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# Presidential Documents

**Title 3—**

## The President

**Presidential Determination No. 2009–08 of December 4, 2008**

## Suspension of Limitations Under the Jerusalem Embassy Act

**Memorandum for the Secretary of State**

Pursuant to the authority vested in me as President by the Constitution and the laws of the United States, including section 7(a) of the Jerusalem Embassy Act of 1995 (Public Law 104–45) (the ''Act''), I hereby determine that it is necessary to protect the national security interests of the United States to suspend for a period of 6 months the limitations set forth in sections 3(b) and 7(b) of the Act. My Administration remains committed to beginning the process of moving our embassy to Jerusalem.

You are hereby authorized and directed to transmit this determination to the Congress, accompanied by a report in accordance with section 7(a) of the Act, and to publish the determination in the *Federal Register*.

This suspension shall take effect after transmission of this determination and report to the Congress.

THE WHITE HOUSE,
*Washington, December 4, 2008*

[FR Doc. E8–30103
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# Rules and Regulations

Federal Register

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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 HOMELAND SECURITY

### 8 CFR Part 274a

**[CIS No. 2441–08; Docket No. USCIS–2008–0001]**

**RIN 1615–AB69**

## Documents Acceptable for Employment Eligibility Verification

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Department of Homeland Security (DHS) is amending its regulations governing the types of acceptable identity and employment authorization documents and receipts that employees may present to their employers for completion of the Form I–9, Employment Eligibility Verification. Under this interim rule, employers will no longer be able to accept expired documents to verify employment authorization on the Form I–9. This rule also adds a new document to the list of acceptable documents that evidence both identity and employment authorization and makes several technical corrections and updates. The purpose of this rule is to improve the integrity of the employment verification process so that individuals who are unauthorized to work are prevented from obtaining employment in the United States. A copy of the amended Form I–9 reflecting these and other form-related changes is being published as an attachment to this rule.[1]

**DATES:** *Effective Date.* This rule is effective February 2, 2009.

*Comment Date:* Written comments must be submitted on or before February 2, 2009.

**ADDRESSES:** You may submit comments, identified by DHS Docket No. USCIS–2008–0001, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210. To ensure proper handling, please reference DHS Docket No. USCIS–2008–0001 on your correspondence. This mailing address may be used for paper, disk, or CD–ROM submissions.
- *Hand Delivery/Courier:* Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210. Contact Telephone Number (202) 272–8377.

**FOR FURTHER INFORMATION CONTACT:** Stephen McHale, Verification Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 470 L'Enfant Plaza East, SW., Suite 8001, Washington, DC 20529–2610, telephone (888) 464–4218 or e-mail at *Everify@dhs.gov.*

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## I. Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this interim rule. Comments that will provide the most assistance to the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) in developing these procedures will reference a specific portion of the interim rule, explain the reason for any recommended change, and include data, information, or authority supporting that change.

*Instructions:* All submissions received must include the agency name and DHS Docket No. USCIS–2008–0001 for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected at the Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210.

## II. Background and Purpose

All employers and agricultural recruiters and referrers for a fee[2] (hereinafter collectively referred to as ''employer(s)'') are required to verify the identity and employment authorization of each individual they hire for employment in the United States, regardless of the individual's citizenship. *See* Immigration and Nationality Act (INA) section 274A(a)(1)(B), 8 U.S.C. 1324a(a)(1)(B). As part of the verification process, employers must complete the Form I–9, ''Employment Eligibility Verification,'' retain the form for a statutorily-

[1] **Note:** Form I–9 is published for informational purposes only and will not be codified in Title 8 of the Code of Federal Regulations.

[2] Title 8 CFR 274a.2(a)(1) provides that ''[f]or purposes of complying with section 274A(b) of the Act and this section, all references to recruiters and referrers for a fee are limited to a person or entity who is either an agricultural associations, agricultural employers, or farm labor contractors (as defined in section 3 of the Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. 97–470).'' * * * *See* 8 CFR 274a.2(a)(1).

established period of time, and make the form available for inspection by certain government officials. *See* INA sec. 274A(b), 8 U.S.C. 1324a(b); 8 CFR 274a.2. On the Form I–9, a newly-hired employee must attest to being a U.S. citizen or national, a lawful permanent resident (LPR), or an alien authorized to work in the United States. The employee then must present to his or her employer a document or combination of documents designated by statute and regulation as acceptable for establishing identity and employment authorization. The employer must examine the documents, record the document information on Form I–9, and attest that the documents reasonably appear both to be genuine and to relate to the individual presenting the documents.

The Form I–9 has three categories of documents that may be accepted, alone or in combination, by employers for employment authorization verification:

(1) *List A*—documents that establish both identity and employment authorization [3] (e.g., U.S. passport; Form I–551, ''Permanent Resident Card;'' and Form I–766, ''Employment Authorization Document'');

(2) *List B*—documents that establish only identity (e.g., State-issued driver's license or identification card); and

(3) *List C*—documents that establish only employment authorization (e.g., State-issued birth certificate and social security account number card).

*See* INA sec. 274A(b)(1)(B), (C) and (D), 8 U.S.C. 1324a(b)(1)(B), (C) and (D); 8 CFR 274a.2(b)(1)(v)(A), (B) and (C). An individual must present to his or her employer either one document from List A or one document each from List B and List C. The employer may not specify a document or combination of documents that the employee must present. INA sec. 274B(a)(6), 8 U.S.C. 1324b(a)(6); 8 CFR 274a.1(l)(2).

If the employee cannot present an acceptable document from one of the three lists, he or she may present an acceptable substitute document, referred to as a ''receipt.'' 8 CFR 274a.2(b)(1)(vi) (commonly referred to as ''the receipt rule''). The receipt satisfies the document presentation requirement for a short period of time, at the end of which the employee must present the actual document or other document(s) specified in the regulations as acceptable to present. An employer may accept a receipt, however, only under specific circumstances prescribed under 8 CFR 274.a.2(b)(1)(vi). For example, if a document acceptable under Lists A, B, or C is stolen or lost, the new hire may provide a receipt for the application for the replacement document, in lieu of the actual document, as long as he or she provides the replacement document within 90 days of hire. If the individual employee is an alien whose employment authorization or employment authorization documentation expires, the employer must reverify the employee's continued employment authorization by the expiration date by reviewing any acceptable list A or list C document.[4] 8 CFR 274a.2(b)(1)(vii).

