (i) essential to the conservation of the species, and (ii) which may require special management considerations or protection. Therefore, areas within the geographic area occupied by the species that do not contain the features essential to the conservation of the species are not, by definition, critical habitat. Similarly, areas within the geographic area occupied by the species that require no special management or protection also are not, by definition, critical habitat. Many areas that did not meet the definition previously and were not included in critical habitat are also not included in this designation for the same reason.

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the

benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

Under section 4(b)(2) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If an exclusion is contemplated, we must determine whether excluding the area would result in the extinction of the species. In addition, the Service is conducting an economic analysis of the impacts of the proposed revised critical habitat designation and related factors, which will be available for public review and comment. We are not proposing any specific exclusions under 4(b)(2) at this time; however, based on public comment on the document, the proposed revised designation itself, and the information in the final economic analysis, areas may be excluded in the final rule. This is provided for in section 4(b)(2) of the Act, and in our implementing regulations at 50 CFR 424.19.

General Principles of Section 7 Consultations Used in the 4(b)(2) Balancing Process

The most direct, and potentially largest, regulatory benefit of critical habitat is that federally authorized, funded, or carried out activities require consultation under section 7 of the Act to ensure that they are not likely to destroy or adversely modify critical habitat. There are two limitations to this regulatory effect. First, it only applies where there is a Federal nexus—if there is no Federal nexus, designation itself does not restrict actions that destroy or adversely modify critical habitat. Second, it only limits destruction or adverse modification. By its nature, the prohibition on adverse modification is designed to ensure that areas containing the physical and biological features essential to the conservation of the species, or unoccupied areas essential to the conservation of the species, are not eroded. Critical habitat designation alone, however, does not require specific steps toward recovery.

Once consultation under section 7 of the Act is triggered, the process may conclude informally if the action agency determines that the proposed Federal action is not likely to adversely affect the listed species or its critical habitat. However, if the action agency determines through informal consultation that adverse impacts are likely to occur, then formal consultation would be initiated. Formal consultation concludes with a biological opinion issued by the Service on whether the proposed Federal action is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of critical habitat, with separate analyses being made under both the jeopardy and the adverse modification standards. For critical habitat, a biological opinion that concludes in a determination of no destruction or adverse modification may contain discretionary conservation recommendations to minimize adverse effects to primary constituent elements, but it would not contain any mandatory reasonable and prudent measures or terms and conditions. Mandatory measures, and terms and conditions to implement them, are only specified when the proposed action would result in the incidental take of a listed animal species. Reasonable and prudent alternatives to the proposed Federal action would only be suggested when the biological opinion results in a jeopardy or adverse modification conclusion.

A benefit of including lands in critical habitat is that the designation of critical habitat serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. This helps focus and promote conservation efforts by other parties by clearly delineating areas of high conservation value for the northern spotted owl. In general the educational benefit of a critical habitat designation always exists, although in some cases it may be redundant with other educational effects.

The Service is conducting an economic analysis of the impacts of the proposed revised critical habitat designation and related factors, which will be available for public review and comment. Based on public comment on that document, the proposed revised designation itself, and the information in the final economic analysis, additional areas beyond those identified in this assessment may be excluded from critical habitat by the Secretary under the provisions of section 4(b)(2) of the Act. This is provided for in the Act, and in our implementing regulations at 50 CFR 424.19.

Exclusions Under Section 4(b)(2) of the Act

We are not proposing to exclude any specific areas under section 4(b)(2) of the Act in this proposed revision to northern spotted owl critical habitat at this time. However, we will consider excluding any, or all, areas in the final designation after taking into account public comments and the economic analysis.

Economic Analysis

An analysis of the economic impacts of proposing revised critical habitat for the northern spotted owl is being prepared. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.fws.gov/oregonfwo,* or by contacting the Oregon Fish and Wildlife Office directly (see **ADDRESSES** section).

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), and based on our implementation of the Office of Management and Budget's Final Information Quality Bulletin for Peer Review, dated December 16, 2004, we will seek the expert opinions of at least five appropriate and independent peer reviewers regarding the science in this proposed rule. The purpose of such review is to ensure that our revised critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to these peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment during the public comment period on the specific assumptions and conclusions regarding the proposed revised designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made in writing at least 15 days prior to the close of the public comment period (see **DATES**). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in

the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

Clarity of the Rule

Executive Order 12866 (Regulatory Planning and Review) requires each agency to write regulations and 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 technical jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make this proposed rule easier to understand?

Send a copy of any comments on 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 this address: *Exsec@ios.doi.gov.*

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of $100 million or more, or to affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. We are preparing a draft economic analysis of this proposed action, which will be available for public comment, to determine the economic consequences of revising our critical habitat designation for the northern spotted owl. This economic analysis also will be used to determine compliance with Executive Order 12866, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 12630.

Further, Executive Order 12866 directs Federal agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A–4, September 17, 2003). Pursuant to Circular A–4, once it has been determined that the Federal regulatory action is appropriate, the agency will need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement under the Act, we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts under section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are listed above in the section on section 7 consultation. The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers so that it is available for public review and comments. The draft economic analysis can be obtained from the internet Web site at: *http://www.fws.gov/oregonfwo* or by contacting the Oregon Fish and Wildlife Office directly (see **ADDRESSES** section).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, the Service lacks the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and Executive Order 12866. The draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, the Service will publish a notice of availability of the draft economic analysis of the proposed revised designation and reopen the public comment period for the proposed revised designation. The Service will include with the notice of availability, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. The Service has concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that the Service makes a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order 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 to designate revised critical habitat for the northern spotted owl is a significant regulatory action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Service makes the following findings:

(a) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, Tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and

''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments, because only Federal lands are involved in the proposed designation. As such, a Small Government Agency Plan is not required. However, as we conduct our economic analysis, we will further evaluate this issue and revise this assessment if appropriate.

Takings

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implication of designating revised critical habitat for the northern spotted owl in a takings implication assessment. The takings implications assessment concludes that this revised designation of critical habitat for the northern spotted owl does not pose significant takings implications. However, we will further evaluate this issue as we conduct our economic analysis and review and revise this assessment as warranted.

Federalism

In accordance with Executive Order 13132 (Federalism), the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI and Department of Commerce policy, we requested information from, and coordinated development of, this proposed revised critical habitat designation with appropriate State resource agencies in Washington, Oregon, and California. The revised designation of critical habitat in areas currently occupied by the northern spotted owl imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are clearly identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed revised critical habitat in accordance with the provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the northern spotted owl.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the National Environmental Policy Act (42 U.S.C. 4321 et seq.) in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. No Tribal lands are proposed as revised critical habitat.

References Cited

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Oregon Fish and Wildlife Office (see **ADDRESSES** section).

Author(s)

The primary authors of this package are the staff of the U.S. Fish and Wildlife Service.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.95(b), revise the entry for ''Northern Spotted Owl (*Strix occidentalis caurina*)'' to read as follows:

17.95 Critical habitat—fish and wildlife.

* * * * *

(b) *Birds.*

* * * * *

Northern Spotted Owl (*Strix occidentalis caurina*)

(1) Critical habitat units are depicted for the States of Washington, Oregon, and California on the maps below.

(2) The primary constituent elements of critical habitat for the northern spotted owl are:

(i) Forest types known to support the northern spotted owl across its geographic range. These forest types include Sitka spruce, western hemlock, mixed conifer and mixed evergreen, grand fir, Pacific silver fir, Douglas-fir, white fir, Shasta red fir, redwood/Douglas-fir (in coastal California and southwestern Oregon), and the moist end of the ponderosa pine coniferous forests zones at elevations up to 3,000 ft (914 m) near the northern edge of the range and up to about 6,000 ft (1,828 m) at the southern edge.

(ii) Forest types described in paragraph (2)(i) of this entry that are of sufficient area, quality, and configuration, or that have the ability to develop these characteristics, to meet the home range needs of territorial pairs of northern spotted owls throughout the year. A home range must provide all of the habitat components and prey needed to provide for the survival and successful reproduction of a resident breeding pair of northern spotted owls. The three habitat components required within the home range of a northern spotted owl include:

(A) Nesting habitat. Habitat that includes a moderate to high canopy closure (60 to 80 percent); a multi-layered, multi-species canopy with large (generally greater than 30 inches (in) (76 centimeters (cm) diameter at breast height (dbh)) overstory trees; a high incidence of large trees with various deformities (e.g., large cavities, broken tops, mistletoe infections, and other platforms); large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for northern spotted owls to fly. Patches of nesting habitat, in combination with roosting habitat (see paragraph (2)(ii)(B) of this entry) need to be sufficiently large and contiguous to maintain northern spotted owl core areas and home ranges, and be in a spatial arrangement with foraging habitat (see paragraph (2)(ii)(C) of this entry) that allows efficient provisioning of young at the nest.

(B) Roosting habitat. Roosting habitat differs from nesting habitat in that it need not contain those specific structural features used for nesting (cavities, broken tops, and mistletoe platforms). As such, it generally includes moderate to high canopy closure; a multi-layered, multi-species canopy; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for northern spotted owls to fly.

(C) Foraging habitat. Foraging habitat provides a food supply for survival and reproduction of northern spotted owls and includes a wider array of forest types than nesting and roosting habitat, particularly more open and fragmented forests. While some foraging habitat has attributes that closely resemble those of nesting and roosting habitat, especially in the northern portions of the subspecies' range, some younger stands without all these attributes are used for foraging, especially in the southern portion of the range. Some younger stands may have high prey abundance and some structural attributes similar to those of older forests, such as moderate tree density, subcanopy perches at multiple levels, multi-layered vegetation, or residual older trees. To be fully functional for northern spotted owls, foraging habitat generally contains some roosting habitat attributes.

(iii) Dispersal habitat. The dispersal of juveniles requires habitat supporting both the transience and colonization phases. Habitat supporting the transience phase of dispersal includes, at a minimum, stands with adequate tree size and canopy closure to provide protection from avian predators and at least minimal foraging opportunities. This may include younger and less diverse forest stands than foraging habitat (see paragraph (2)(ii)(C) of this entry), such as even-aged, pole-sized stands. These stands still require the interspersion of some roosting structures and foraging habitat to allow for temporary resting and feeding during the movement phase. Habitat supporting colonization is generally equivalent to roosting and foraging habitat and is described in paragraphs (2)(ii)(B) and (2)(ii)(C) of this entry, although it may be in smaller amounts than that needed to support nesting pairs (see paragraph (2)(ii)(A) of this entry). Dispersal habitats will typically occur in the intervening areas between larger blocks of forest that provide nesting, foraging, and roosting habitats for resident northern spotted owls.

(3) Critical habitat does not include manmade structures (e.g., buildings, aqueducts, airports, and roads, including the land on which they are located) existing on the effective date of this rule and not containing one or more of the primary constituent elements.

(4) Critical habitat map units. The designated critical habitat units for the northern spotted owl are depicted on the maps below.

(5) Note: Index map of critical habitat units for the northern spotted owl in the State of Washington (Map 1–A) follows:

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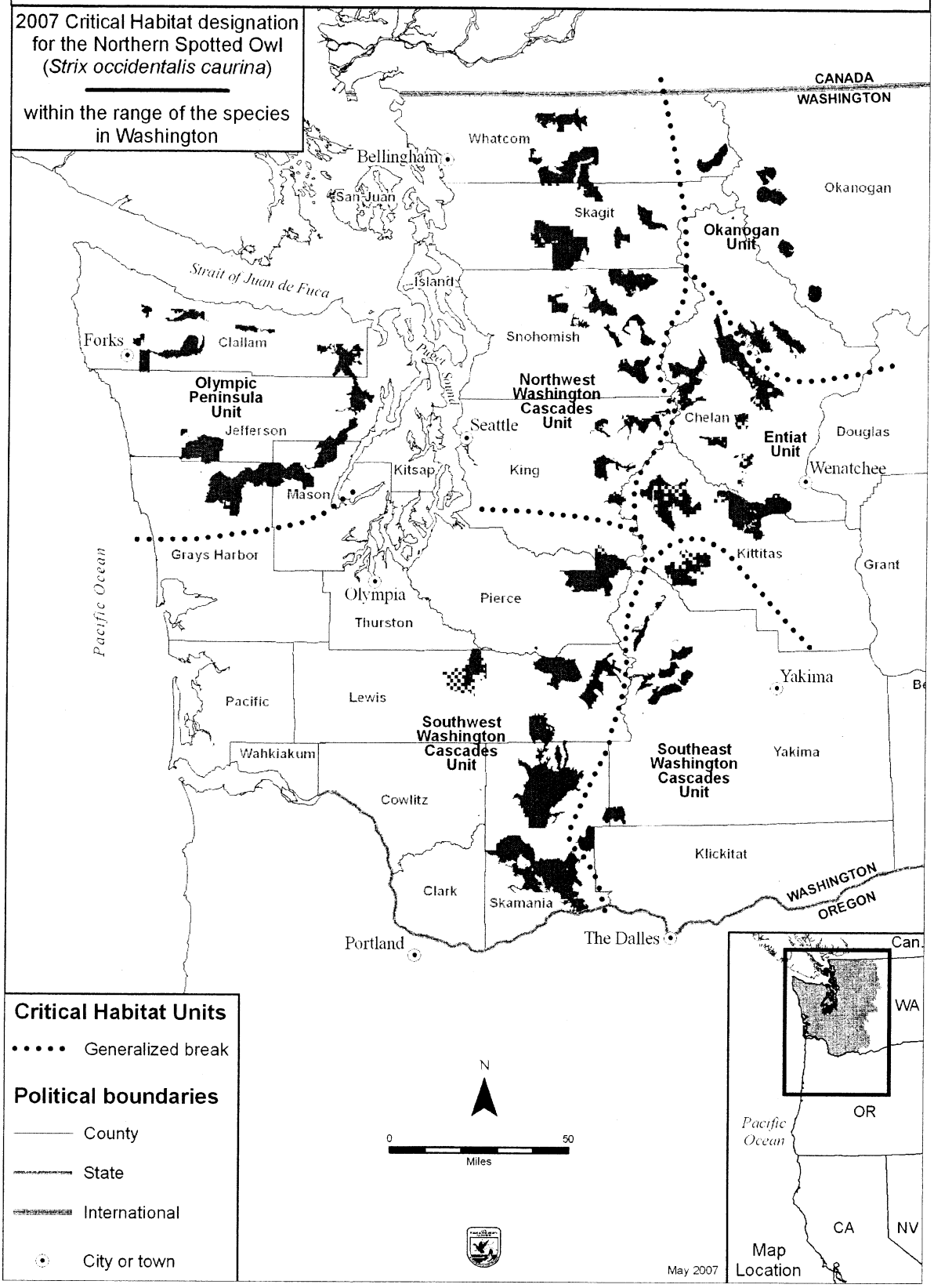
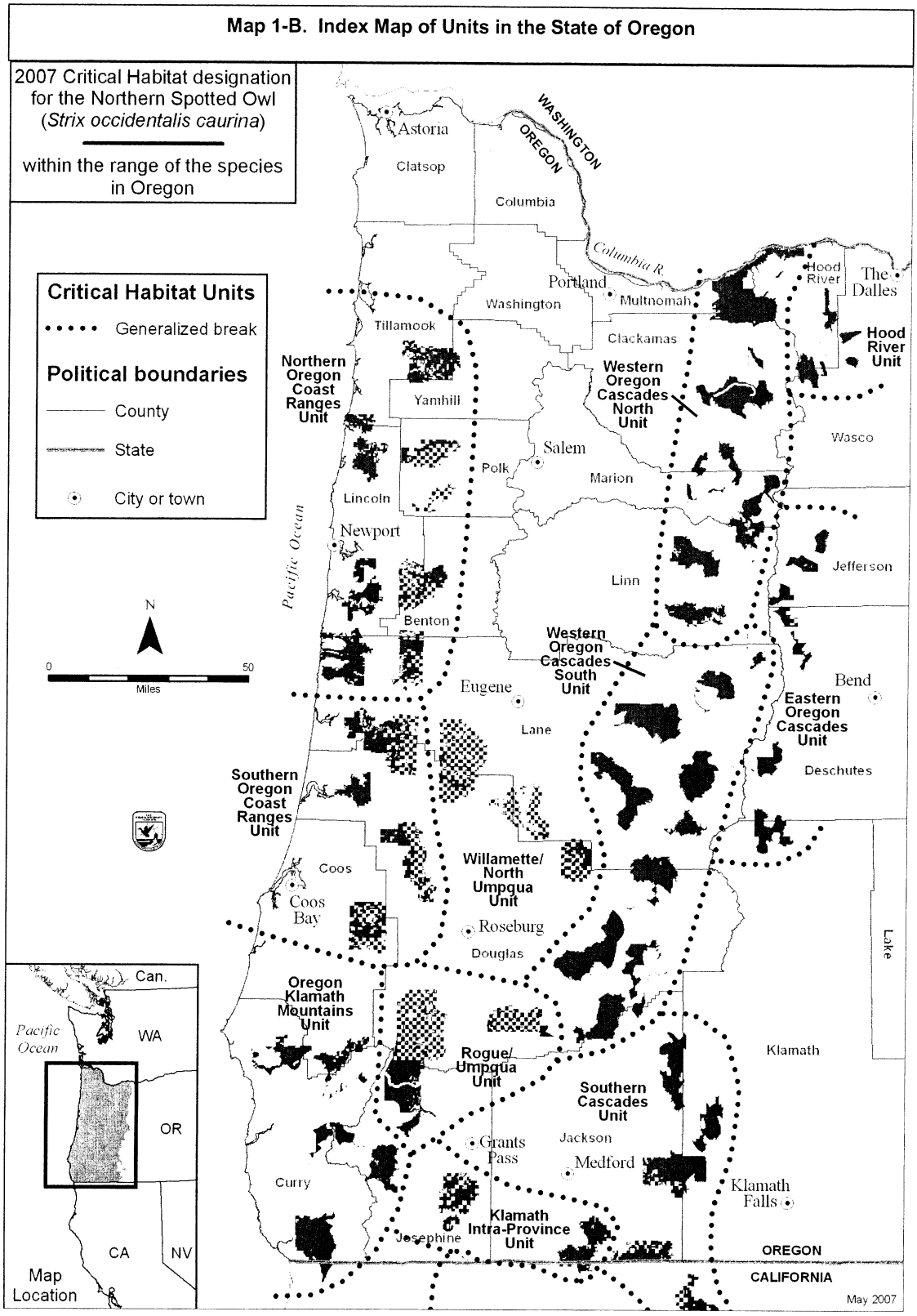
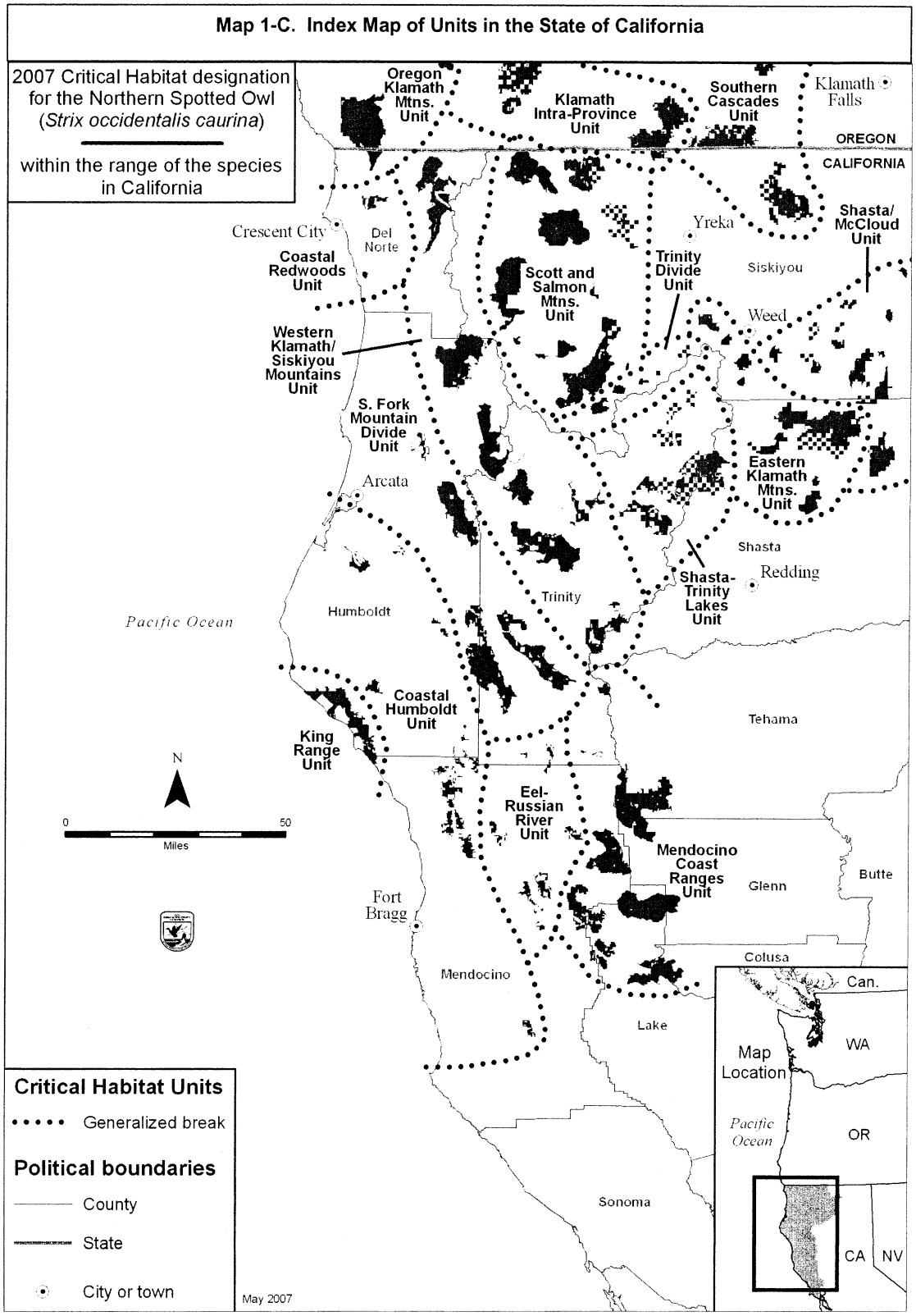
Map 1-A. Index Map of Units in the State of Washington



(6) Note: Index map of critical habitat units for the northern spotted owl in the State of Oregon (Map 1–B) follows:



(7) Note: Index map of critical habitat units for the northern spotted owl in the State of California (Map 1–C) follows:

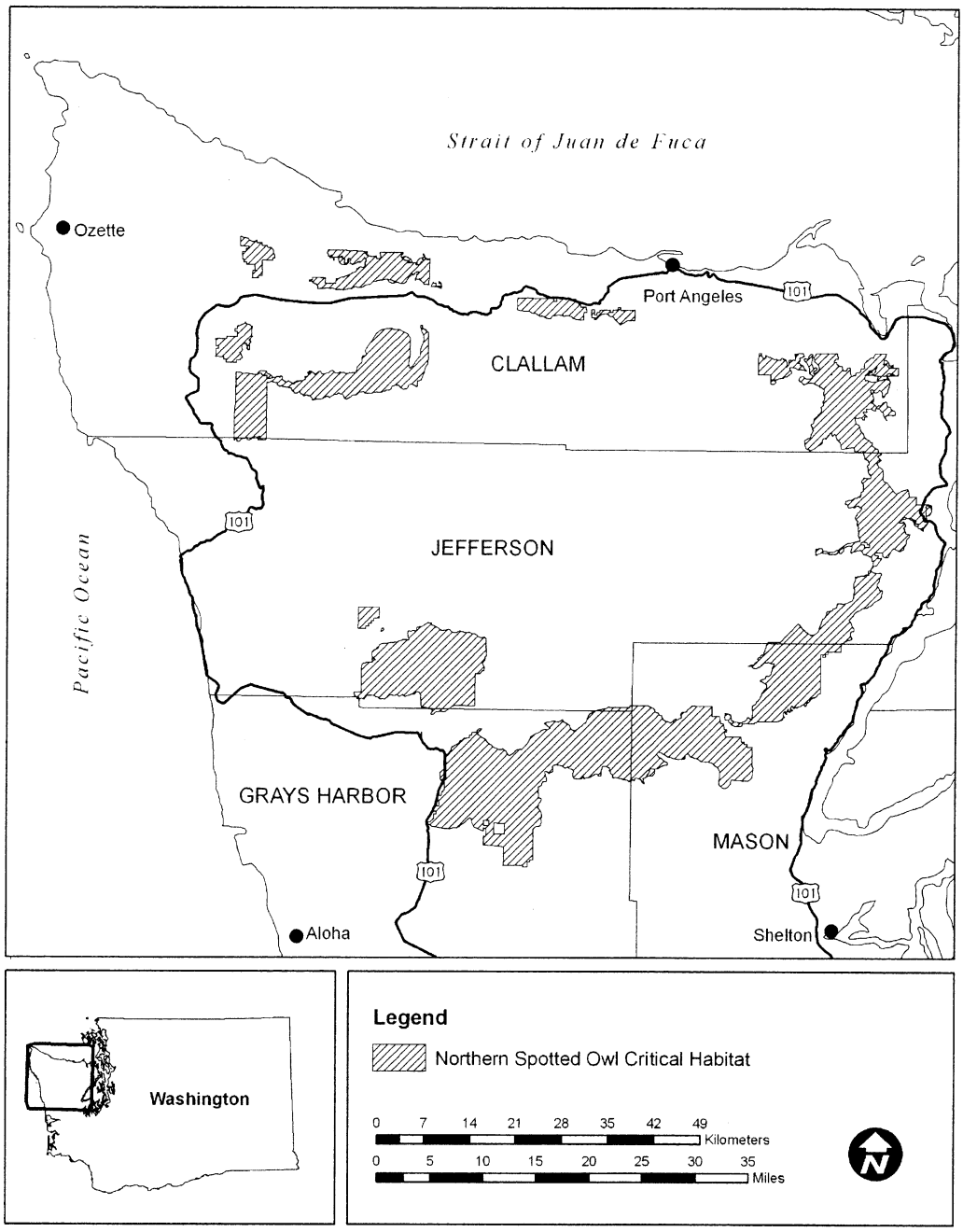


(8) Olympic Peninsula Unit (Unit 1). Clallam, Grays Harbor, Jefferson, and Mason Counties, Washington. From USGS 1:24,000 scale quadrangles Anderson Creek, Brinnon, Bunch Lake, Burnt Hill, Colonel Bob, Deadmans Hill, Eldon, Ellis Mountain, Elwha, Finley Creek, Hunger Mountain, Indian Pass, Kloochman Rock, Lake Pleasant, Lake Quinault East, Lake Quinault West, Lake Sutherland, Larsen Creek, Lightning Peak, Maiden Peak, Matheny Ridge, Mount Deception, Mount Hoquiam, Mount Jupiter, Mount Muller, Mount Olson, Mount Skokomish, Mount Tebo, Mount Townsend, Mount Walker, Mount Washington, Mount Zion, Pysht, Reade Hill, Salmon River East, Slide Peak, Snider Peak, Stequaleho Creek, Stevens Creek, The Brothers, Twin Rivers, Tyler Peak, Uncas, West of Pysht, Winfield Creek, and Wynoochee Lake.

(i) The Olympic Peninsula Unit consists of 331,741 ac (134,251 ha) in Clallam, Jefferson, Mason, and Grays Harbor Counties, Washington, and is comprised of lands managed by the Olympic National Forest.

(ii) Note: Map of Olympic Peninsula Unit (Map 2) follows:

Map 2. Olympic Peninsula Unit, Washington

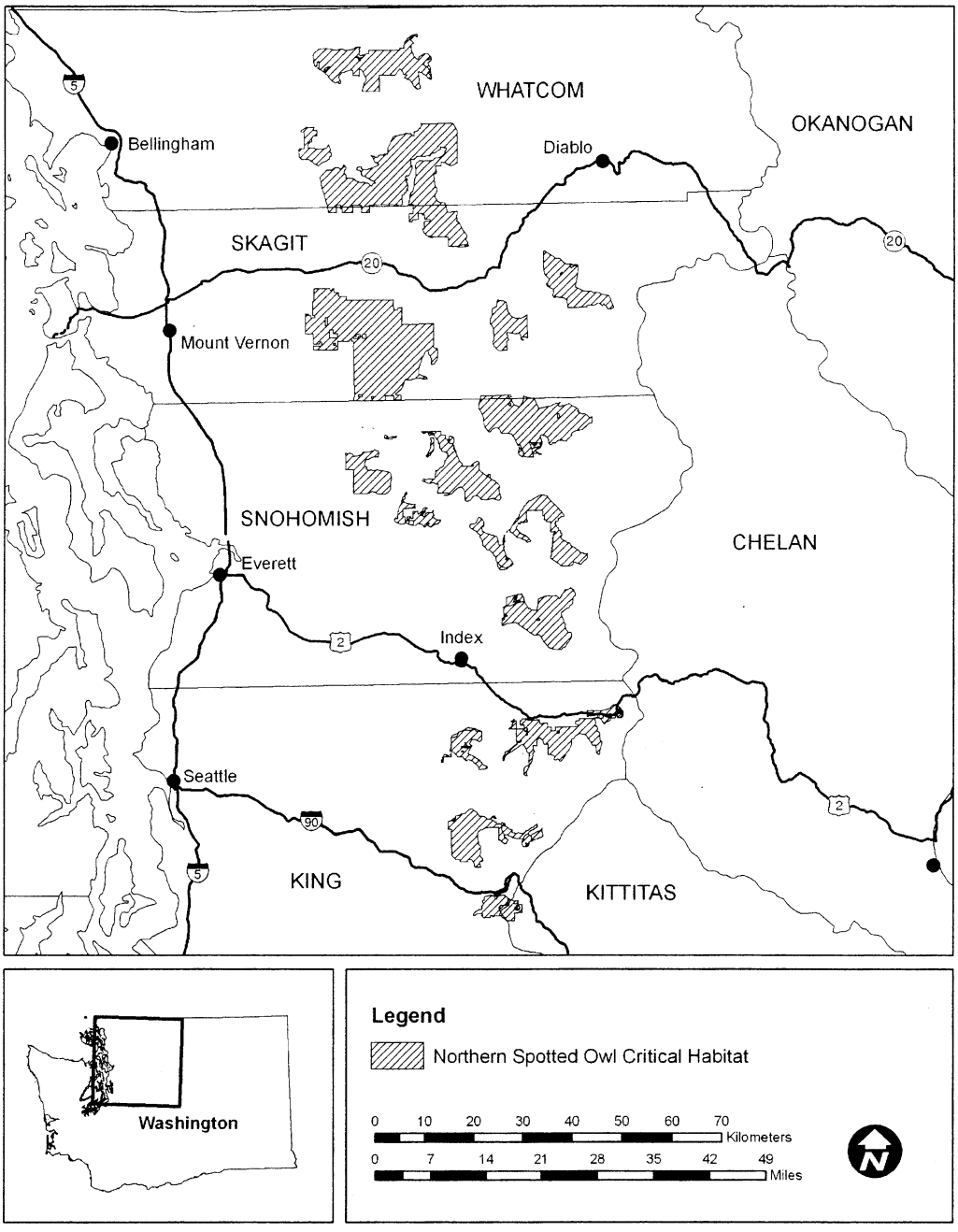


(9) Northwest Washington Cascades Unit (Unit 2). King, Kittitas, Skagit, Snohomish, and Whatcom Counties, Washington. From USGS 1:24,000 scale quadrangles Bacon Peak, Baker Pass, Bandera, Baring, Bearpaw Mountain, Bedal, Benchmark Mountain, Big Devil Peak, Big Snow Mountain, Blanca Lake, Cascade Pass, Chikamin Peak, Darrington, Day Lake, Downey Mountain, Eldorado Peak, Evergreen Mountain, Findley Lake, Finney Peak, Fortson, Gee Point, Glacier, Glacier Peak West, Groat Mountain, Grotto, Helena Ridge, Huckleberry Mountain, Illabot Peaks, Lake Philippa, Lake Shannon, Lime Mountain, Lost Lake, Mallardy Ridge, Meadow Mountain, Monte Cristo, Mount Baker, Mount Higgins, Mount Larrabee, Mount Phelps, Mount Sefrit, Mount Shuksan, Prairie Mountain, Pugh Mountain, Rockport, Sauk Mountain, Scenic, Shuksan Arm, Silverton, Skykomish, Sloan Peak, Snoqualmie Lake, Snoqualmie Pass, Snowking Mountain, Sonny Boy Lakes, Stevens Pass, Twin Sisters Mountain, Verlot, Welker Peak, White Chuck Mountain, and Whitehorse Mountain.

(i) The Northwest Washington Cascades Unit consists of 410,872 ac (166,274 ha) in Whatcom, Skagit, Snohomish, King, and Kittitas Counties, Washington, and is comprised of lands managed by the Mt. Baker-Snoqualmie and Wenatchee National Forests.

(ii) Note: Map of Northwest Cascades Unit (Map 3) follows:

Map 3. Northwest Washington Cascades Unit, Washington

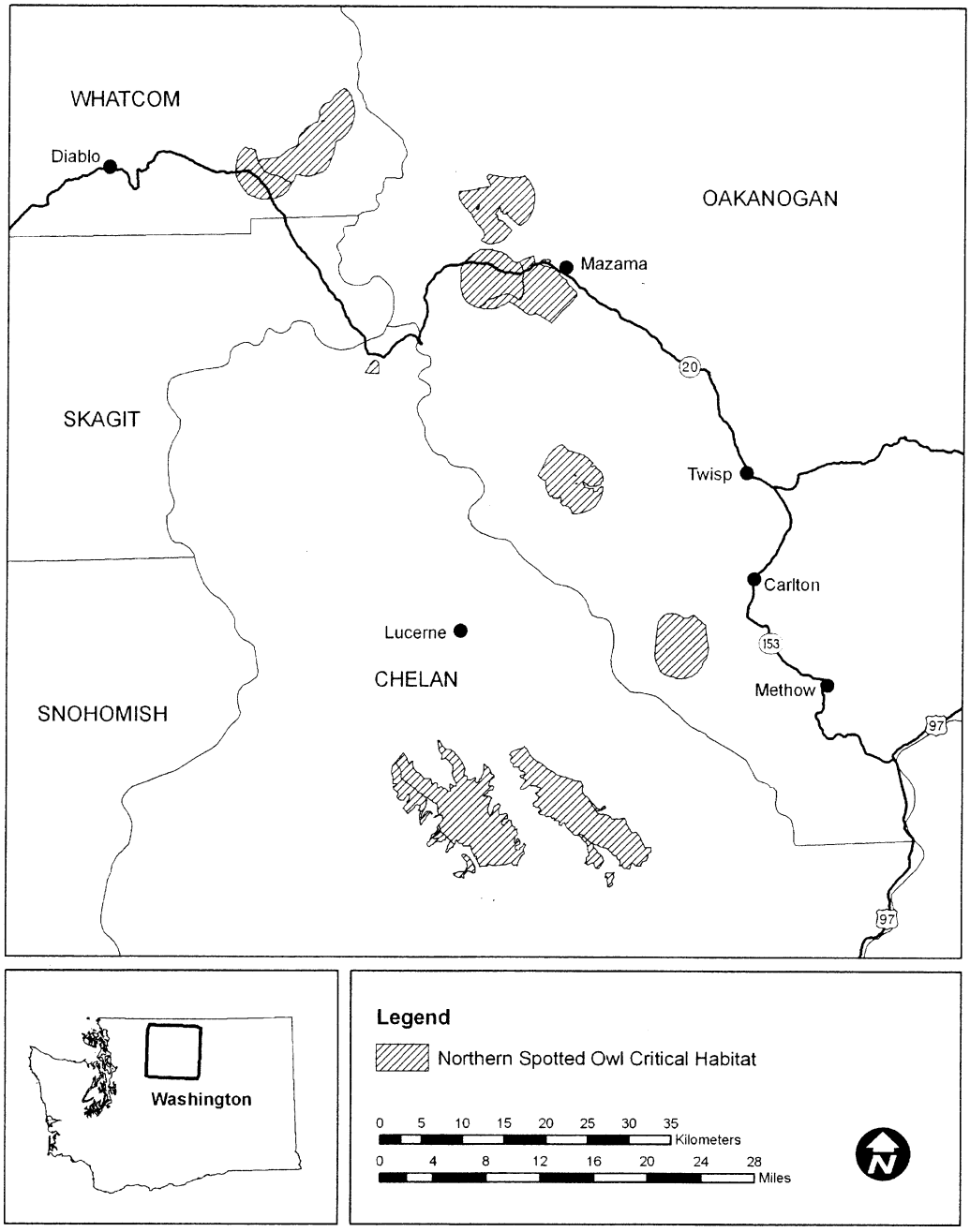


(10) Okanogan Unit (Unit 3). Whatcom, Okanogan, and Chelan Counties, Washington. From USGS 1:24,000 scale quadrangles Azunite Peak, Big Goat Mountain, Brief, Chikamin Creek, Crater Mountain, Hoodoo Peak, Hungry Mountain, Martin Peak, Mazama, McAlester Mountain, McCleod Mountain, Midnight Mountain, Oval Peak, Pasayten Peak, Pyramid Mountain, Robinson Mountain, Saska Peak, Shull Mountain, Silver Falls, Silver Star Mountain, Slate Peak, South Navarre Peak, Stormy Mountain, and Thompson Ridge.

(i) The Okanogan Unit consists of 115,638 ac (46,797 ha) in Whatcom, Okanogan, and Chelan Counties, Washington, and is comprised of lands managed by the Okanogan and Wenatchee National Forests.

(ii) Note: Map of Okanogan Unit (Map 4) follows:

Map 4. Okanogan Unit, Washington

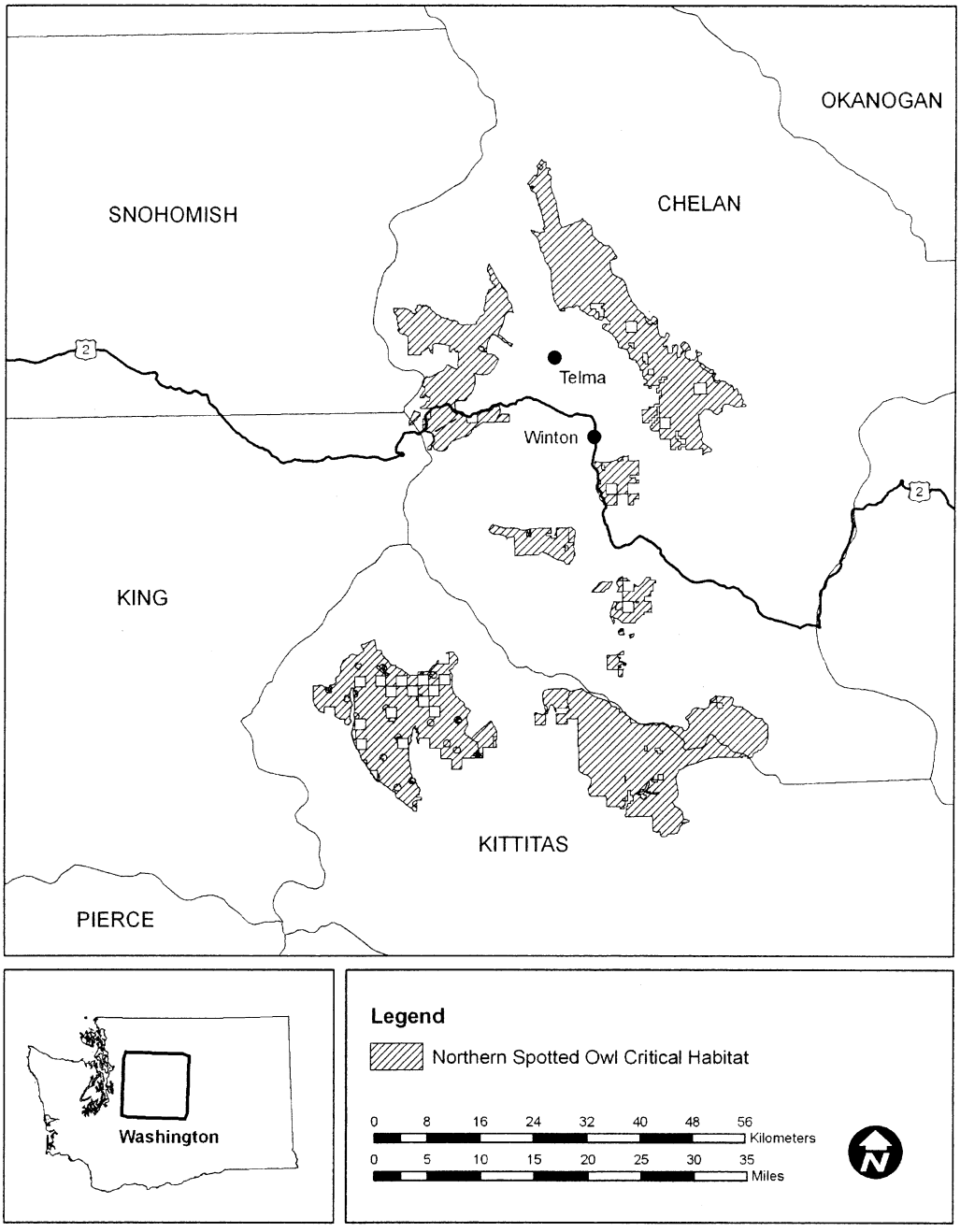


(11) Entiat Unit (Unit 4). Chelan and Kittitas Counties, Washington. From USGS 1:24,000 scale quadrangles Benchmark Mountain, Blewett, Cashmere Mountain, Chikamin Creek, Chikamin Peak, Chiwaukum Mountains, Cle Elum Lake, Davis Peak, Easton, Enchantment Lakes, Jack Ridge, Kachess Lake, Labyrinth Mountain, Leavenworth, Liberty, Mission Peak, Monitor, Mount David, Mount Howard, Peshastin, Plain, Poe Mountain, Polallie Ridge, Red Top Mountain, Reecer Canyon, Ronald, Saska Peak, Schaefer Lake, Silver Falls, Stampede Pass, Stevens Pass, Sugarloaf Peak, Swauk Pass, Swauk Prairie, Teanaway, Teanaway Butte, Tiptop, Trinity, Tyee Mountain, Van Creek, and Winton.