The former Immigration and Naturalization Service (INS) issued the first Form I–9 and list of acceptable documents in 1987. 52 FR 16216–01 (May 1, 1987) (regulatory list of acceptable documents); 52 FR 21454–01 (Jun. 5, 1987) (Notice introducing Form I–9); *see also* 53 FR 8611–01 (Mar. 16, 1988). After reports that the large number of acceptable Form I–9 documents led to employer confusion and that a reduction in the number of documents could lead to less employment discrimination, INS published rules in 1993 and 1995 proposing reductions in the number of acceptable documents. *See* 60 FR 32472–01 (Jun. 22, 1995); 58 FR 61846–01 (Nov. 23, 1993). Thereafter, in response to legislative action reducing the statutory list of acceptable documents,[5] INS published an interim rule in 1997 and a proposed rule in 1998. 62 FR 51001 (Sept. 30, 1997) (interim rule), *modified by* 64 FR 6187 (Feb. 9, 1999); 63 FR 5287 (Feb. 2, 1998) (proposed rule). On November 7, 2007, USCIS issued a press release notifying the public that the Form I–9 had been revised to reflect changes to documents implemented under the 1997 interim rule. *See* ''USCIS Revises Employment Eligibility Verification Form'' (Nov. 7, 2007) at *http://www.uscis.gov/files/pressrelease/FormI9Update110707.pdf.* This press release was followed by a notice published in the **Federal Register** describing the changes made to the Form I–9 and stating when DHS will begin enforcing the changes. 72 FR 65974–01 (Nov. 26, 2007). Neither the former INS nor USCIS published a final rule following the 1998 proposed rule. Instead, this rulemaking action supersedes the 1998 NPRM, although comments received during that rulemaking action informed the development of this rulemaking action.

DHS recognizes that the Form I–9 process plays an integral role in ensuring a legal workforce in the United States and is committed to minimizing vulnerabilities in the Form I–9 process. As is evident from past legislative action and rulemaking efforts, an overly expansive Form I–9 document list that includes expired documents compromises the effectiveness and security of the Form I–9 process. After reevaluating the statutory requirements (INA sec. 274A(b)(1), 8 U.S.C. 1324a(b)(1)) and reviewing the regulatory list of documents currently acceptable for the Form I–9, DHS has identified several aspects of the list that are in need of change in order to strengthen the effectiveness of the Form I–9 process. In so doing, this interim rule introduces a requirement that all documents must be unexpired for the Form I–9. DHS invites post-promulgation comments from the public on this interim rule for consideration in a subsequent final rule.

## III. Changes to the List of Acceptable Documents and Receipts

### *A. Requiring Unexpired, Valid Documents*

Under current regulations, the U.S. passport and all List B documents are acceptable for the Form I–9 even if they are expired. *See* 8 CFR 274a.2(b)(1)(v)(A)(1) and (B). Using its authority to place conditions on acceptable documents for the Form I–9 (*see* INA sec. 274A(b)(1)(E), 8 U.S.C. 1324a(b)(1)(E)), DHS is providing in this rule that expired documents are no longer acceptable for the Form I–9. *See* revised 8 CFR 274a.2(b)(1)(v). DHS has determined that this action is necessary to ensure that acceptable documents reliably establish identity and employment authorization and that documents that are used fraudulently to an unacceptable degree are not included on the list of acceptable documents. Expired documents are prone to fraudulent use in the Form I–9 process by aliens seeking unauthorized employment. Being of little use to their owners, expired documents fall prey to counterfeiters who, for a small sum, can substitute unauthorized aliens' photographs and other identifying information. Unauthorized aliens then use these documents to obtain employment. Establishing a requirement that all documents must be unexpired

[3] Current regulations use the term ''employment eligibility'' rather than ''employment authorization.'' To be consistent with the statute, this rulemaking uses the term ''employment authorization.'' *See* INA sec. 274A(b)(1)(B) and (C), 8 U.S.C. 1324a(b)(1)(B) and (C).

[4] Note that an expiration date on Form I–551 does not trigger the reverification requirement. See ''Handbook for Employers, Instructions for Completing the Form I–9'' (M–274) (Rev. 11/01/07), *http://www.uscis.gov,* ''Handbook for Employers'') page 26.

[5] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), section 412, Pub. L. No. 104–208, 110 Stat. 3009–666 (1996).

closes this loophole and sets a bright-line standard for U.S. employers. Moreover, such a requirement honors the limits placed by document issuance authorities on their documents. Finally, by requiring unexpired documents, there is a greater likelihood that such documents will contain up-to-date security features that will make them less vulnerable to counterfeiting and fraud.

In its 1998 proposed rule, the former INS proposed precluding expired documents from use for the Form I–9. 63 FR at 5302. Out of the 73 comments received in response to the proposed rule, 15 comments addressed this proposal. Five commenters favored the change. Ten commenters indicated a clear preference against the change, focusing primarily on identity documents with some specifying that their objection applied to List B documents only. Those who favored the change stated that expired documents do not provide a reliable representation of the holder's identity, such as when the expired document includes an outdated photograph.

DHS considered the comments from the 1998 proposed rule for this interim rule and has noted them in this discussion to acknowledge that some members of the public may face challenges in accessing unexpired documents for Form I–9 purposes. As stated above, DHS believes that precluding the use of expired documents for the Form I–9 is essential for improving the security of the employment verification process. The U.S. Department of State (DOS), DHS, and many States have taken and are continuing to take significant steps to improve the security features of their documents. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005; REAL ID Act of 2005, div. B, Public Law No. 109–13, 119 Stat. 231, 302 (2005) (codified at 49 U.S.C. 30301 note); Enhanced Border Security and Visa Entry Reform Act of 2002, section 303(b), Public Law 107–173, 116 Stat. 543, 553 (2002). In keeping with these efforts, DHS has determined that it is appropriate to amend the regulations governing the Form I–9 process to require that all documents must be unexpired to be acceptable for the Form I–9.

To modify the current regulations, this rule removes the terms ''unexpired'' and ''expired'' from those documents currently listed in the regulations with these limitations (e.g., ''unexpired foreign passport that contains a temporary I–551 stamp'' and ''unexpired Employment Authorization Document''). Rather than modify each acceptable document with the term ''unexpired,'' this rule imposes a general requirement that all documents must be unexpired to be acceptable for the Form I–9. *See* revised 8 CFR 274a.2(b)(1)(v). A document containing no expiration date, such as the Social Security account number card, will be deemed unexpired.

DHS invites comments on whether this rule's prohibition on the use of expired documents for the Form I–9 should be modified to permit employers to accept List B identity documents that have expired within the last 90 days (or other limited time period) of the date they are presented to the employer for the Form I–9.

*B. Adding Documentation for Citizens of the Federated States of Micronesia and the Republic of the Marshall Islands*

In 2003, the Compacts of Free Association between the United States and the Federated States of Micronesia (FSM) and Republic of the Marshall Islands (RMI) were amended. *See* Compact of Free Association Amendments Act of 2003, Public Law 108–188 (2003). Under both the preexisting Compacts and the Compacts as amended, most citizens of the RMI and the FSM are eligible for admission to the United States as nonimmigrants, including the privilege of residing and working in the United States. The amendments to the Compacts included provisions that eliminated the need for citizens of the FSM and the RMI to obtain an Employment Authorization Document (Form I–766), although they may still apply for one if they wish. As provided by the Compact Amendments, FSM and RMI citizens admitted under the Compacts may present valid FSM or RMI passports with evidence of their admission under the Compacts to satisfy Form I–9 requirements.[6] To conform the Form I–9 regulations with the requirements of the Compacts, USCIS is including a List A provision specifically tailored to these FSM and RMI citizens. *See* new 8 CFR 274a.2(b)(1)(v)(A)(*6*).

*C. Revising References to Temporary I–551s*

List A refers to temporary I–551 stamps in unexpired foreign passports as acceptable documents. *See* 8 CFR 274a.2(b)(1)(v)(A)(*3*). DHS issues temporary I–551 stamps to LPRs on either unexpired foreign passports or Forms I–94, ''Arrival-Departure Record,'' to serve as temporary documentation of LPR status while they wait for the actual Form I–551. Although the regulations refer to temporary I–551 ''stamps,'' DOS has been affixing machine-readable immigrant visas (MRIVs) that contain a pre-printed temporary I–551 notation in the foreign passports of aliens immigrating to the United States for several years. The pre-printed temporary I–551 notation is triggered after the bearer is admitted to the United States as an LPR. To update the regulations to reflect this alternate temporary I–551 document, this rule modifies the reference in List A to temporary I–551 stamps on unexpired foreign passports to include pre-printed temporary I–551 notation on MRIVs. 8 CFR 274a.2(b)(1)(v)(A)(*3*). Because the pre-printed notation is not included on Forms I–94, this rule does not make any changes to regulatory references to temporary I–551 stamps on Forms I–94. *See* 8 CFR 274a.2(b)(1)(vi)(B).

*D. Eliminating Forms I–688, I–688A, and I–688B*

DHS notes that Form I–688, ''Temporary Resident Card,'' and Forms I–688A and I–688B, ''Employment Authorization Cards,'' are no longer issued and has determined that any such documents that were previously issued have expired. Therefore, this rule removes these documents from List A and any references to the documents in the receipt provision at 8 CFR 274a.2(B)(1)(vi)(C). USCIS now issues Forms I–766 to those who formerly received Forms I–688, I–688A, or I–688B. The Form I–766 remains on List A. 8 CFR 274a.2(b)(1)(v)(A)(*4*).

*E. Adding References to Form I–94A*

This rule updates the list of acceptable documents and receipts by including ''Form I–94A'' next to each reference to the Form I–94, ''Arrival-Departure Record.'' *See* revised 8 CFR 274a.2(b)(1)(v)(A)(*5*) and (b)(1)(vi)(B) and (C). The Form I–94A is nearly identical to the Form I–94 except that all fields are computer-generated rather than being annotated by hand.

*F. Revising Reference to Social Security Account Number Card (''Social Security Card'')*

This interim rule replaces the current reference to the List C document, ''Social Security number card,'' with the statutory term ''Social Security account number card.'' Revised 8 CFR 274a.2(b)(1)(v)(C)(*1*). This document is

[6] There is also a Compact of Free Association with the Republic of Palau (Compact of Free Association Approval Act, Pub. L. No. 99–658 (Nov. 14, 1986)) providing similar employment and residency privileges for citizens of Palau, but the Compact has not been amended to include a similar Form I–9 documentation provision. Therefore, the amendment to the regulations does not include Palau.

commonly referred to as the Social Security card. The rule also revises the restriction on the acceptability of Social Security account number cards. The statute provides that a Social Security account number card, ''other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States'' is an acceptable List C document. *See* INA sec. 274A(b)(1)(C)(i), 8 U.S.C. 1324a(b)(1)(C)(i). The current regulations provide that unacceptable cards are those that include the following legend: ''not valid for employment purposes.'' 8 CFR 274a.2(b)(1)(v)(C)(*1*). Over the years since Social Security account number cards have included employment restrictions, the legend printed on the face of the cards has changed. Therefore, the restriction stated in the current regulations is inadequate. This rule revises the restriction to track the statutory language.

## IV. Technical Changes

### *A. Correcting References to Employment Eligibility*

This interim rule replaces the term ''employment eligibility'' with ''employment authorization'' in each place that ''employment eligibility'' appears in the verification provisions of the regulations relevant to the substantive changes made by this rule, 8 CFR 274a.2(a) and (b)(1). This change is necessary to conform the regulations to the statute, which uses the term ''employment authorization'' and not ''employment eligibility.'' *See* INA sec. 274A(b)(1)(B) and (C), 8 U.S.C. 1324a(b)(1)(B) and (C).

In addition, DHS revised the section heading to 8 CFR 274a.2 to more accurately reflect the contents of this section. Currently, the section heading reads, ''Verification of employment eligibility.'' This rule revises the section heading to read, ''Verification of identity and employment authorization.''

### *B. Replacing References to the Former INS*

This rule deletes references to the former INS or replaces such references with ''DHS'' wherever ''INS'' appears in the provisions affected by this rule. *See* revised 8 CFR 274a.2(b)(1)(v)(A)(*4*) and (b)(1)(v)(C)(*6*), (*7*), and (*8*). After a transfer of functions to DHS, the INS was abolished in March 2003. *See* 6 U.S.C. 291; Homeland Security Act of 2002, Public Law No. 107–296, 116 Stat. 2135 (Nov. 25, 2002).