(i) The Entiat Unit consists of 304,817 ac (123,355 ha) in Chelan and Kittitas Counties, Washington, and is comprised of lands managed by the Wenatchee and Mt. Baker-Snoqualmie National Forests.

(ii) Note: Map of Entiat Unit (Map 5) follows:

Map 5. Entiat Unit, Washington

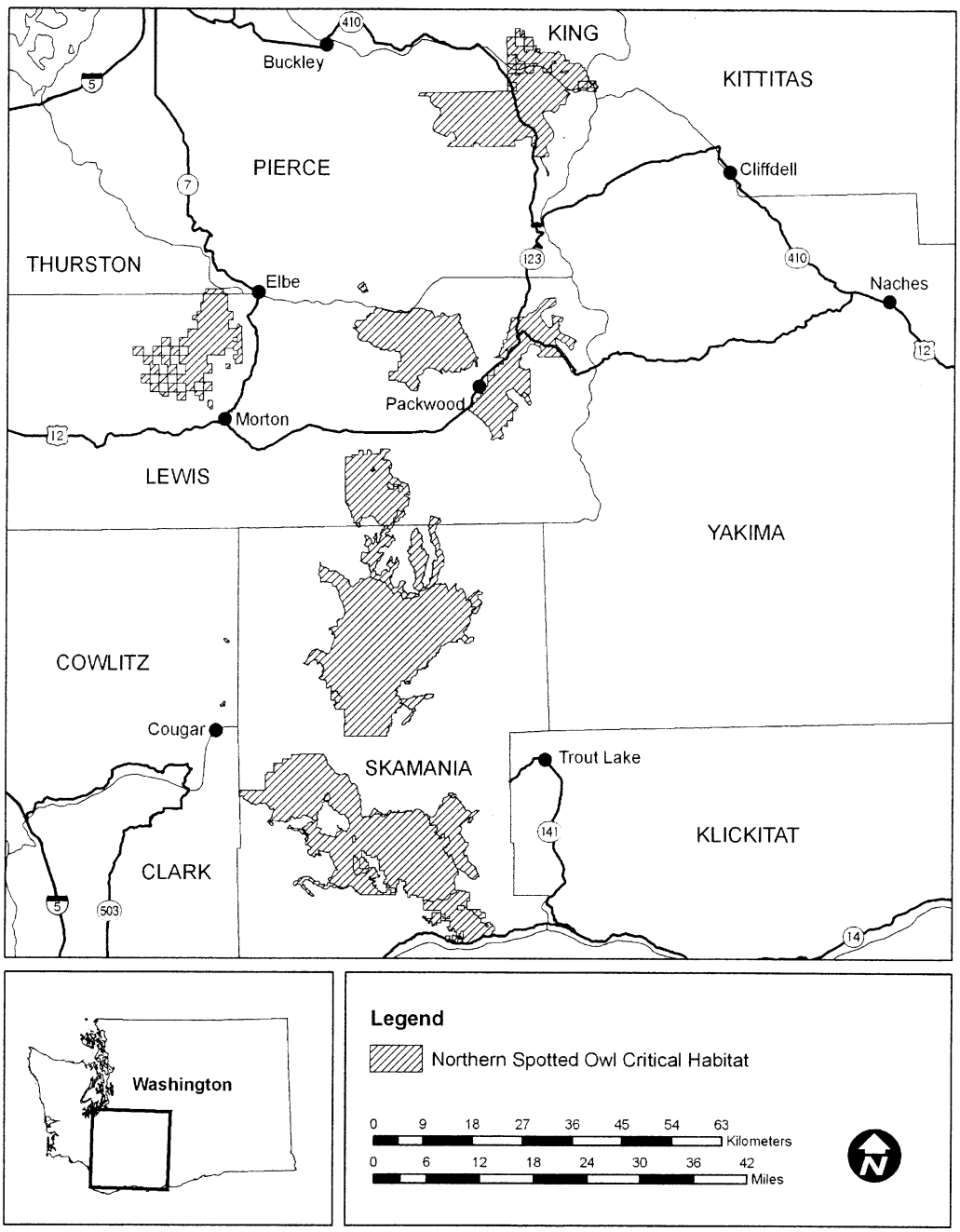


(12) Southwest Washington Cascades Unit (Unit 5). Clark, Cowlitz, King, Kittitas, Lewis, Pierce, Skamania, and Thurston Counties, Washington. From USGS 1:24,000 scale quadrangles Bare Mountain, Bearhead Mountain, Big Huckleberry Mountain, Burnt Peak, Carson, Cedar Flats, Clear West Peak, Cougar, East Canyon Ridge, Eatonville, French Butte, Gifford Peak, Goat Mountain, Greenhorn Buttes, Lester, Little Huckleberry Mountain, Lone Butte, Lookout Mountain, McCoy Peak, Mineral, Morton, Mossyrock, Mount Defiance, Mount Mitchell, Mount Wow, Nagrom, Newautum Lake, Noble Knob, Norse Peak, Ohanapecosh Hot Springs, Packwood, Packwood Lake, Purcell Mountain, Quartz Creek Butte, Randle, Sawtooth Ridge, Siouxon Peak, Smith Creek Butte, Spencer Butte, Spirit Lake East, Stabler, Steamboat Mountain, Sun Top, Sunrise, Tatoosh Lakes, Termination Point, The Rockies, Tower Rock, Wahpenayo Peak, White Pass, White River Park, and Willard.

(i) The Southwest Washington Cascades Unit consists of 523,710 ac (211,938 ha) in King, Pierce, Thurston, Lewis, Skamania, Cowlitz, Kittitas, and Yakima Counties, Washington, and is comprised of lands managed by the Mt. Baker-Snoqualmie, Gifford Pinchot, and Wenatchee National Forests.

(ii) Note: Map of Southwest Washington Cascades Unit (Map 6) follows:

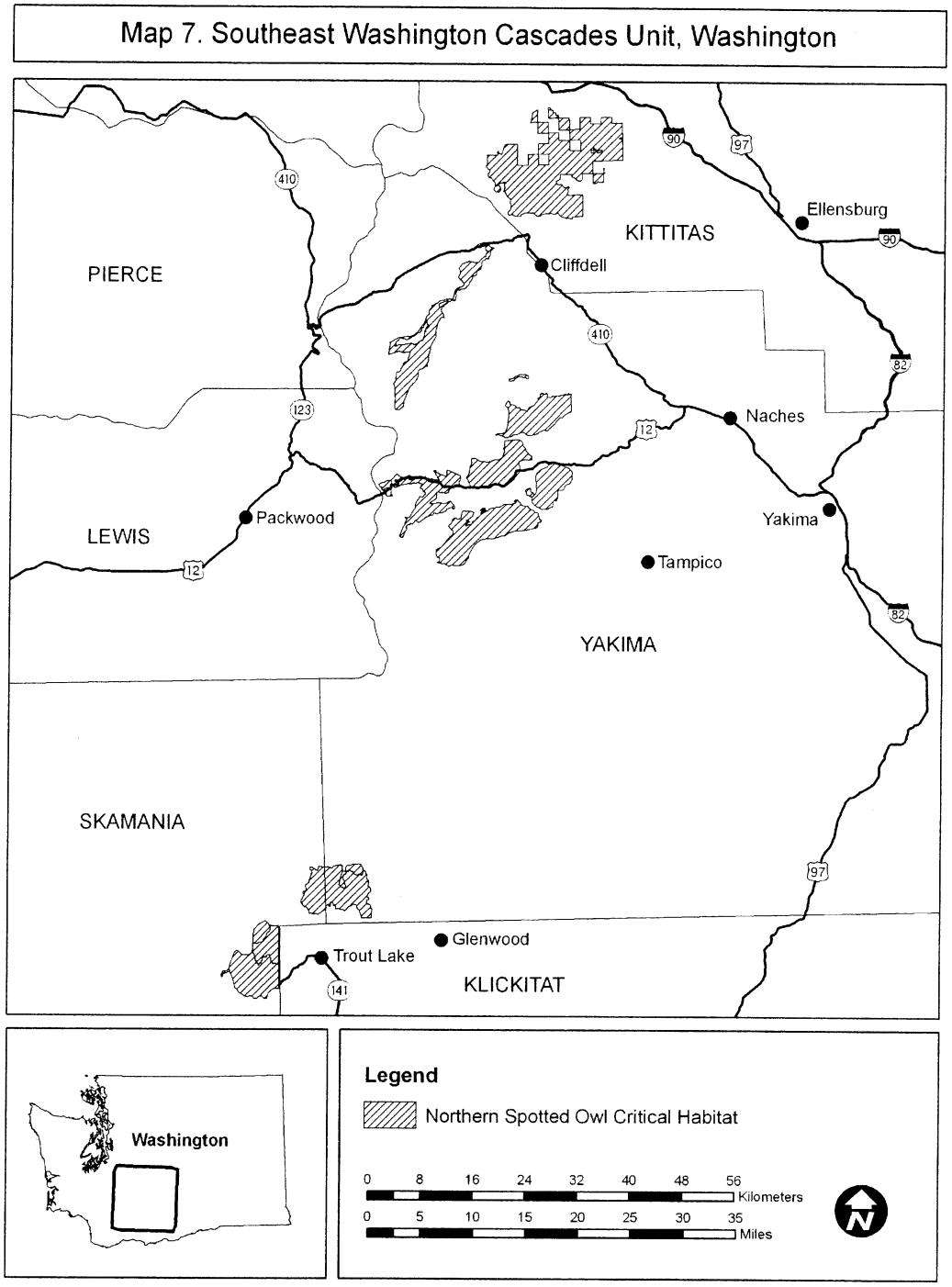
Map 6. Southwest Washington Cascades Unit, Washington



(13) Southeast Washington Cascades Unit (Unit 6). Kittitas, Yakima, and Skamania Counties, Washington. From USGS 1:24,000 scale quadrangles Bumping Lake, Cle Elum, Cougar Lake, Darland Mountain, Foundation Ridge, Frost Mountain, Goose Prairie, Guler Mountain, King Mountain, Little Huckleberry Mountain, Meeks Table, Mount Adams East, Mount Clifty, Old Scab Mountain, Pinegrass Ridge, Quartz Mountain, Rimrock Lake, Ronald, Sleeping Beauty, Spiral Butte, Tieton Basin, Timberwolf Mountain, Trout Lake, and White Pass.

(i) The Southeast Washington Cascades Unit consists of 143,400 ac (58,031 ha) in Kittitas, Yakima, and Skamania Counties, Washington, and is comprised of lands managed by the Wenatchee and Gifford Pinchot National Forests.

(ii) Note: Map of Southeast Washington Cascades Unit (Map 7) follows:

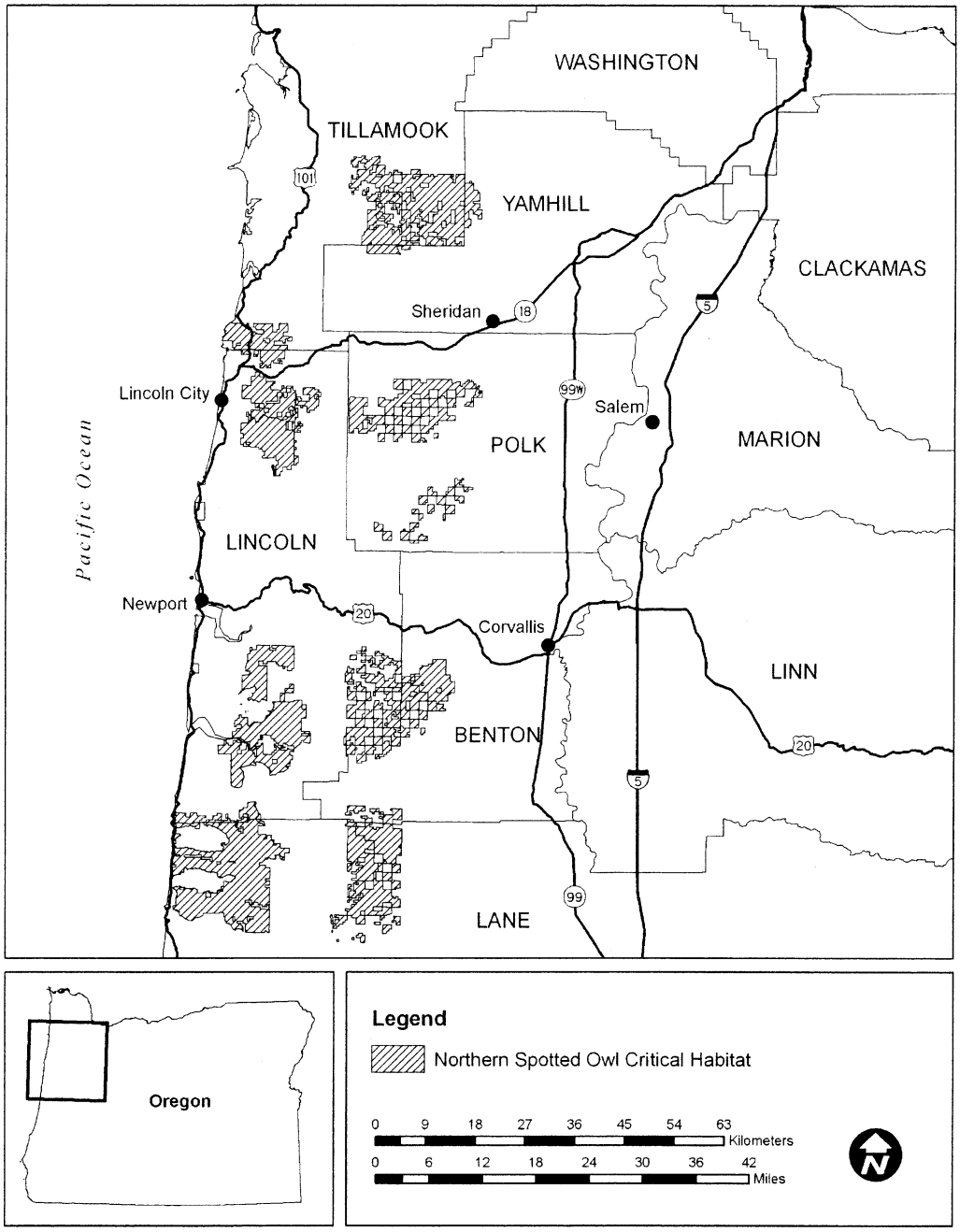


(14) Northern Oregon Coast Ranges Unit (Unit 7). Benton, Lane, Lincoln, Polk, Tillamook, and Yamhill Counties, Oregon. From USGS 1:24,000 scale quadrangles Alsea, Blaine, Cannibal Mountain, Cummins Peak, Devils Lake, Digger Mountain, Dolph, Dovre Peak, Elk City, Eurchre Mountain, Falls City, Fanno Ridge, Five Rivers, Flat Mountain, Grand Ronde, Grass Mountain, Greenleaf, Harlan, Heceta Head, Hellion Rapids, Herman Creek, Laurel Mountain, Mapleton, Marys Peak, Mercer Lake, Mowrey Landing, Neskowin, Neskowin OE W, Niagara Creek, Nortons, Prairie Peak, Sheridan, Socialist Valley, Springer Mountain, Stony Mountain, Stott Mountain, Summit, Tidewater, Tiernan, Toledo South, Trask Mountain, Triangle Lake, Valsetz, Waldport, Walton, Warnicke Creek, Windy Peak, Wren, and Yachats.

(i) The Northern Oregon Coast Ranges Unit consists of 321,420 ac (130,074 ha) in Tillamook, Yamhill, Polk, Lincoln, Benton, and Lane Counties, Oregon, and is comprised of lands managed by the Siuslaw National Forest (187,562 ac (75,904 ha)) and Salem and Eugene Bureau of Land Management (BLM) Districts (133,858 ac (54,170 ha)).

(ii) Note: Map of Northern Oregon Coast Ranges Unit (Map 8) follows:

Map 8. Northern Oregon Coast Ranges Unit, Oregon

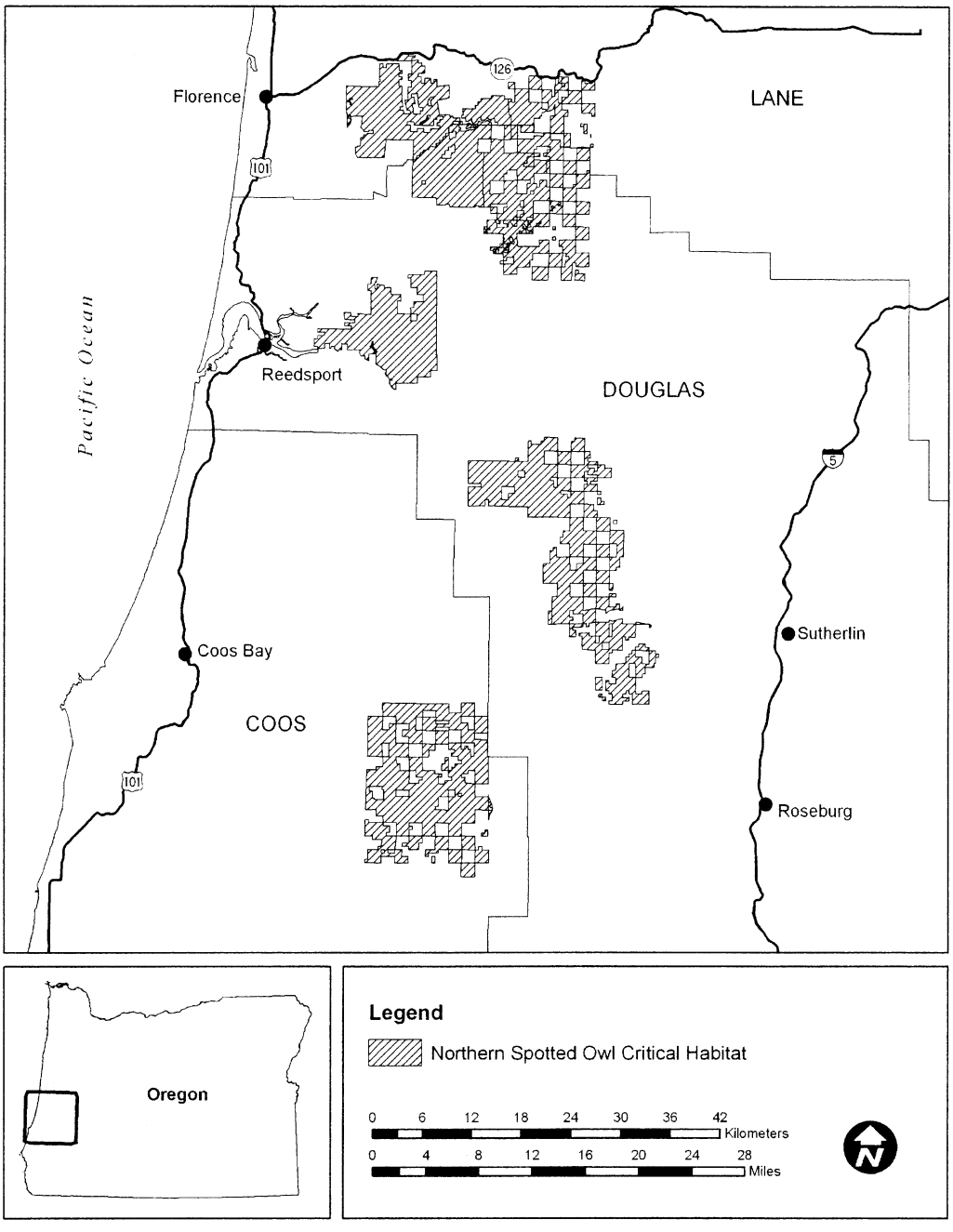


(15) Southern Oregon Coast Ranges Unit (Unit 8). Coos, Douglas, and Lane Counties, Oregon. From USGS 1:24,000 scale quadrangles Baldy Mountain, Callahan, Clay Creek, Coos Mountain, Deer Head Point, Dora, Goodwin Peak, Gunter, Kellogg, Kelly Butte, Loon Lake, Mapleton, North Fork, Old Blue, Reedsport, Roman Nose Mountain, Scottsburg, Sitkum, Smith River Falls, Tiernan, Tioga, Twin Sisters, and Tyee.