### *C. Correcting References to Certificates of Birth Abroad in List C*

Current regulations incorrectly identify the List C documents, Forms FS–545 and DS–1350 issued by the Department of State, as ''Certification of Birth Abroad.'' 8 CFR 274a.2(b)(1)(v)(C)(*2*) and (*3*). This rule corrects this error. The Form FS–545 is correctly entitled, ''Certification of Birth,'' and Form DS–1350 is correctly entitled, ''Certification of Report of Birth.''

## V. Form Changes

In implementing the regulatory changes being made by this rule, DHS also is revising the Form I–9 itself. Changes to the Form I–9, in addition to revisions to the list of acceptable documents, include:

- In Section 1, making ''citizen of the United States'' and ''noncitizen national of the United States, as defined in 8 U.S.C. 1408'' two separate categories in the employee attestation part of the form. Currently, the first box in that section states: ''A citizen or national of the United States.'' Separating those two groups will eliminate one difficulty that currently exists when prosecuting those who make false claims to U.S. citizenship. Noncitizen nationals of the United States are persons born in American Samoa as provided in section 308 of the INA, 8 U.S.C. 1408; certain former citizens of the former Trust Territory of the Pacific Islands who relinquished their U.S. citizenship acquired under section 301 of Public Law 94–241 (establishing the Commonwealth of the Northern Mariana Islands) by executing a declaration before an appropriate court that they intended to be noncitizen nationals rather than U.S. citizens; and certain children of noncitizen nationals born abroad, as provided by section 308 of the INA, 8 U.S.C. 1408. A definition of noncitizen national is added to the instructions to the Form I–9.
- In Section 1, replacing ''An alien authorized to work until __/__/__ (Alien # or Admission _____'' with ''An alien authorized to work (A# or Admission #_____ ) until (expiration date, if applicable—month/day/year) __/__/__''.
- In the form instructions, including a paragraph that clarifies when employers need to reverify certain employees to read as follows:

''Note that some employees may leave the expiration date blank if they are aliens whose work authorization does not expire (e.g., asylees, refugees, certain citizens of the Federated States of Micronesia or the Republic of the Marshall Islands). For such employees, reverification does not apply unless they choose to present in Section 2 evidence of employment authorization that contains an expiration date (e.g., Employment Authorization Document (Form I–766)).''

Form I–9 will be included as an attachment to this rule. It will also be made available in Spanish and posted on the USCIS Web site (*http://www.uscis.gov*) at a later date.

## VI. Regulatory Requirements

### *A. Administrative Procedure Act*

The Administrative Procedure Act (APA) provides that an agency may dispense with notice and comment rulemaking procedures when an agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' *See* 5 U.S.C. 553(b)(B). DHS finds advance notice and comment for this rule to be impracticable, unnecessary, and contrary to the public interest.

In its 1998 proposed rule, the former INS proposed precluding expired documents from use for the Form I–9. 63 FR at 5302. The INS received 15 comments on the proposal to remove expired documents as discussed above. Therefore, although the INS did not finalize that NPRM, USCIS has considered those public comments in the development of this interim rule and DHS has concluded that further public comment on this issue would be unnecessary under the APA.

DHS understands that this rule is a change in its longstanding practice of accepting expired documents. However, advances in technology since the original issuance of these regulations and Form I–9, especially in recent years, increase the need for DHS to make sure that documents accepted for identity and work authorization purposes have sufficient security features and continue to ensure the integrity of the employment verification process.[7] Employment documentation requirements must be strengthened as soon as possible in order for DHS enforcement capabilities to stay ahead of document counterfeiters; requiring that documents be unexpired is one way to help ensure this. Continued delay created by the notice and comment requirements would result in additional damage to these important interests.

Accordingly, DHS finds that good cause exists under 5 U.S.C. 553(b) to

[7] DHS Fact Sheet: Combating Fraudulent Documents. August 1, 2006. Available at *http://www.dhs.gov/xnews/releases/pr_1158347347660.shtm.*

issue this rule as an interim rule. DHS nevertheless invites written comments on this interim rule and will consider those comments in the development of a final rule in this action.

*B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). However, when an agency invokes the good cause exception under the Administrative Procedure Act (APA) to make changes effective through an interim final rule, the RFA does not require the agency to prepare a regulatory flexibility analysis. This rule makes changes for which notice and comment are not necessary and, accordingly, USCIS has not prepared a regulatory flexibility analysis.

*C. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. As outlined in the Executive Order 12866 section of this rule below, this rule may result in the expenditure in the aggregate by the private sector of more than $100 million in the first year following its publication. However, there are no recurring costs and it will not significantly or uniquely affect small governments or other small entities. Further, no action on the part of any state, tribe, or other governmental entity is required by this rule's changes. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*D. Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. 5 U.S.C. 804.

*E. Executive Order 12866*

This rule is considered by DHS to be an ''economically significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this interim rule has been reviewed by the Office of Management and Budget.

Employees are already completing, and employers are already retaining, Forms I–9. Employers are also conducting re-verifications when employment authorization expires. Likewise, U.S. Immigration and Customs Enforcement (ICE) agents already conduct Form I–9 enforcement actions. Therefore, this interim rule is not expected to impose significant new or recurring costs on employers, new employees, or the government.

*Costs for employers.* After publication of this rule, there will be some costs associated with becoming familiar with the new requirements, switching to the new forms, and retraining personnel who are familiar with the existing requirements. All employers and agricultural recruiters and referrers for a fee are required to verify the identity and employment authorization of each individual they hire for employment in the United States, regardless of the individual's citizenship. The number of employees hired each year varies greatly among firms as does the number of employees that each firm has devoted to the hiring process. Based on an analysis of data from the U.S. Department of Agriculture, National Agricultural Census [8], and, U.S. Department of Labor, Bureau of Labor Statistics, Business Employment Dynamics,[9] DHS has determined that there are approximately 554,000 farms, around 90,000 local government jurisdictions, and approximately 4.9 million firms in the private sector of the U.S. economy that could possibly hire an employee in the year after this rule takes effect. While many farms and companies hire no employees in a given year requiring submission of no Forms I–9, DHS assumed that the largest possible universe of employers would be affected by the rule in its first year in effect, or all entities. That means there are a total of about 5.54 million farms, businesses, and governmental entities in the U.S. that must obtain a Form I–9 from their new hires. DHS also assumed that each of the affected firms will incur a small cost to learn about the new form and regulations. The Office of Management and Budget (OMB) approved information collection reporting burden for Form I–9 is an average of 12 minutes per response for learning about the form, completing the form, and assembling and filing the form. Because this training facet would add a few minutes to that time burden to read this rule and compare the new and old Form I–9 lists, DHS estimates that each employer will each need approximately 30 minutes to research the changes made by this rule and learn what an acceptable Form I–9 supporting document is after this rule takes effect. According the U.S. Department of Labor, Bureau of Labor Statistics quarterly report, ''Employer Costs for Employee Compensation,'' employer compensation costs for all civilian occupations averages $28.11 per hour worked. Therefore, based on 30 minutes per employer for 5.54 million employers, this rule will cost all employers nationwide a total of $77,864,700 to familiarize themselves with the new requirements, switch to the new forms, and retrain personnel. This is, however, a one-time and not a repeating or annual cost. Once the transition to this interim rule and new Form I–9 is complete, DHS anticipates that the costs incurred by employers will be lower than under the existing rule because the modified lists of acceptable forms is expected to reduce confusion. DHS believes that the reduced number of documents that may be presented for verification, simplified design of the Form I–9, and more comprehensive instructions provided with the form, will make the verification process for employers easier than it is now.

*Costs for employees.* By reducing the number of documents that are acceptable, this rule will require a newly hired employee to expend some time, effort, and expense in order to obtain an acceptable, unexpired document. For example, a new hire who was able to use an expired passport or U.S. military identification card before this rule rendered those documents unacceptable will now need to obtain a current, unexpired document. Those individuals who could have used an expired document will incur a cost to obtain an alternative document, such as a State-issued driver's license or identification card, which can be presented with their social security card or birth certificate, or a passport card or passport. In order to provide an example that will illustrate this potential impact, DHS has examined what that cost may be. DHS obtained a list of the amounts charged for State-issued driver's licenses or identification cards in every state in the U.S. and the District of Columbia from the American

[8] Economic Class of Farms by Market Value of Agricultural Products Sold and Government Payments: 2002 *http://www.nass.usda.gov/census/census02/volume1/us/st99_1_003_003.pdf.*

[9] New Quarterly Data from BLS on Business Employment Dynamics by Size of Firm, 2005 *http://www.bls.gov/news.release/pdf/cewfs.pdf.*

Association of Motor Vehicle Administrators (AAMVA). The average cost to obtain a state-issued photo identification card was found to be $14.40. The U.S. Department of State charges $100 for a passport for someone age 16 and over, and a passport card costs $20. Thus, it assumed for this example, logically, that those individuals who could have used an expired document before this rule will choose the lower-cost option and obtain a state identification card.

According to the U.S. Department of Transportation, Federal Highway Administration, of the 233 million people in the United States who are in the driving age population (age 16 and over), 209 million, or 87 percent, have a State-issued driver's license.[10] Also, as of 2006, almost 33 million State-issued identification cards were in effect. Therefore, there are approximately 242 million driver's licenses and identification cards held by persons age 16 and over, while the U.S. population of people who are of driving age is 233 million. The issuance of 9 million more State-issued driver's licenses and State-issued identification cards than the driving age population suggests that a very small portion of the working-age population would have neither a State-issued driver's license nor a State-issued identification card. Therefore, it is likely that very few people will be required to obtain a license in order to comply with the new requirements of this rule. On the other hand, a sample of 2000 registered voters in three states performed for a study being conducted by American University (AU) found that roughly 1.2 percent of the people surveyed did not have acceptable photo identification cards for voting purposes.[11] Assuming that the result from those three states would hold true nationwide, that percentage, while small, is not trivial due to the annual volume of new hires who must present Form I–9. If only 1.2 percent of the estimated 58 million annual new hires in the United States must obtain a new document, 696,000 people are affected.[12] As stated above, states charge an average of $14.40 for an identification card. In addition, DHS estimates that expenses for each affected person would also include spending about 4 hours of their personal time to obtain the card and that the worker gives up this amount of time engaging in a leisure activity. According to guidelines used by the U.S. Department of Transportation on the values of travel time, the opportunity cost of leisure time forgone for travel is calculated as 50 percent of wages. Using the employer compensation costs per hour for all civilian occupations of $28.11, the value of leisure per hour is about $14.06. Thus, a person could be required to expend up to $14.40 in cash and $56.20 in opportunity costs, or total costs of $70.60, to obtain a State-issued identification card because of the changes made by this rule. Using the 1.2 percent figure from the AU study, this example results in an aggregate nationwide employee expense for obtaining an acceptable document of $49,137,600.

The cost associated with the information collection burden of the Form I–9 and its instructions is discussed below in the Paperwork Reduction Act section of this rule.

*F. Executive Order 13132*

This rule would have no substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*G. Paperwork Reduction Act*

This interim rule requires a revision to the Form I–9 (OMB Control Number 1615–0047).

Since this is an interim rule, this information collection has been submitted and approved by OMB for 180 days under the emergency review and clearance procedures covered under the PRA. During the first 60 days, USCIS is requesting comments on this information collection until February 17, 2009. When submitting comments on this information collection, your comments 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 agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's 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 the information on those who are to respond, including through the use of any and all 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 a currently approved information collection.

(2) *Title of the Form/Collection:* Employment Eligibility Verification.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–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. This form was developed to facilitate compliance with section 274A of the Immigration and Nationality Act, which prohibits the knowing employment of unauthorized aliens. The information collected is used by employers or by recruiters for enforcement of provisions of immigration laws that are designed to control the employment of unauthorized aliens.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* This figure was derived by multiplying the number of respondents (78,000,000) × frequency of response (1) × hour per response (9 minutes or 0.15 hours). The annual recordkeeping burden is added to the total annual reporting burden that is based on 20,000,000 record keepers at (3 minutes or .05 hours) per filing.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 12,700,000 annual burden hours.

All comments and suggestions or questions regarding additional information should be directed to the Department of Homeland Security, U.S. Citizenship and Immigration Services, Chief, Regulatory Management Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529.