(i) The Southern Oregon Coast Ranges Unit consists of 204,276 ac (82,668 ha) in Lane, Coos, and Douglas Counties, Oregon, and is comprised of lands managed by the Siuslaw National Forest (67,751 ac (27,418 ha)) and Eugene, Roseburg, and Coos Bay BLM Districts (136,525 ac (55,250 ha)).

(ii) Note: Map of Southern Oregon Coast Ranges Unit (Map 9) follows:

Map 9. Southern Oregon Coast Ranges Unit, Oregon

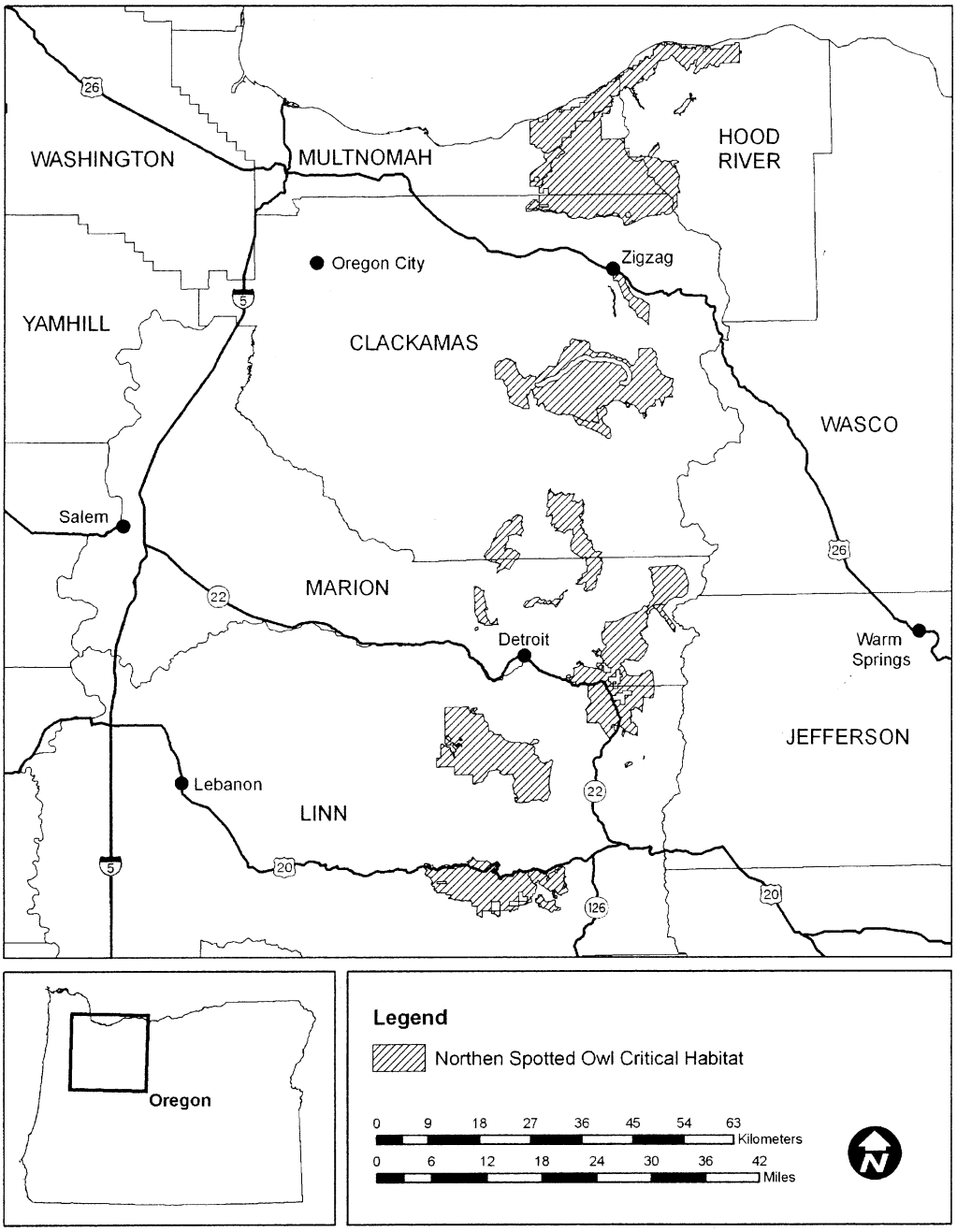


(16) Western Oregon Cascades North Unit (Unit 9). Clackamas, Hood River, Linn, Marion, and Multnomah Counties, Oregon. From USGS 1:24,000 scale quadrangles Bagby Hot Spring, Battle Ax, Bedford Point, Bonneville Dam, Breitenbush Hot Springs, Brightwood, Bull of the Woods, Bull Run, Bull Run Lake, Carpenter Mountain, Carson, Chimney Peak, Coffin Mountain, Dee, Detroit, Echo Mountain, Elkhorn, Fish Creek Mountain, Government Camp, Harter Mountain, Hickman Butte, High Rock, Idanha, Lawhead Creek, Marion Forks, Mother Lode Mountain, Mount Bruno, Mount Defiance, Mount Jefferson, Mount Lowe, Mount Mitchell, Multnomah Falls, Olallie Butte, Quartzville, Rhododendron, Tamolitch Falls, Tanner Butte, Three Lynx, Tidbits Mountain, Timothy Lake, Upper Soda, Wahtum Lake, and Wolf Peak.

(i) The Western Oregon Cascades North Unit consists of 334,738 ac (135,464 ha) in Linn, Marion, Clackamas, Hood River, and Multnomah Counties, Oregon, and is comprised of lands managed by the Mt. Hood and Willamette National Forests.

(ii) Note: Map of Western Oregon Cascades North Unit (Map 10) follows:

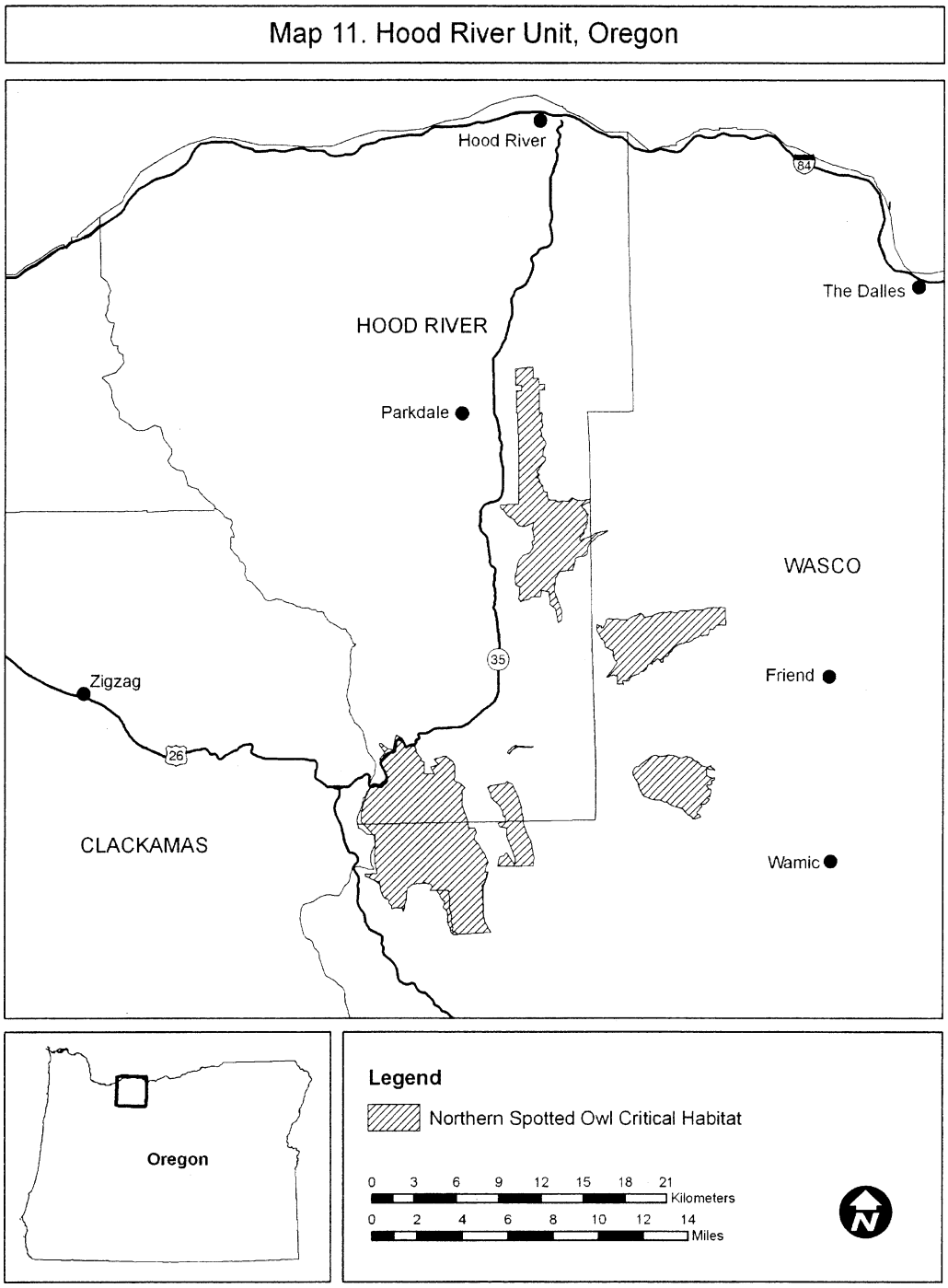
Map 10. Western Oregon Cascades North Unit, Oregon



(17) Hood River Unit (Unit 10). Clackamas, Hood River, and Wasco Counties, Oregon. From USGS 1:24,000 scale quadrangles Badger Lake, Dog River, Fivemile Butte, Flag Point, Friend, Mount Hood South, Parkdale, Post Point, Wapinitia Pass, and Wolf Run.

(i) The Hood River Unit consists of 42,863 ac (17,273 ha) in Hood River and Wasco Counties, Oregon, and is comprised of lands managed by the Mt. Hood National Forest.

(ii) Note: Map of Hood River Unit (Map 11) follows:

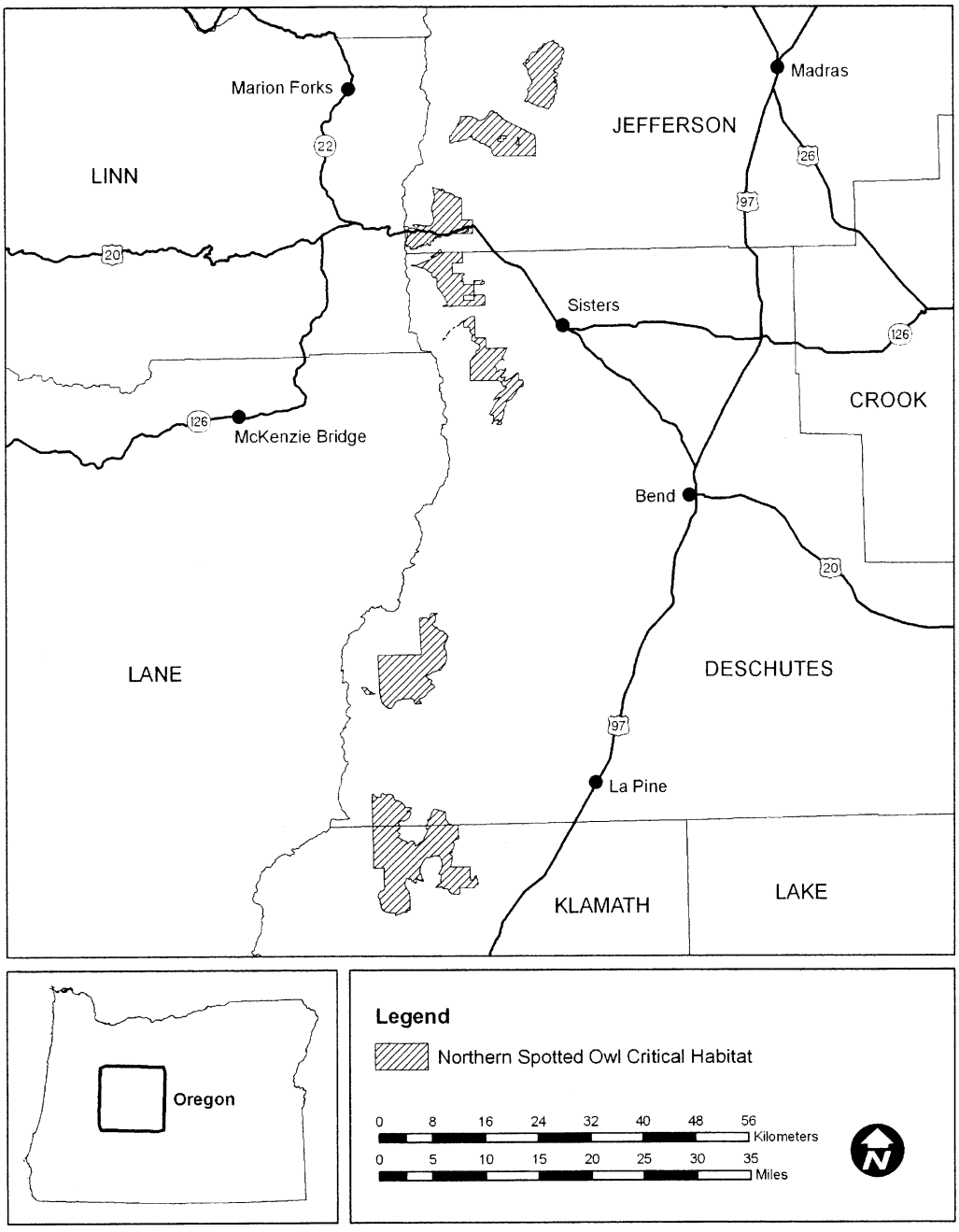


(18) Eastern Oregon Cascades Unit (Unit 11). Deschutes, Jefferson, and Klamath Counties, Oregon. From USGS 1:24,000 scale quadrangles Black Butte, Black Crater, Candle Creek, Crane Prairie Reservoir, Crescent Lake, Cryder Butte, Davis Mountain, Elk Lake, Hamner Butte, Irish Mountain, Marion Lake, Mount Washington, Odell Butte, Odell Lake, Prairie Farm Spring, Shitike Butte, The Twins, Three Creek Butte, Three Fingered Jack, and Trout Creek Butte.

(i) The Eastern Oregon Cascades Unit consists of 106,665 ac (43,166 ha) in Jefferson, Deschutes, and Klamath Counties, Oregon, and is comprised of lands managed by the Deschutes National Forest.

(ii) Note: Map of Eastern Oregon Cascades Unit (Map 12) follows:

Map 12. Eastern Oregon Cascades Unit, Oregon

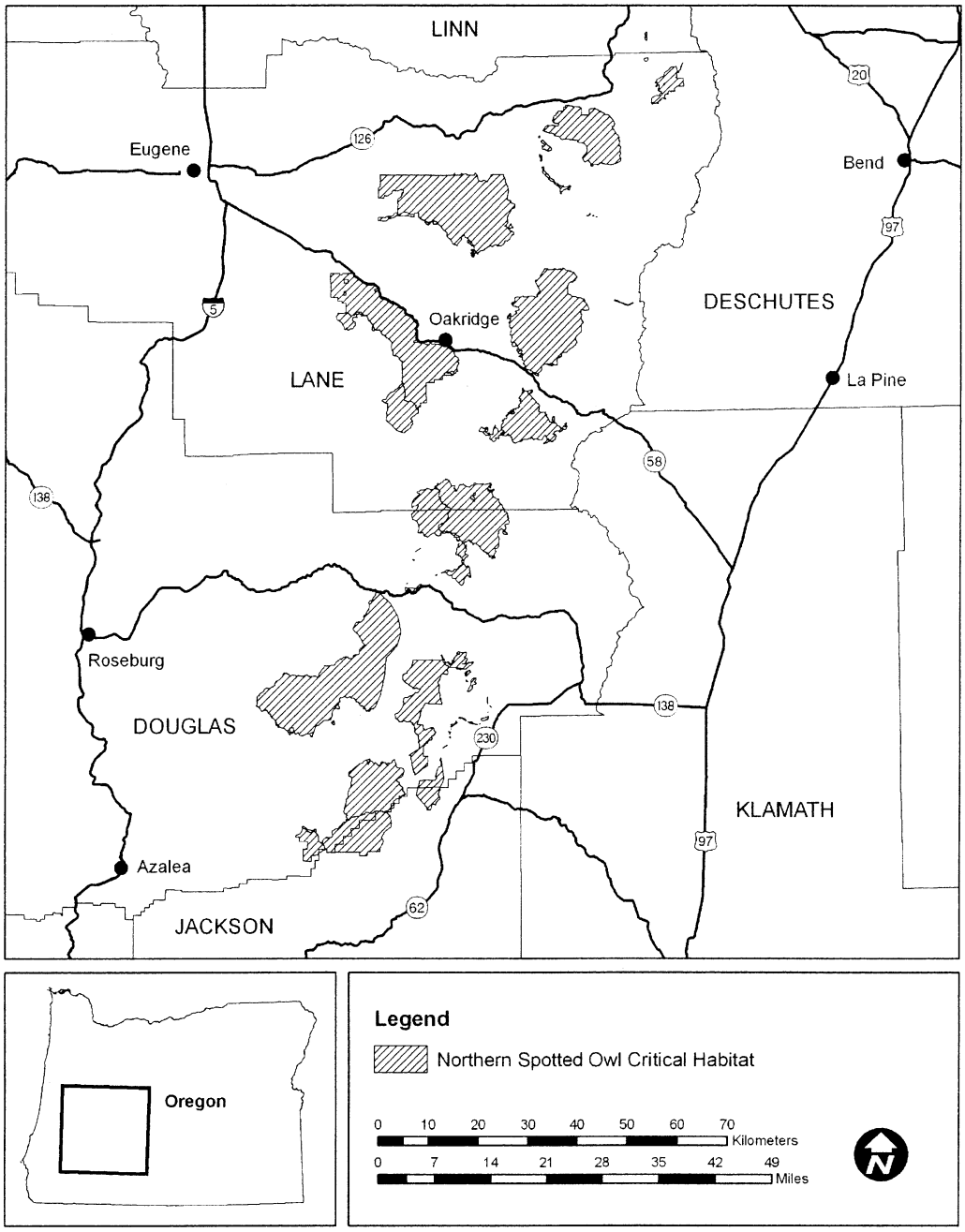


(19) Western Oregon Cascades South Unit (Unit 12). Douglas, Jackson, Lane, and Linn Counties, Oregon. From USGS 1:24,000 scale quadrangles Abbott Butte, Acker Rock, Bearbones Mountain, Belknap Springs, Blair Lake, Buckeye Lake, Butler Butte, Chucksney Mountain, Clear Lake, Cougar Reservoir, Deadman Mountain, Diamond Peak, Dumont Creek, Fall Creek Lake, Fish Creek Desert, Fish Mountain, French Mountain, Goat Point, Groundhog Mountain, Hamaker Butte, Harvey Mountain, Holland Point, Huckleberry Mountain, Illahee Rock, Irish Mountain, Linton Lake, McCredie Springs, McKenzie Bridge, Mount David Douglas, Mount June, Nimrod, North Sister, Oakridge, Potter Mountain, Quartz Mountain, Ragsdale Butte, Red Butte, Reynolds Ridge, Rigdon Point, Saddleblanket Mountain, Sardine Butte, Sinker Mountain, Staley Ridge, Steamboat, Sugarpine Creek, Taft Mountain, Toketee Falls, Twin Lakes Mountain, Union Creek, Waldo Mountain, Warner Mountain, Westfir West, and Whetstone Point.

(i) The Western Oregon Cascades South Unit consists of 448,403 ac (181,463 ha) in Jackson, Douglas, Lane, and Linn Counties, Oregon, and is comprised of lands managed by the Willamette, Umpqua, and Rogue River National Forests (448,324 ac (181,406 ha)) and Eugene BLM Districts (79 ac (32 ha)).

(ii) Note: Map of Western Oregon Cascades South Unit (Map 13) follows:

Map 13. Western Oregon Cascades South Unit, Oregon

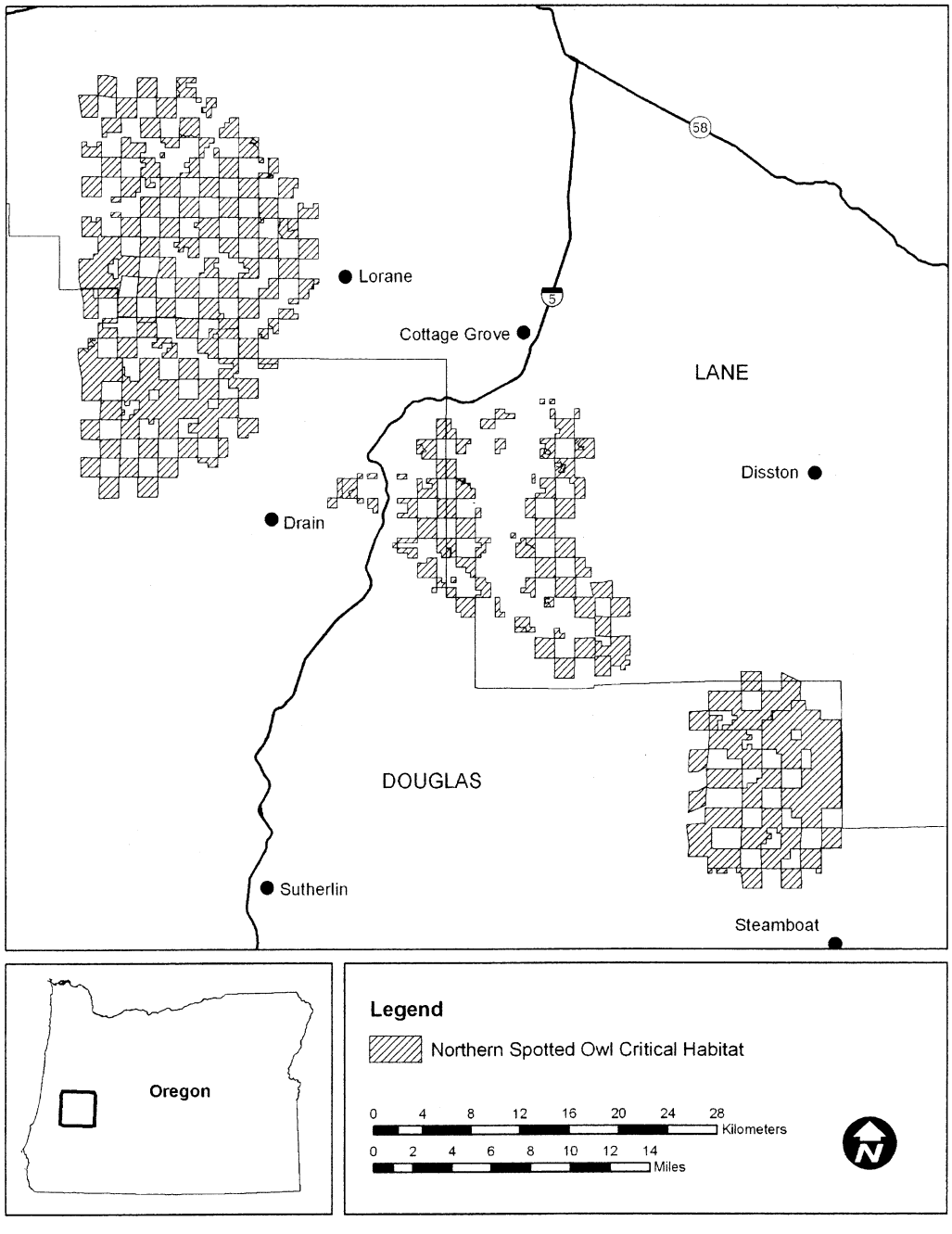


(20) Willamette/North Umpqua Unit (Unit 13). Douglas and Lane Counties, Oregon. From USGS 1:24,000 scale quadrangles Beaver Creek, Blue Mountain, Burnt Mountain, Chilcoot Mountain, Clay Creek, Cottage Grove, Cottage Grove Lake, Crow, Curtin, Drain, Elkton, Fairview Peak, Gunter, Harness Mountain, Harrington Creek, High Point, Letz Creek, Putnam Valley, Scaredman Creek, Scotts Valley, and Silica Mountain.

(i) The Willamette/North Umpqua Unit consists of 119,637 ac (48,415 ha) of lands in Lane and Douglas Counties, Oregon, and is comprised of lands managed by the Eugene and Roseburg BLM Districts.

(ii) Note: Map of Willamette/North Umpqua Unit (Map 14) follows:

Map 14. Willamette/North Umpqua Unit, Oregon

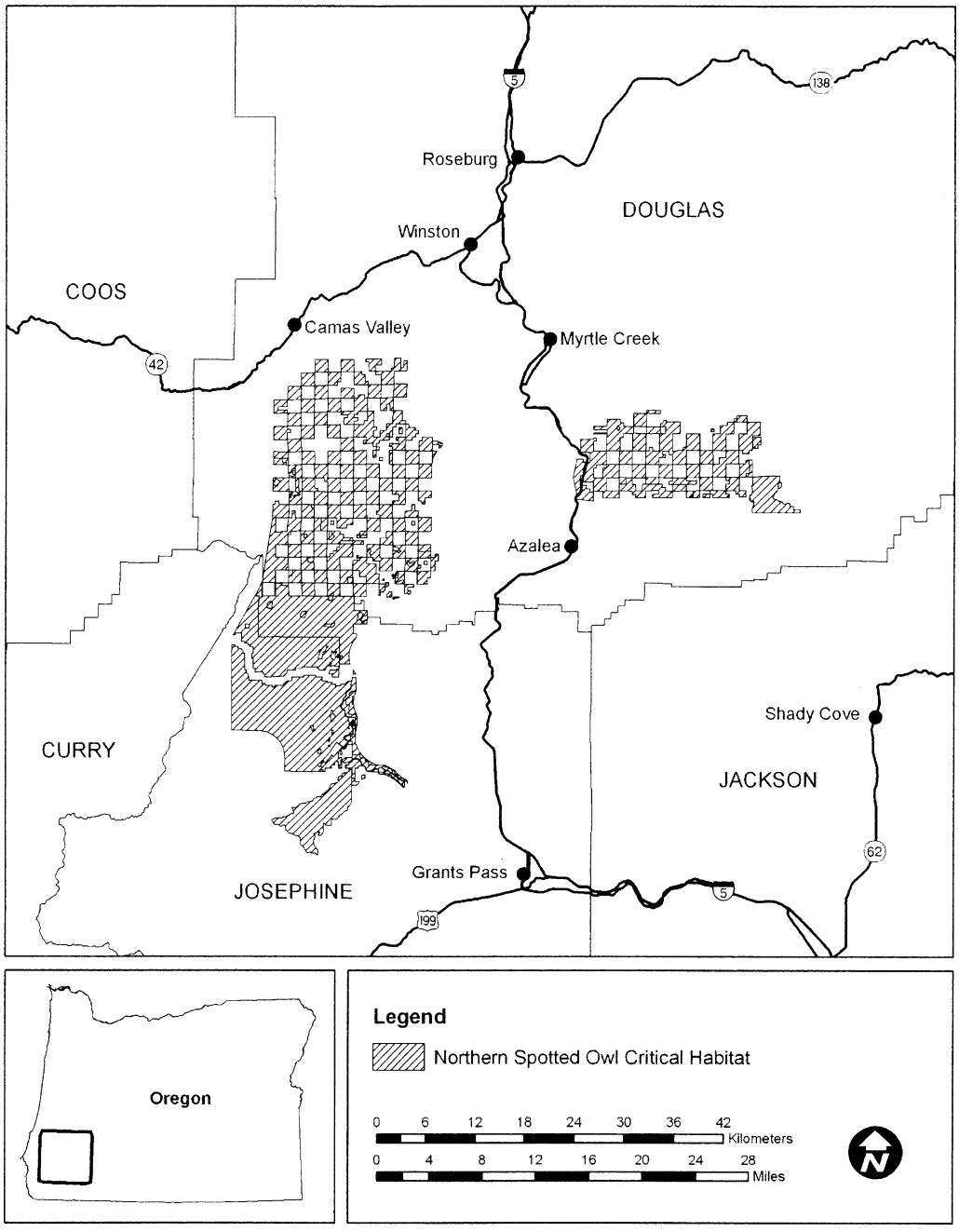


(21) Rogue/Umpqua Unit (Unit 14). Douglas and Josephine Counties, Oregon. From USGS 1:24,000 scale quadrangles Bunker Creek, Canyonville, Cedar Springs Mountain, Chipmunk Ridge, Chrome Ridge, Days Creek, Dutchman Butte, Galice, Glendale, Hobson Horn, Kelsey Peak, Live Oak Mountain, McCullough Creek, Merlin, Milo, Mount Peavine, Mount Reuben, Nickel Mountain, Onion Mountain, Quines Creek, Rabbit Mountain, Richter Mountain, Starvout Creek, and Tiller.

(i) The Rogue/Umpqua Unit consists of 165,504 ac (66,977 ha) in Douglas and Josephine Counties, Oregon, and is comprised of lands managed by the Umpqua National Forest (13,147 ac (5,320 ha)) and Roseburg and BLM Medford Districts (152,357 ac (61,657 ha)).

(ii) Note: Map of Rogue/Umpqua Unit (Map 15) follows:

Map 15. Rogue/Umpqua Unit, Oregon

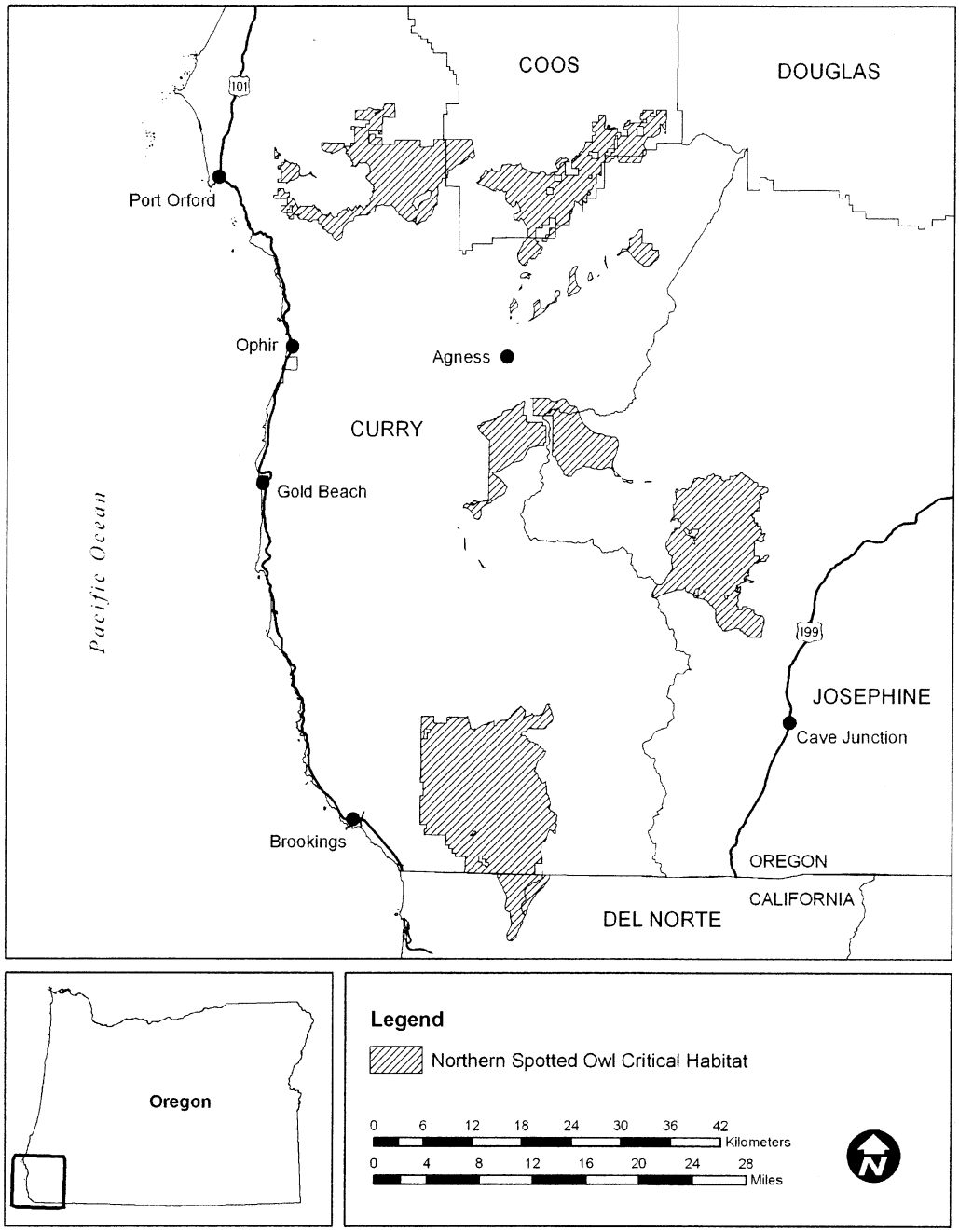


(22) Oregon Klamath Mountains Unit (Unit 15). Coos, Curry, and Josephine Counties, Oregon. Del Norte County, California. From USGS 1:24,000 scale quadrangles Agness, Barklow Mountain, Big Craggies, Biscuit Hill, Bosley Butte, Brandy Peak, Chetco Peak, China Flat, Chrome Ridge, Collier Butte, Eden Valley, Eight Dollar Mountain, Father Mountain, Fourth of July Creek, High Divide, High Plateau Mountain, Horse Sign Butte, Illahe, Kelsey Peak, Marial, Mount Bolivar, Mount Butler, Mount Emily, Ophir Mountain, Pearsoll Peak, Port Orford, Quail Prairie Mountain, Silver Peak, Sixes, and York Butte.

(i) The Oregon Klamath Mountains Unit is a total of 195,211 ac (79,215 ha), including 189,424 ac (76,657 ha) in Coos, Curry, and Josephine Counties, Oregon, and 5,787 ac (2,342 ha) in the northernmost portion of Del Norte County, California. It is comprised of lands managed by the Siskiyou and Six Rivers National Forests (194,745 ac (78,810 ha)) and Coos Bay BLM District (466 ac (188 ha)).

(ii) Note: Map of Oregon Klamath Mountains Unit (Map 16) follows:

Map 16. Oregon Klamath Mountains Unit, Oregon and California

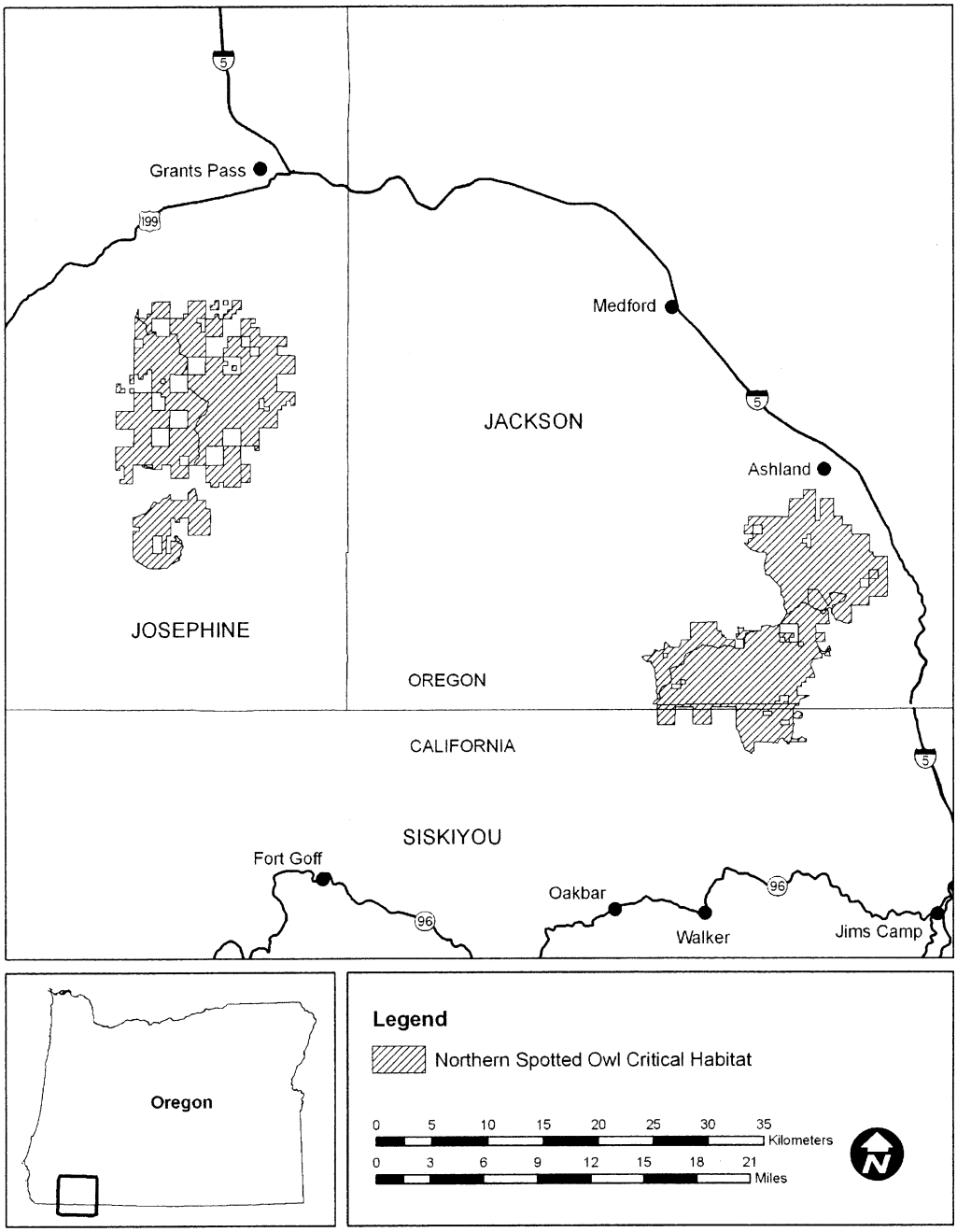


(23) Klamath Intra-Province Unit (Unit 16). Jackson and Josephine Counties, Oregon. Siskiyou County, California. From USGS 1:24,000 scale quadrangles Ashland, Buckhorn Bally, Condrey Mountain, Cottonwood Peak, Dutchman Peak, Kerby Peak, Mount Ashland, Murphy, Murphy Mountain, Oregon Caves, Siskiyou Peak, Talent, and Williams.

(i) The Klamath Intra-Province Unit is a total of 96,572 ac (39,081 ha), including 90,437 ac (36,598 ha) in Josephine and Jackson Counties, Oregon, and 6,135 ac (2,483 ha) in the northern portion of Siskiyou County, California. It is comprised of lands managed by the Rogue-Siskiyou and Klamath National Forests (57,977 ac (23,462 ha)) and Medford BLM District (38,595 ac (15,619 ha)).