[10] United States Department of Transportation, Federal Highway Administration, Highway Statistics 2006, Licensed drivers—Ratio of licensed drivers to population. Available at *http://www.fhwa.dot.gov/policy/ohim/hs06/driver_licensing.htm.*

[11] Robert Pastor, *et al.*, Voter IDs Are Not the Problem: A Survey of Three States, (Center for Democracy and Election Management, American University, Washington, DC , Jan. 9, 2008). *http://www.american.edu/ia/cdem/pdfs/VoterIDFinalReport1-9-08.pdf.*

[12] U.S. Department of Labor, U.S. Bureau of Labor Statistics, Job Openings and Labor Turnover Survey Available at *http://data.bls.gov/PDQ/outside.jsp?survey=jt.*

**List of Subjects in 8 CFR Part 274a**

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

■ Accordingly, part 274a of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

## PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 1. The authority citation for part 274a continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

■ 2. Section 274a.2 is amended by:
■ a. Revising the section heading;
■ b. Revising the term ''eligibility'' to read ''authorization'' in the first sentence of paragraphs (a)(3), (b)(1)(i)(B), and (b)(1)(ii)(A);
■ c. Revising paragraph (b)(1)(v) introductory text;
■ d. Revising paragraph (b)(1)(v)(A);
■ e. Revising paragraphs (b)(1)(v)(C)(*1*), (*2*), (*3*), (*6*), (*7*), and (*8*); and by
■ f. Revising paragraphs (b)(1)(vi)(B) and (C).

The revisions read as follows:

### § 274a.2 Verification of identity and employment authorization.

* * * * *

(b) * * *

(1) * * *

(v) The individual may present either an original document which establishes both employment authorization and identity, or an original document which establishes employment authorization and a separate original document which establishes identity. Only unexpired documents are acceptable. The identification number and expiration date (if any) of all documents must be noted in the appropriate space provided on the Form I–9.

(A) The following documents, so long as they appear to relate to the individual presenting the document, are acceptable to evidence both identity and employment authorization:

(*1*) A United States passport;

(*2*) An Alien Registration Receipt Card or Permanent Resident Card (Form I–551);

(*3*) A foreign passport that contains a temporary I–551 stamp, or temporary I–551 printed notation on a machine-readable immigrant visa;

(*4*) An Employment Authorization Document which contains a photograph (Form I–766);

(*5*) In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with a Form I–94 or Form I–94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Form;

(*6*) A passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I–94 or Form I–94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI.

* * * * *

(C) * * *

(*1*) A Social Security account number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States;

(*2*) Certification of Birth issued by the Department of State, Form FS–545;

(*3*) Certification of Report of Birth issued by the Department of State, Form DS–1350;

* * * * *

(*6*) United States Citizen Identification Card, Form I–197;

(*7*) Identification card for use of resident citizen in the United States, Form I–179;

(*8*) An employment authorization document issued by the Department of Homeland Security.

(vi) * * *

(B) *Form I–94 or I–94A indicating temporary evidence of permanent resident status.* The individual indicates in section 1 of the Form I–9 that he or she is a lawful permanent resident and the individual:

(*1*) Presents the arrival portion of Form I–94 or Form I–94A with an unexpired foreign passport containing an unexpired ''Temporary I–551'' stamp and a photograph of the individual, which is designated for purposes of this section as a receipt for Form I–551; and

(*2*) Presents the Form I–551 by the expiration date of the ''Temporary I–551'' stamp or, if the stamp or statement has no expiration date, within one year from the issuance date of the arrival portion of the Form I–94 or Form I–94A; or

(C) *Form I–94 or I–94A indicating refugee status.* The individual indicates in section 1 of the Form I–9 that he or she is an alien authorized to work and the individual:

(*1*) Presents the departure portion of Form I–94 or I–94A containing an unexpired refugee admission stamp, which is designated for purposes of this section as a receipt for the Form I–766, or a social security account number card that contains no employment restrictions; and

(*2*) Presents, within 90 days of the hire or, in the case of reverification, the date employment authorization expires, either an unexpired Form I–766, or a social security account number card that contains no employment restrictions and a document described under paragraph (b)(1)(v)(B) of this section.

* * * * *

**Paul A. Schneider,**

*Deputy Secretary.*

**Note:** The Form I–9 included as an attachment to this document should not be codified in Title 8 of the Code of Federal Regulations.

OMB No. 1615-0047; Expires xx/xx/xx

**Department of Homeland Security**
U.S. Citizenship and Immigration Services

# Form I-9, Employment Eligibility Verification

## Instructions

**Read all instructions carefully before completing this form.**

**Anti-Discrimination Notice.** It is illegal to discriminate against any individual (other than an alien not authorized to work in the United States) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents presented have a future expiration date may also constitute illegal discrimination. For more information, call the Office of Special Counsel for Immigration Related Unfair Employment Practices at 1-800-255-8155.

## What Is the Purpose of This Form?

The purpose of this form is to document that each new employee (both citizen and noncitizen) hired after November 6, 1986, is authorized to work in the United States.

## When Should Form I-9 Be Used?

All employees, citizens, and noncitizens hired after November 6, 1986, and working in the United States must complete Form I-9.

## Filling Out Form I-9

### Section 1, Employee

This part of the form must be completed no later than the time of hire, which is the actual beginning of employment. Providing the Social Security Number is voluntary, except for employees hired by employers participating in the USCIS Electronic Employment Eligibility Verification Program (E-Verify). **The employer is responsible for ensuring that Section 1 is timely and properly completed.**

### Noncitizen Nationals of the United States

Noncitizen nationals of the United States are persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad.

**Employers should note** the work authorization expiration date (if any) shown in **Section 1**. For employees who indicate an employment authorization expiration date in **Section 1**, employers are required to reverify employment authorization for employment on or before the date shown. Note that some employees may leave the expiration date blank if they are aliens whose work authorization does not expire (e.g., asylees, refugees, certain citizens of the Federated States of Micronesia or the Republic of the Marshall Islands). For such employees, reverification does not apply unless they choose to present in Section 2 evidence of employment authorization that contains an expiration date (e.g., Employment Authorization Document (Form I-766)).

### Preparer/Translator Certification

The Preparer/Translator Certification must be completed if **Section 1** is prepared by a person other than the employee. A preparer/translator may be used only when the employee is unable to complete **Section 1** on his or her own. However, the employee must still sign **Section 1** personally.