(ii) Note: Map of Klamath Intra-Province Unit (Map 17) follows:

Map 17. Klamath Intra-Province Unit, Oregon and California

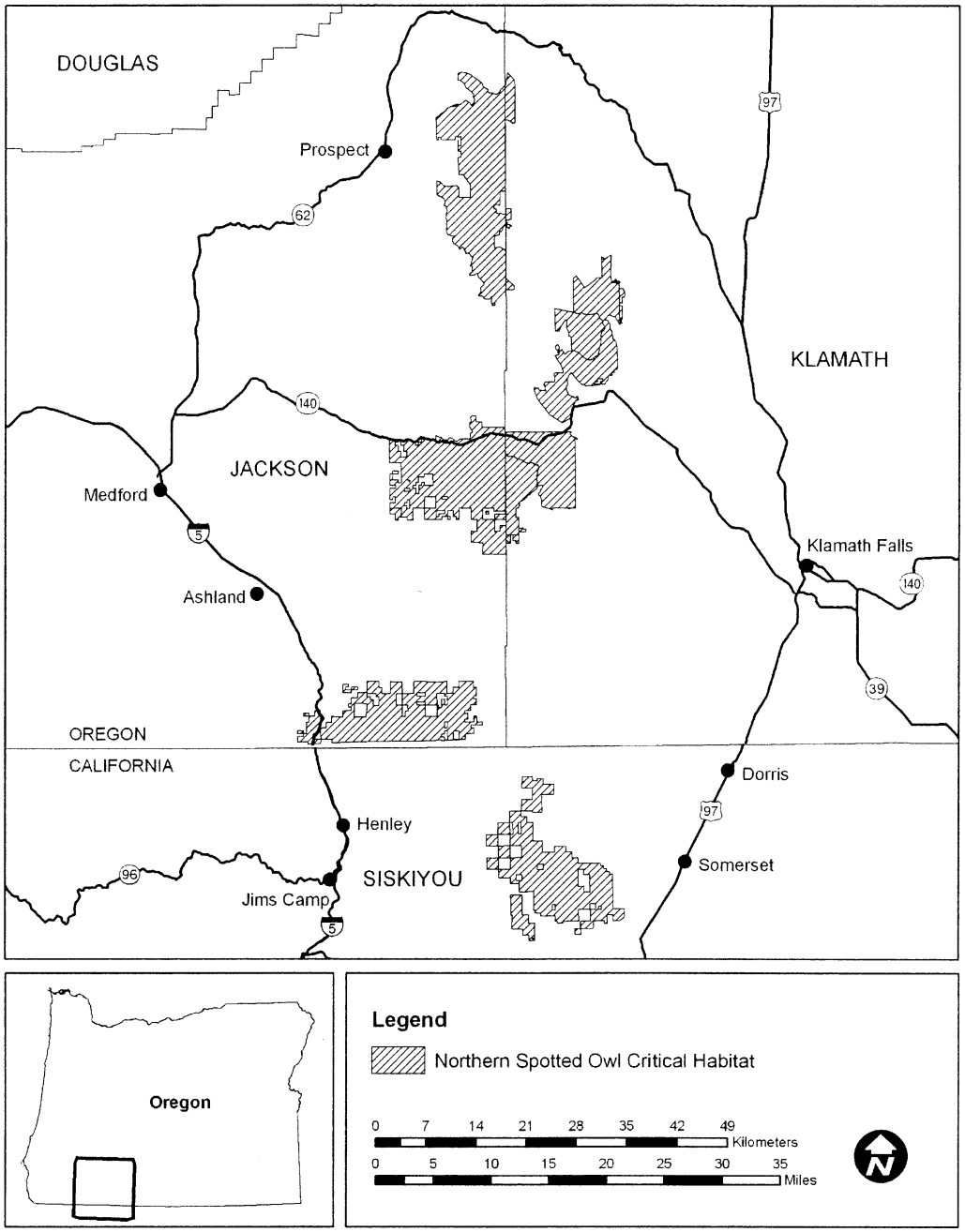


(24) Southern Cascades Unit (Unit 17). Jackson and Klamath Counties, Oregon. Siskiyou County, California. From USGS 1:24,000 scale quadrangles Brown Mountain, Copco, Crystal Spring, Dewey Gulch, Imnaha Creek, Lake of the Woods North, Lake of the Woods South, Little Chinquapin Mountain, MacDoel, Mount Ashland, Mount McLoughlin, Panther Rock, Parker Mountain, Pelican Bay, Pelican Butte, Prospect North, Prospect South, Red Blanket Mountain, Robinson Butte, Rustler Peak, Secret Spring Mountain, Siskiyou Pass, Soda Mountain, and Willow Lake.

(i) The Southern Cascades Unit is a total of 226,430 ac (91,634 ha), including 186,732 ac (75,568 ha) in Jackson and Klamath Counties, Oregon, and 39,698 ac (16,065 ha) in the northern portion of Siskiyou County, California. It is comprised of lands managed by Rogue-Siskiyou, Winema, and Klamath National Forests (191,612 ac (77,543 ha)) and Medford and Lakeview BLM Districts (34,818 ac (14,090 ha)).

(ii) Note: Map of Southern Cascades Unit (Map 18) follows:

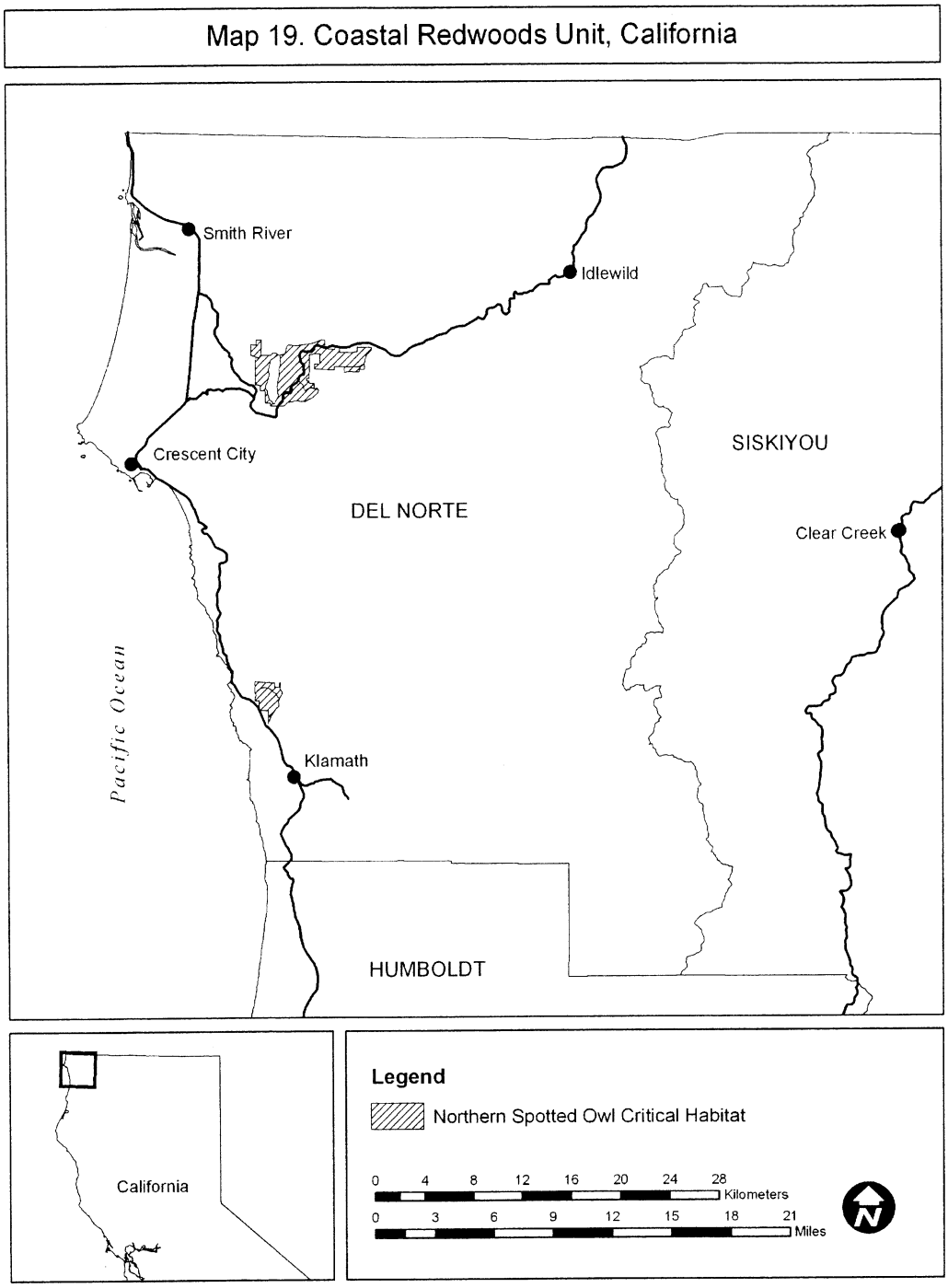
Map 18. Southern Cascades Unit, Oregon and California



(25) Coastal Redwoods Unit (Unit 18). Del Norte County, California. From USGS 1:24,000 scale quadrangles Gasquet, Hiouchi, and Requa.

(i) The Coastal Redwoods Unit consists of 6,937 ac (2,807 ha) in Del Norte County, California, and is comprised of lands managed by Six Rivers National Forest.

(ii) Note: Map of Coastal Redwoods Unit (Map 19) follows:

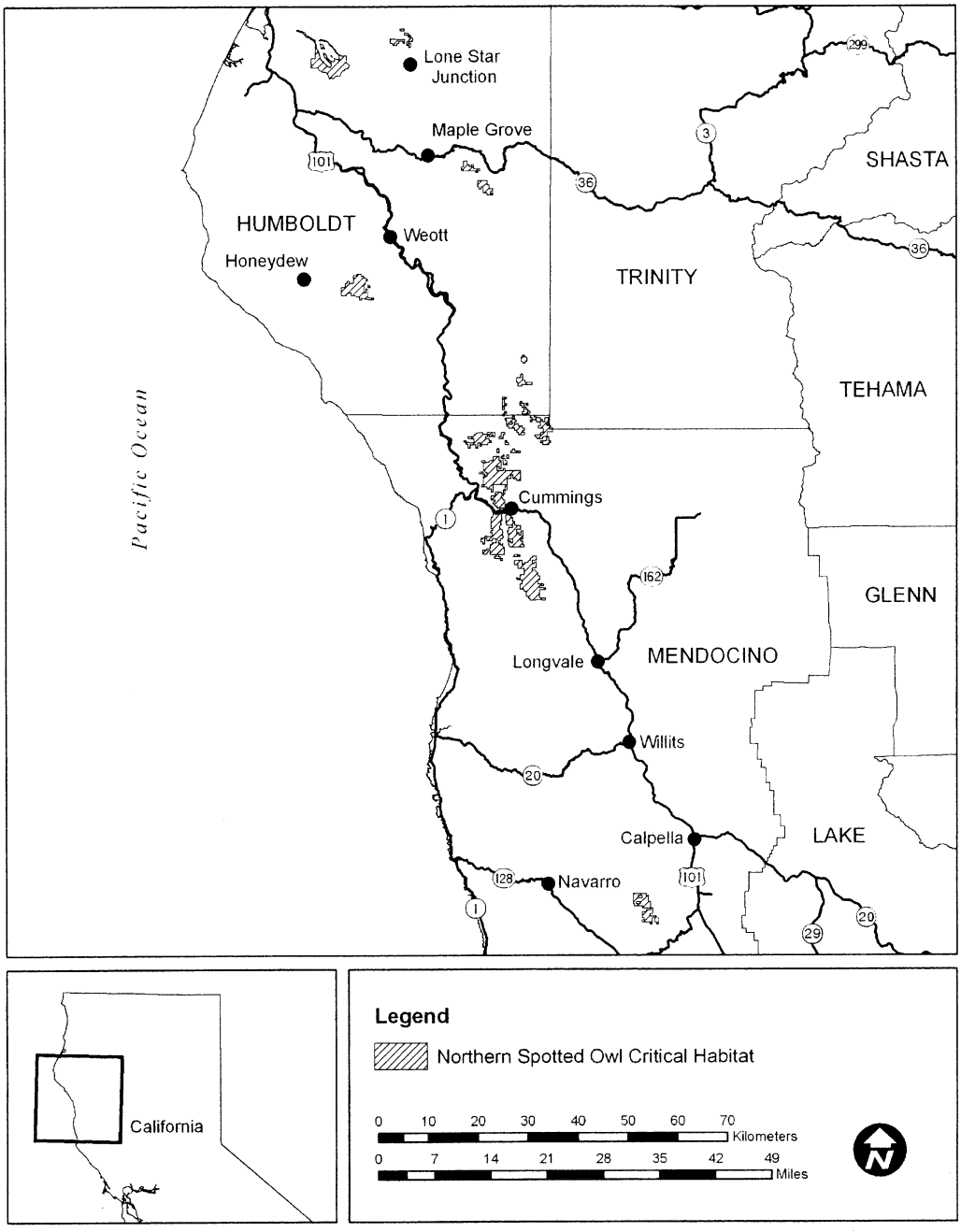


(26) Coastal Humboldt Unit (Unit 19). Humboldt, Mendocino, and Trinity Counties, California. From USGS 1:24,000 scale quadrangles Bell Springs, Boonville, Bridgeville, Bull Creek, Cahto Peak, Ettersburg, Fields Landing, Harris, Honeydew, Hydesville, Iaqua Buttes, Jewett Rock, Larabee Valley, Leggett, Lincoln Ridge, Mad River Buttes, McWhinney Creek, Noble Butte, Orrs Springs, Tan Oak Park, and Weott.

(i) The Coastal Humboldt Unit consists of 49,308 ac (19,954 ha) in Humboldt and Mendocino Counties, California, and is comprised of lands managed by the BLM Arcata Field Office.

(ii) Note: Map of Coastal Humboldt Unit (Map 20) follows:

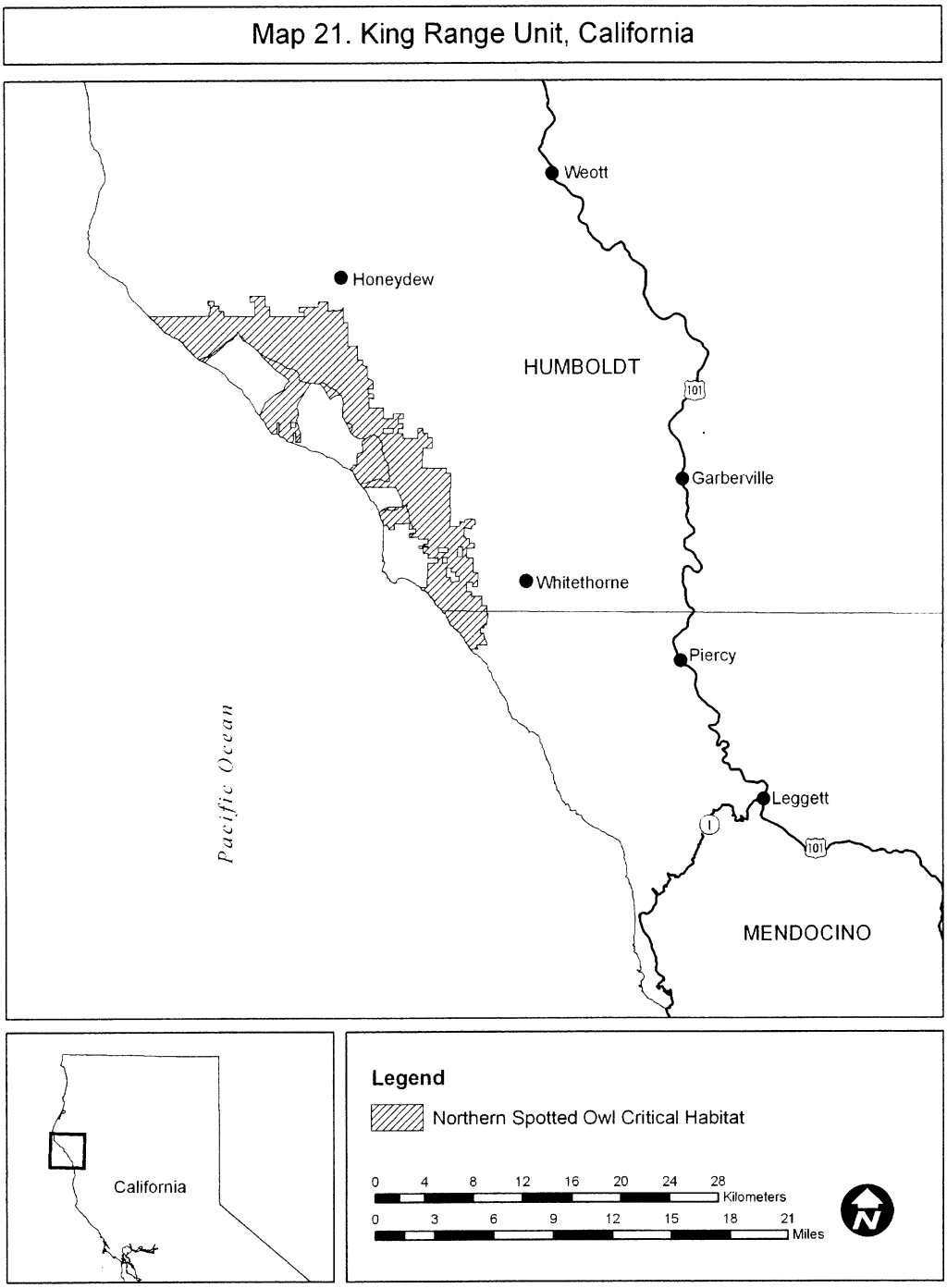
Map 20. Coastal Humboldt Unit, California



(27) King Range Unit (Unit 20). Humboldt and Mendocino Counties, California. From USGS 1:24,000 scale quadrangles Bear Harbor, Bear Harbor OE W, Briceland, Cooskie Creek, Honeydew, Shelter Cove, Shubrick Peak, and Shubrick Peak OE S.

(i) The King Range Unit consists of 40,308 ac (16,312 ha) in Humboldt and Mendocino Counties, California, and is comprised of lands managed by the BLM Arcata Field Office.

(ii) Note: Map of King Range Unit (Map 21) follows:

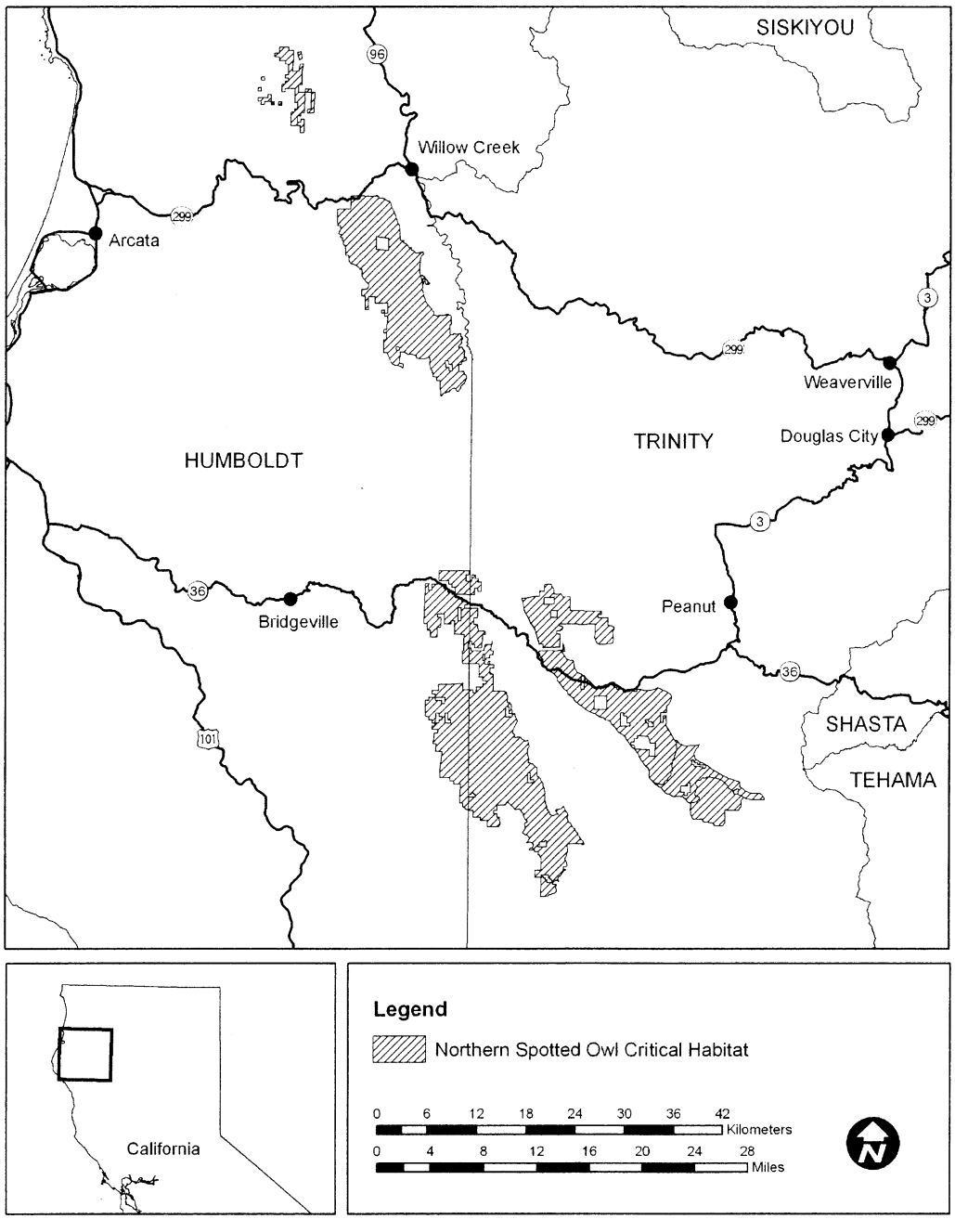


(28) South Fork Mountain Divide Unit (Unit 21). Humboldt and Trinity Counties, California. From USGS 1:24,000 scale quadrangles Alderpoint, Black Lassic, Blake Mountain, Board Camp Mountain, Dinsmore, Forest Glen, Grouse Mountain, Hennessy Peak, Hupa Mountain, Lord-Ellis Summit, Naufus Creek, Pony Buck Peak, Ruth Lake, Sims Mountain, Smoky Creek, Sportshaven, Swim Ridge, Willow Creek, and Zenia.

(i) The South Fork Mountain Divide Unit consists of 141,180 ac (58,752 ha) in Humboldt and Trinity Counties, California, and is comprised of lands managed by the Six Rivers and Shasta-Trinity National Forests (141,054 ac (57,082 ha)) and BLM Arcata Field Office (4,126 ac (1,670 ha)).

(ii) Note: Map of South Fork Mountain Divide Unit (Map 22) follows:

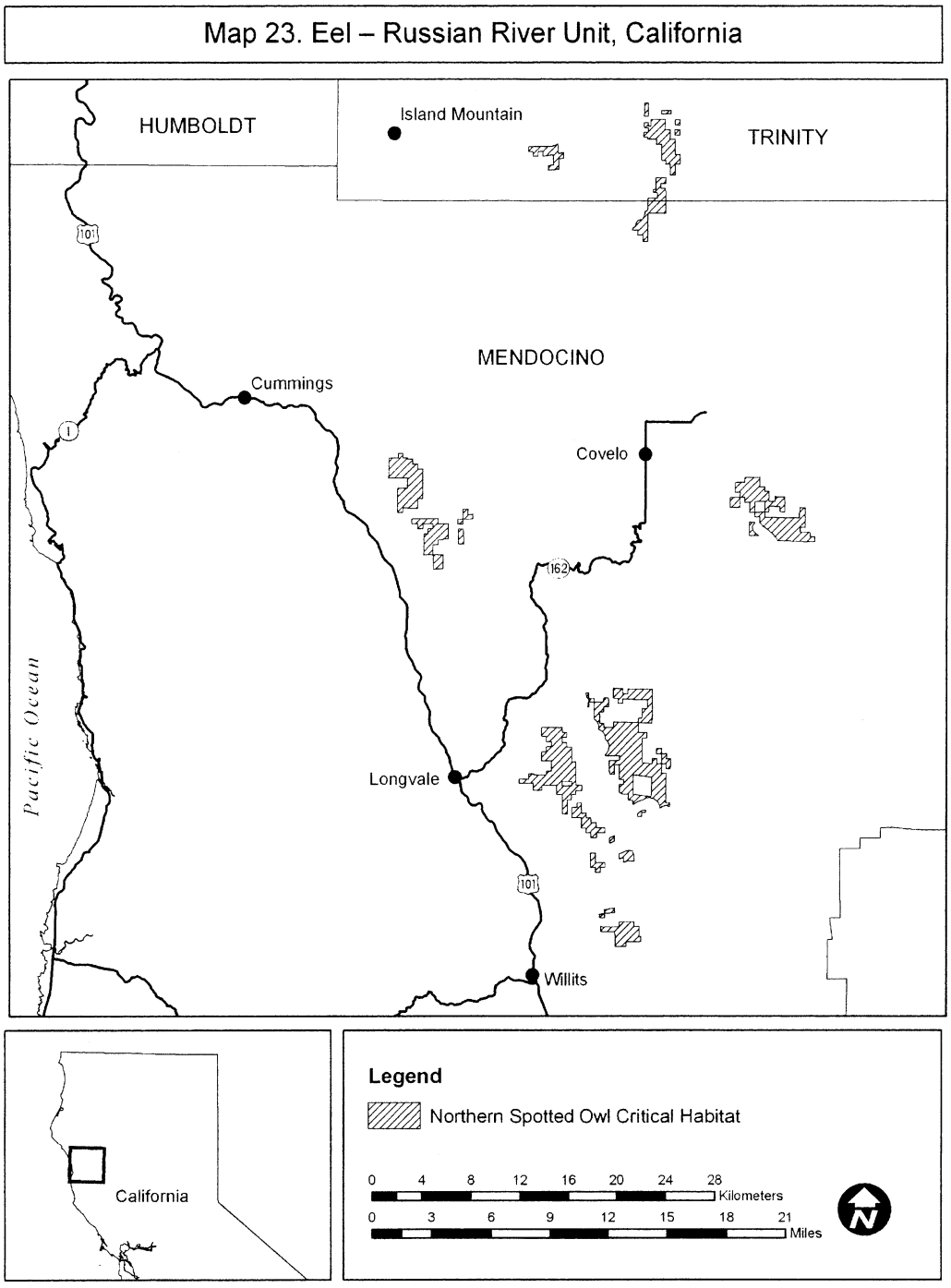
Map 22. South Fork Mountain Divide Unit, California



(29) Eel-Russian River Unit (Unit 22). Mendocino and Trinity Counties, California. From USGS 1:24,000 scale quadrangles Bluenose Ridge, Brushy Mountain, Covelo East, Foster Mountain, Four Corners Rock, Iron Peak, Jamison Ridge, Laytonville, Long Ridge, Mina, Newhouse Ridge, Thatcher Ridge, Willis Ridge, and Willits.

(i) The Eel-Russian River Unit consists of 21,940 ac (8,879 ha) in Mendocino and Trinity Counties, California, and is comprised of lands managed by the BLM Ukiah and Arcata Field Offices.

(ii) Note: Map of Eel-Russian River Unit (Map 23) follows:

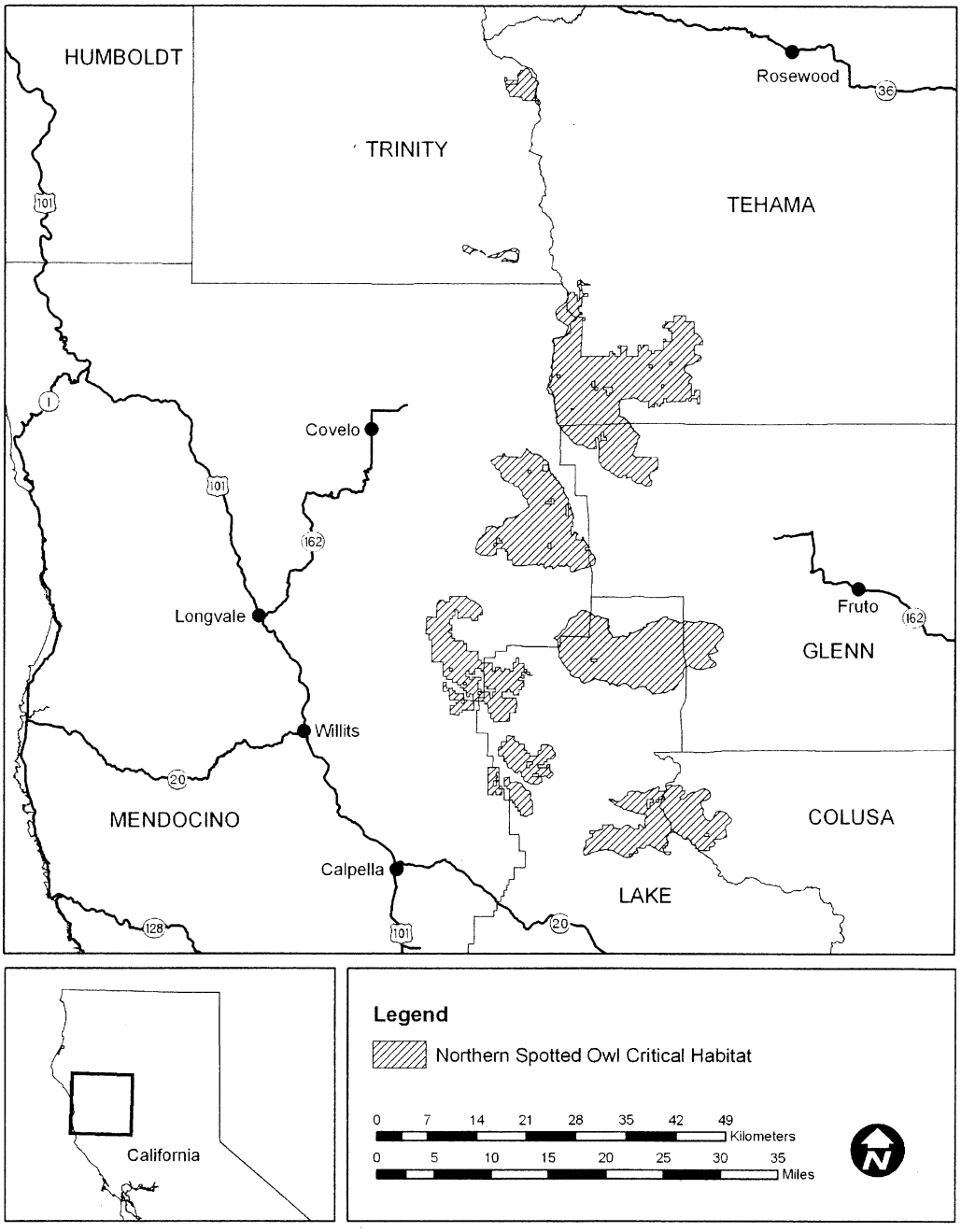


(30) Mendocino Coast Ranges Unit (Unit 23). Colusa, Glenn, Lake, Mendocino, Tehama, and Trinity Counties, California. From USGS 1:24,000 scale quadrangles Ball Mountain, Bartlett Mountain, Black Rock Mountain, Brushy Mountain, Buck Rock, Crockett Peak, Elk Mountain, Felkner Hill, Foster Mountain, Fouts Springs, Hall Ridge, Hull Mountain, Kneecap Ridge, Lake Pillsbury, Log Spring, Mendocino Pass, Newhouse Ridge, North Yolla Bolly Mountains, Plaskett Meadows, Plaskett Ridge, Potato Hill, Potter Valley, Riley Ridge, Saint John Mountain, Sanhedrin Mountain, Thatcher Ridge, Van Arsdale Reservoir, and Wrights Ridge.

(i) The Mendocino Coast Ranges Unit consists of 215,105 ac (87,050 ha) in Mendocino, Lake, Colusa, Glenn, Tehama, and Trinity Counties, California, and is comprised of lands managed by the Mendocino National Forest.

(ii) Note: Map of Mendocino Coast Ranges Unit (Map 24) follows:

Map 24. Mendocino Coast Ranges Unit, California

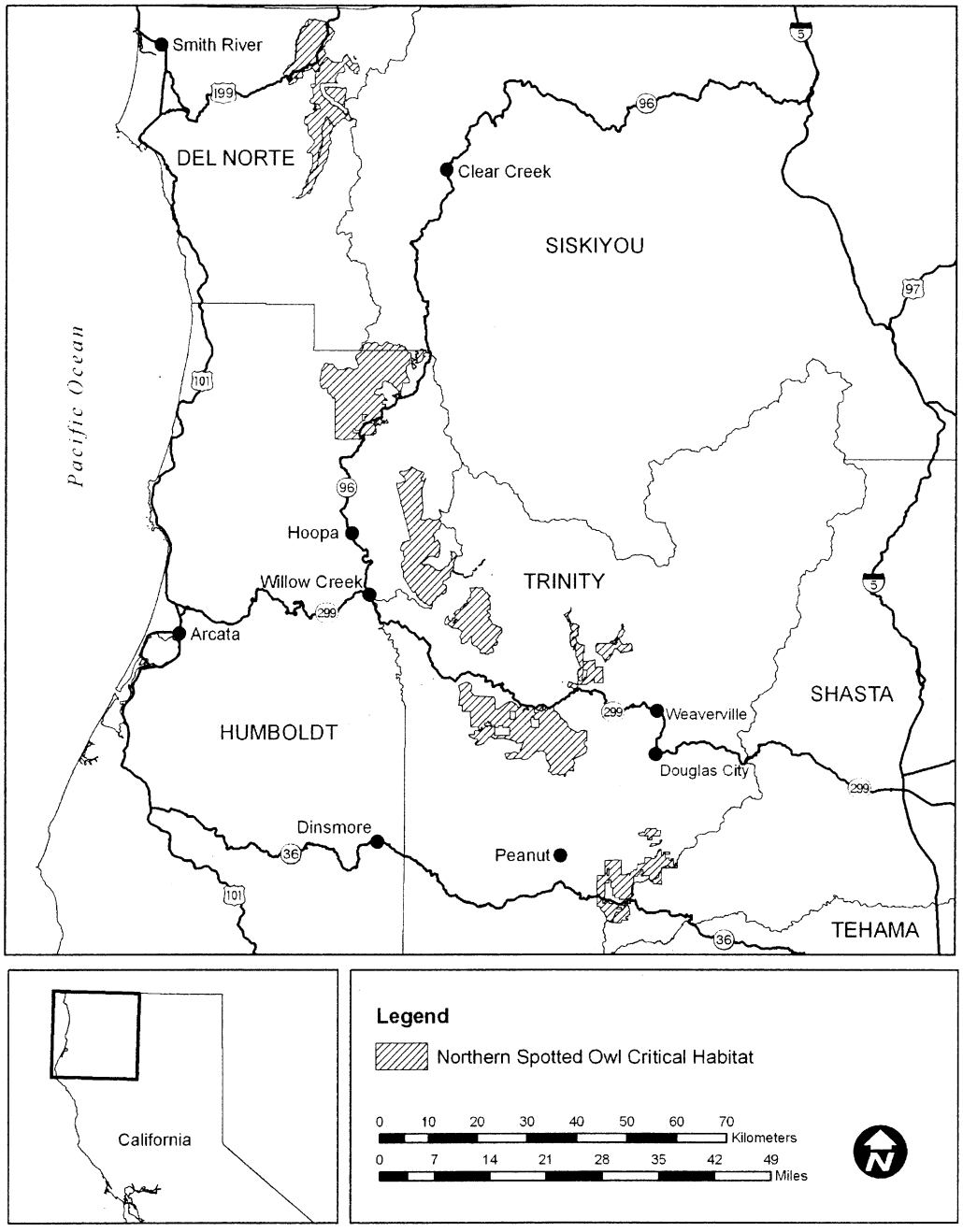


(31) Western Klamath-Siskiyou Mountains Unit (Unit 24). Del Norte, Humboldt, Shasta, Siskiyou, and Trinity Counties, California. From USGS 1:24,000 scale quadrangles Bark Shanty Gulch, Big Bar, Broken Rib Mountain, Chanchelulla Peak, Dedrick, Dees Peak, Del Loma, Denny, Devils Punchbowl, Fish Lake, Hayfork, Hayfork Bally, Helena, Hopkins Butte, Hossimbim Mountain, Hurdygurdy Butte, Hyampom Mountain, Ironside Mountain, Jim Jam Ridge, Johnsons, Junction City, Lonesome Ridge, Mount Hilton, Orleans, Orleans Mountain, Pony Buck Peak, Prescott Mountain, Rush Creek Lakes, Salmon Mountain, Salyer, Shelly Creek Ridge, Ship Mountain, Somes Bar, Thurston Peaks, Tish Tang Point, Trinity Mountain, Weitchpec, and Wildwood.

(i) The Western Klamath-Siskiyou Mountains Unit consists of 240,130 ac (87,178 ha) in Del Norte, Humboldt, Trinity, Shasta, and Siskiyou Counties, California, and is comprised of lands managed by the Six Rivers and Shasta-Trinity National Forests (236,460 ac (95,692 ha)) and BLM Redding Field Office (3,670 ac (1,485 ha)).

(ii) Note: Map of Western Klamath-Siskiyou Mountains Unit (Map 25) follows:

Map 25. Western Klamath/Siskiyou Mountains Unit, California

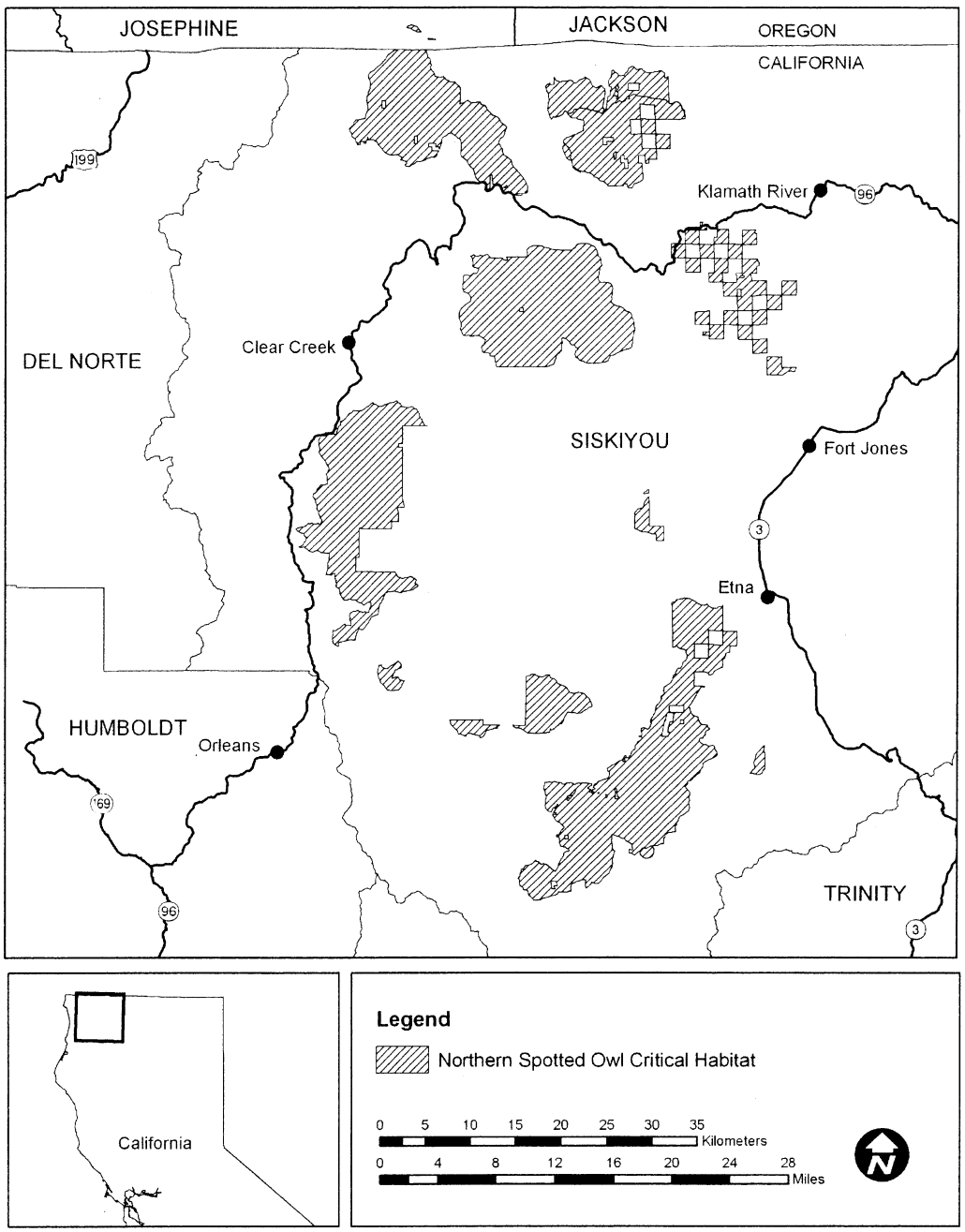


(32) Scott and Salmon Mountains Unit (Unit 25). Siskiyou County, California. Josephine County, Oregon. From USGS 1:24,000 scale quadrangles Boulder Peak, Cecilville, Clear Creek, Deadman Peak, Deadman Point, Dillon Mountain, Dutch Creek, Eaton Peak, English Peak, Etna, Figurehead Mountain, Forks of Salmon, Grasshopper Ridge, Grayback Mountain, Grider Valley, Hamburg, Horse Creek, Huckleberry Mountain, Indian Creek Baldy, Kangaroo Mountain, McKinley Mountain, Medicine Mountain, Orleans Mountain, Russell Peak, Sawyers Bar, Scott Bar, Seiad Valley, Slater Butte, Somes Bar, Tanners Peak, Ukonom Lake, Ukonom Mountain, and Yellow Dog Point.