### Section 2, Employer

For the purpose of completing this form, the term "employer" means all employers including those recruiters and referrers for a fee who are agricultural associations, agricultural employers, or farm labor contractors. Employers must complete **Section 2** by examining evidence of identity and employment authorization within three business days of the date employment begins. However, if an employer hires an individual for less than three business days, **Section 2** must be completed at the time employment begins. Employers cannot specify which document(s) listed on the last page of Form I-9 employees present to establish identity and employment authorization. Employees may present any List A document **OR** a combination of a List B and a List C document.

If an employee is unable to present a required document (or documents), the employee must present an acceptable receipt in lieu of a document listed on the last page of this form. Receipts showing that a person has applied for an initial grant of employment authorization, or for renewal of employment authorization, or for renewal of employment authorization, are not acceptable. Employees must present receipts within three business days of the date employment begins and must present valid replacement documents within 90 days or other specified time.

**Employers must record in Section 2:**

1. Document title;
2. Issuing authority;
3. Document number;
4. Expiration date, if any; and
5. The date employment begins.

Employers must sign and date the certification in **Section 2**. Employees must present original documents. Employers may, but are not required to, photocopy the document(s) presented. If photocopies are made, they must be made for all new hires. Photocopies may only be used for the verification process and must be retained with Form I-9. **Employers are still responsible for completing and retaining Form I-9.**

FOR INFORMATIONAL PURPOSES ONLY

**For more detailed information, you may refer to the *USCIS Handbook for Employers* (Form M-274). You may obtain the handbook using the contact information found under the header "USCIS Forms and Information."**

**Section 3, Updating and Reverification**

Employers must complete **Section 3** when updating and/or reverifying Form I-9. Employers must reverify employment authorization of their employees on or before the work authorization expiration date recorded in **Section 1** (if any). Employers **CANNOT** specify which document(s) they will accept from an employee.

**A.** If an employee's name has changed at the time this form is being updated/reverified, complete Block A.

**B.** If an employee is rehired within three years of the date this form was originally completed and the employee is still authorized to be employed on the same basis as previously indicated on this form (updating), complete Block B and the signature block.

**C.** If an employee is rehired within three years of the date this form was originally completed and the employee's work authorization has expired **or** if a current employee's work authorization is about to expire (reverification), complete Block B; and:

1. Examine any document that reflects the employee is authorized to work in the United States (see List A **or** C);
2. Record the document title, document number, and expiration date (if any) in Block C; and
3. Complete the signature block.

Note that for reverification purposes, employers have the option of completing a new Form I-9 instead of completing **Section 3.**

## What Is the Filing Fee?

There is no associated filing fee for completing Form I-9. This form is not filed with USCIS or any government agency. Form I-9 must be retained by the employer and made available for inspection by U.S. Government officials as specified in the Privacy Act Notice below.

## USCIS Forms and Information

To order USCIS forms, you can download them from our website at www.uscis.gov/forms or call our toll-free number at 1-800-870-3676. You can obtain information about Form I-9 from our website at www.uscis.gov or by calling 1-888-464-4218.

Information about E-Verify, a free and voluntary program that allows participating employers to electronically verify the employment eligibility of their newly hired employees, can be obtained from our website at www.uscis.gov/e-verify or by calling 1-888-464-4218.

General information on immigration laws, regulations, and procedures can be obtained by telephoning our National Customer Service Center at 1-800-375-5283 or visiting our Internet website at www.uscis.gov.

## Photocopying and Retaining Form I-9

A blank Form I-9 may be reproduced, provided both sides are copied. The Instructions must be available to all employees completing this form. Employers must retain completed Form I-9s for three years after the date of hire or one year after the date employment ends, whichever is later.

Form I-9 may be signed and retained electronically, as authorized in Department of Homeland Security regulations at 8 CFR 274a.2.

## Privacy Act Notice

The authority for collecting this information is the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 USC 1324a).

This information is for employers to verify the eligibility of individuals for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the United States.

This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States. The form will be kept by the employer and made available for inspection by authorized officials of the Department of Homeland Security, Department of Labor, and Office of Special Counsel for Immigration-Related Unfair Employment Practices.

Submission of the information required in this form is voluntary. However, an individual may not begin employment unless this form is completed, since employers are subject to civil or criminal penalties if they do not comply with the Immigration Reform and Control Act of 1986.

FOR INFORMATIONAL PURPOSES ONLY

## Paperwork Reduction Act

An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 12 minutes per response, including the time for reviewing instructions and completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, N.W., 3rd Floor, Suite 3008, Washington, DC 20529. OMB No. 1615-0047. **Do not mail your completed Form I-9 to this address.**

FOR INFORMATIONAL PURPOSES ONLY

OMB No. 1615-0047; Expires 06/30/09

**Department of Homeland Security**
U.S. Citizenship and Immigration Services

# Form I-9, Employment Eligibility Verification

**Read instructions carefully before completing this form. The instructions must be available during completion of this form.**

**ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.**

**Section 1. Employee Information and Verification** *(To be completed and signed by employee at the time employment begins.)*

| Print Name: Last | First | Middle Initial | Maiden Name |
|---|---|---|---|
| Address *(Street Name and Number)* | | Apt # | Date of Birth *(month/day/year)* |
| City | State | Zip Code | Social Security # |

**I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.**

I attest, under penalty of perjury, that I am (check one of the following).

- ☐ A citizen of the United States
- ☐ A noncitizen national of the United States (see instructions)
- ☐ A lawful permanent resident (Alien #) _____
- ☐ An alien authorized to work (Alien # or Admission #) _____ until (expiration date, if applicable - *month/day/year*)

Employee's Signature | Date *(month/day/year)*

**Preparer and/or Translator Certification** *(To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.*

Preparer's/Translator's Signature | Print Name

Address *(Street Name and Number, City, State, Zip Code)* | Date *(month/day/year)*

FOR INFORMATIONAL PURPOSES ONLY

**Section 2. Employer Review and Verification** *(To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)*

| | List A | OR | List B | AND | List C |
|---|---|---|---|---|---|
| Document title: | | | | | |
| Issuing authority: | | | | | |
| Document # | | | | | |
| Expiration Date *(if any)*: | | | | | |
| Document # | | | | | |
| Expiration Date *(if any)*: | | | | | |

**CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on** *(month/day/year)* _____ **and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)**

Signature of Employer or Authorized Representative | Print Name | Title

Business or Organization Name and Address *(Street Name and Number, City, State, Zip Code)* | Date *(month/day/year)*

**Section 3. Updating and Reverification** *(To be completed and signed by employer.)*

A. New Name *(if applicable)* | B. Date of Rehire *(month/day/year) (if applicable)*

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment authorization.