(i) The Scott and Salmon Mountains Unit is a total of 242,450 ac (98,116 ha), including 242,292 ac (98,052 ha) in Siskiyou County, California, and 158 ac (64 ha) in Josephine County, Oregon, and is comprised of lands managed by the Klamath National Forest.

(ii) Note: Map of Scott and Salmon Mountains Unit (Map 26) follows:

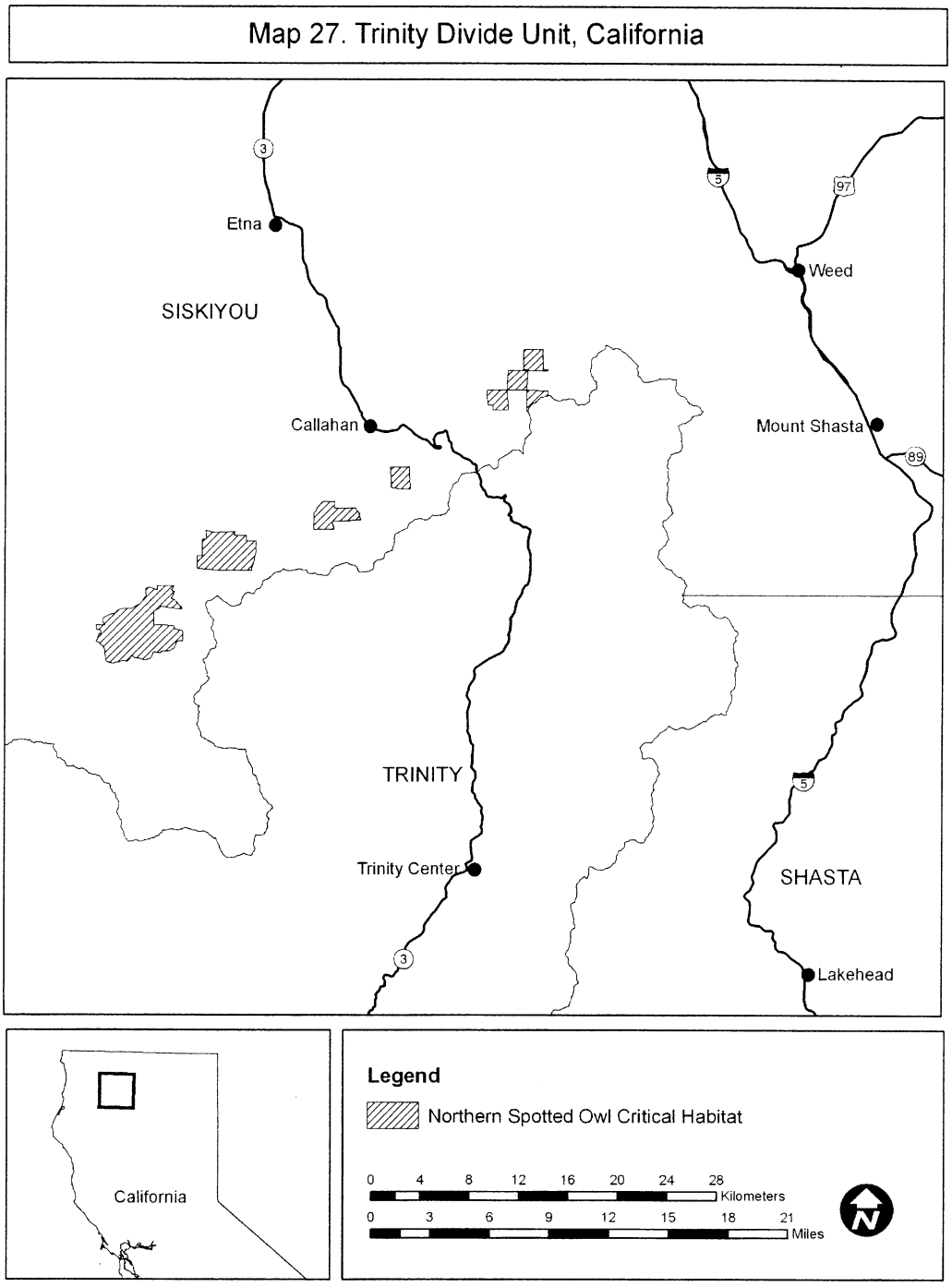
Map 26. Scott and Salmon Mountains Unit, California and Oregon



(33) Trinity Divide Unit (Unit 26). Siskiyou County, California. From USGS 1:24,000 scale quadrangles Billys Peak, Callahan, Deadman Peak, Grasshopper Ridge, and Scott Mountain.

(i) The Trinity Divide Unit consists of 13,870 ac (5,613 ha) in Siskiyou County, California, and is comprised of lands managed by the Klamath National Forest.

(ii) Note: Map of Trinity Divide Unit (Map 27) follows:

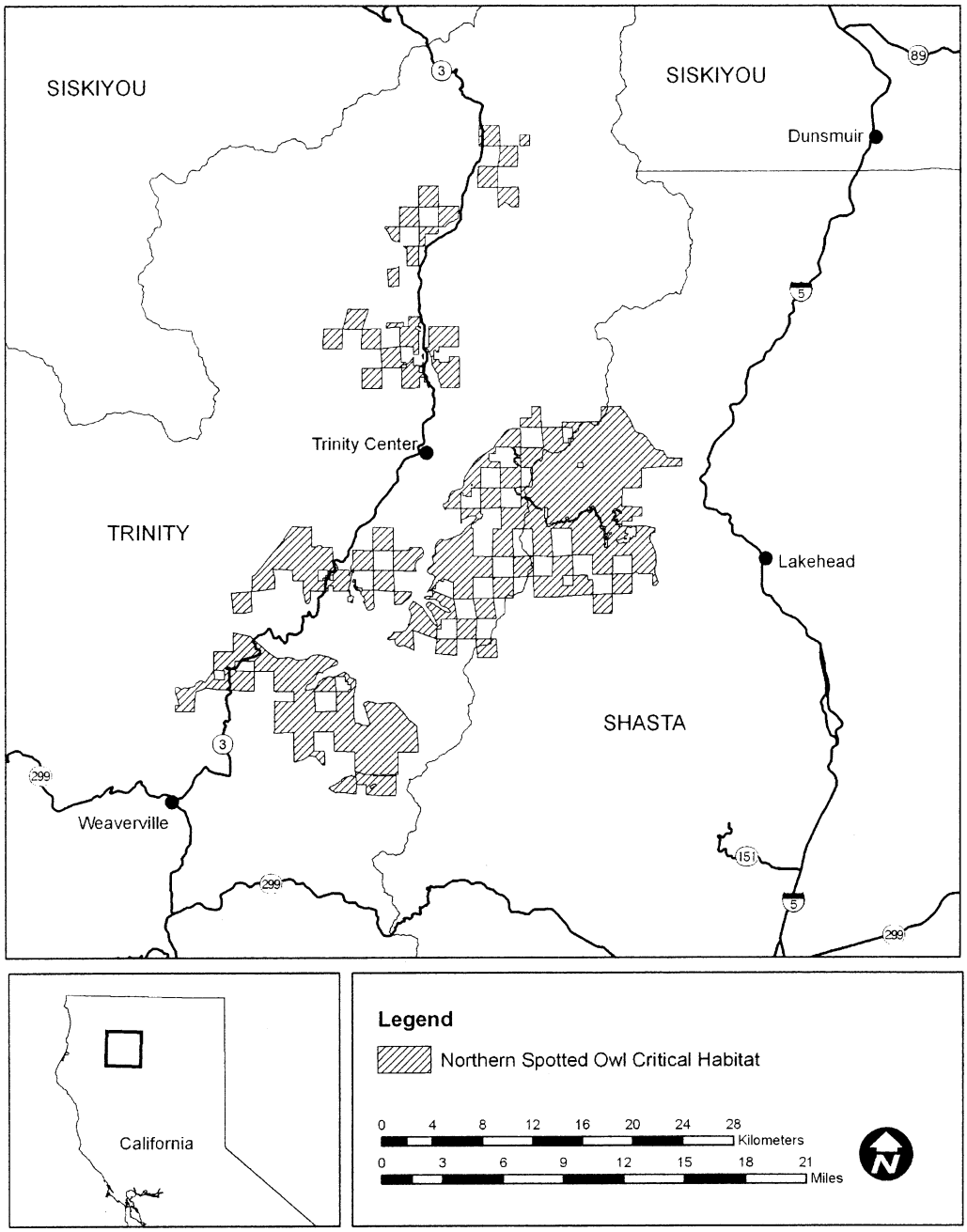


(34) Shasta-Trinity Lakes Unit (Unit 27). Shasta and Trinity Counties, California. From USGS 1:24,000 scale quadrangles Carrville, Covington Mill, Damnation Peak, French Gulch, Lamoine, Lewiston, Mumbo Basin, Papoose Creek, Rush Creek Lakes, Schell Mountain, Siligo Peak, Tangle Blue Lake, Trinity Center, Trinity Dam, Whisky Bill Peak, and Ycatapom Peak.

(i) The Shasta-Trinity Lakes Unit consists of 86,819 ac (35,134 ha) in Shasta and Trinity Counties, California, and is comprised of lands managed by the Shasta-Trinity National Forest (85,730 ac (34,694 ha)) and BLM Redding Field Office (1,090 ac (441 ha)).

(ii) Note: Map of Shasta-Trinity Lakes Unit (Map 28) follows:

Map 28. Shasta – Trinity Lakes Unit, California

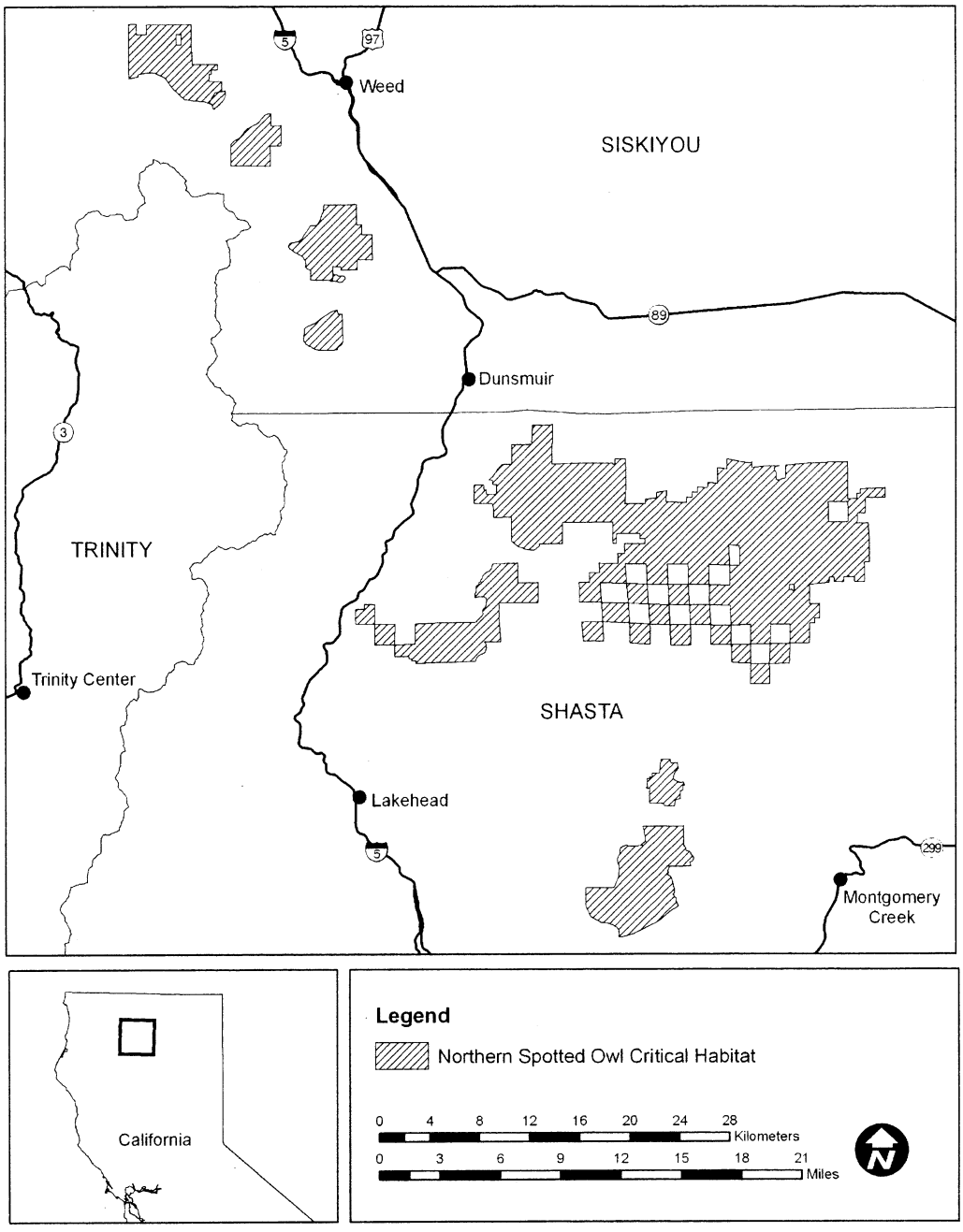


(35) Eastern Klamath Mountains Unit (Unit 28). Shasta and Siskiyou Counties, California. From USGS 1:24,000 scale quadrangles Big Bend, Chicken Hawk Hill, China Mountain, City of Mount Shasta, Dead Horse Summit, Devils Rock, Dunsmuir, Girard Ridge, Goose Gap, Grizzly Peak, Lake McCloud, Minnesota Mountain, Mount Eddy, Roaring Creek, Seven Lakes Basin, Shoeinhorse Mountain, Skunk Ridge, Tombstone Mountain, Weed, and Yellowjacket Mountain.

(i) The Eastern Klamath Mountains Unit consists of 110,756 ac (44,821 ha) in Shasta and Siskiyou Counties, California, and is comprised of lands managed by the Shasta-Trinity and Klamath National Forests.

(ii) Note: Map of Eastern Klamath Mountains Unit (Map 29) follows:

Map 29. Eastern Klamath Mountains Unit, California

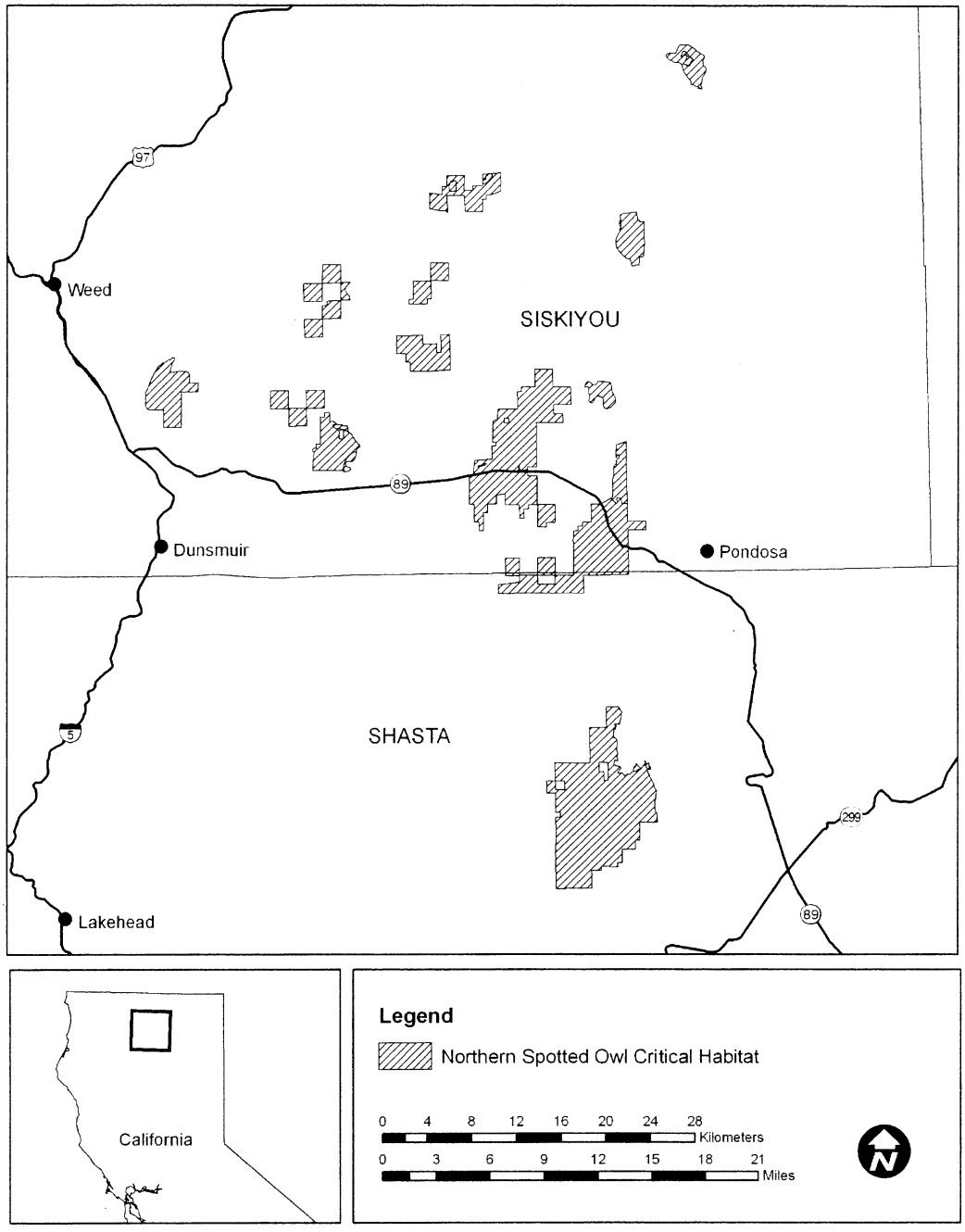


(36) Shasta/McCloud Unit (Unit 29). Shasta and Siskiyou Counties, California. From USGS 1:24,000 scale quadrangles Ash Creek Butte, Bartle, Burney, Burney Falls, Chalk Mountain, City of Mount Shasta, Dead Horse Summit, Elk Spring, Grizzly Peak, Horse Peak, Kinyon, Little Glass Mountain, McCloud, Mount Shasta, Rainbow Mountain, Skunk Ridge, and Tennant.

(i) The Shasta/McCloud Unit consists of 73,316 ac (29,670 ha) in Siskiyou and Shasta Counties, California, and is comprised of lands managed by the Klamath and Shasta-Trinity National Forests.

(ii) Note: Map of Shasta/McCloud Unit (Map 30) follows:

Map 30. Shasta/McCloud Unit, California



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Dated: May 31, 2007.

David M. Verhey,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 07–2805 Filed 6–11–07; 8:45 am]

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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 ''P L U S'' (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. 414/P.L. 110–29

To designate the facility of the United States Postal Service located at 60 Calle McKinley, West in Mayaguez, Puerto Rico, as the ''Miguel Angel García Méndez Post Office Building''. (June 1, 2007; 121 Stat. 219)

H.R. 437/P.L. 110–30

To designate the facility of the United States Postal Service located at 500 West Eisenhower Street in Rio Grande City, Texas, as the ''Lino Perez, Jr. Post Office''. (June 1, 2007; 121 Stat. 220)

H.R. 625/P.L. 110–31

To designate the facility of the United States Postal Service located at 4230 Maine Avenue in Baldwin Park, California, as the ''Atanacio Haro-Marin Post Office''. (June 1, 2007; 121 Stat. 221)

H.R. 1402/P.L. 110–32

To designate the facility of the United States Postal Service located at 320 South Lecanto Highway in Lecanto, Florida, as the ''Sergeant Dennis J. Flanagan Lecanto Post Office Building''. (June 1, 2007; 121 Stat. 222)

H.R. 2080/P.L. 110–33

To amend the District of Columbia Home Rule Act to conform the District charter to revisions made by the Council of the District of Columbia relating to public education. (June 1, 2007; 121 Stat. 223)

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