Document Title: _____ Document #: _____ Expiration Date *(if any)*: _____

**I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.**

Signature of Employer or Authorized Representative | Date *(month/day/year)*

## LISTS OF ACCEPTABLE DOCUMENTS

**All documents must be unexpired**

| LIST A<br>Documents that Establish Both Identity and Employment Authorization | OR | LIST B<br>Documents that Establish Identity | AND | LIST C<br>Documents that Establish Employment Authorization |
|---|---|---|---|---|
| 1. U.S. Passport or U.S. Passport Card | | 1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address | | 1. Social Security Account Number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States |
| 2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551) | | | | 2. Certification of Birth Abroad issued by the Department of State (Form FS-545) |
| 3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa | | 2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address | | 3. Certification of Report of Birth issued by the Department of State (Form DS-1350) |
| 4. Employment Authorization Document that contains a photograph (Form I-766) | | 3. School ID card with a photograph | | |
| | | 4. Voter's registration card | | 4. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal |
| 5. In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form | | 5. U.S. Military card or draft record | | |
| | | 6. Military dependent's ID card | | |
| | | 7. U.S. Coast Guard Merchant Mariner Card | | 5. Native American tribal document |
| | | 8. Native American tribal document | | 6. U.S. Citizen ID Card (Form I-197) |
| | | 9. Driver's license issued by a Canadian government authority | | |
| | | **For persons under age 18 who are unable to present a document listed above:** | | 7. Identification Card for Use of Resident Citizen in the United States (Form I-179) |
| 6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI | | 10. School record or report card | | 8. Employment authorization document issued by the Department of Homeland Security |
| | | 11. Clinic, doctor, or hospital record | | |
| | | 12. Day-care or nursery school record | | |

**Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)**

[FR Doc. E8–29874 Filed 12–16–08; 8:45 am]

BILLING CODE 9111–97–C

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2008–0836; Airspace Docket No. 08–AEA–23]**

## Amendment of Class E Airspace; Butler, PA; Removal of Class E Airspace; East Butler, PA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; confirmation of effective date.

**SUMMARY:** This action confirms the effective date of a direct final rule published in the **Federal Register** (73 FR 56470) that amends Class E Airspace at Butler, PA to merge the existing Class E Airspace listed under East Butler, PA, and corrects a technical error to the airport name by correctly listing the Butler County Airport as Butler Co./K W Scholter Field Airport.

**DATES:** Effective 0901 UTC, January 15, 2009. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** Melinda Giddens, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5610.

**SUPPLEMENTARY INFORMATION:**

### Confirmation of Effective Date

The FAA published this direct final rule with a request for comments in the **Federal Register** on September 29, 2008 (73 FR 56470), Docket No. FAA–2008–0836; Airspace Docket No. 08–AEA–23. The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on January 15, 2009. No adverse comments were received, and thus this notice confirms that effective date.

* * * * *

Issued in College Park, Georgia, on November 28, 2008.

**Barry A. Knight,**

*Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.*

[FR Doc. E8–29814 Filed 12–16–08; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2008–0960; Airspace Docket No. 08–ASW–17]**

## Establishment of Class D and Class E Airspace; Conroe, TX

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action establishes Class D airspace and Class E airspace at Lone Star Executive Airport, Conroe, TX. Establishment of an air traffic control tower at Lone Star Executive Airport has made this action necessary for the safety of Instrument Flight Rule (IFR) operations at the airport. Class D airspace will revert to a Class E Surface Area during periods when the control tower is not operating. This action also corrects the radials used to define the airspace.

**DATES:** *Effective Date:* 0901 UTC, March 12, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Ft. Worth, TX 76193–0530; telephone (817) 222–5582.

**SUPPLEMENTARY INFORMATION:**

### History

On October 7, 2008, the FAA published in the **Federal Register** a notice of proposed rulemaking to establish Class D airspace and Class E airspace at Conroe, TX (73 FR 58512, Docket No. FAA–2008–0960). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Subsequent to publication, the FAA found that a minor correction to the radials defining the airspace was needed. This action makes that correction. With the exception of editorial changes, and the changes described above, this rule is the same as that proposed in the NPRM. Class D airspace designations are published in paragraph 5000 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR part 71.1. Class E Surface Area airspace designations are published in paragraph 6002 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR part 71.1. The Class D airspace and Class E airspace designations listed in this document will be published subsequently in that Order.

### The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class D airspace and Class E Surface Area airspace extending upward from the surface to and including 2,700 feet MSL within a 4.1-mile radius of Lone Star Executive Airport, excluding that airspace within the 4.1-mile radius north and east of the intersection of the IAH 357° radial and the TNV 083° radial.

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. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use

of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at Lone Star Executive Airport, Conroe, TX.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**Adoption of the Amendment**

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

## PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR part 71.1 of the Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, signed October 3, 2008, and effective October 31, 2008, is amended as follows:

*Paragraph 5000 Class D Airspace.*

* * * * *

**ASW TX D Conroe, TX [New]**

Lone Star Executive Airport, TX
(Lat. 30°21′09″ N., long. 95°24′52″ W.)
Humble VORTAC
(Lat. 29°57′25″ N., long. 95°20′45″ W.)
Navasota VORTAC
(Lat. 30°17′19″ N., long. 96°03′30″ W.)

That airspace extending upward from the surface to and including 2,700 feet MSL within a 4.1-mile radius of Lone Star Executive Airport, excluding that airspace within the 4.1-mile radius north and east of the intersection of the IAH 357° radial and the TNV 083° radial. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

*Paragraph 6002 Class E Airspace Designated as Surface Areas.*

* * * * *

**ASW TX E2 Conroe, TX [New]**

Lone Star Executive Airport, TX
(Lat. 30°21′09″ N., long. 95°24′52″ W.)
Humble VORTAC
(Lat. 29°57′25″ N., long. 95°20′45″ W.)
Navasota VORTAC
(Lat. 30°17′19″ N., long. 96°03′30″ W.)

Within a 4.1-mile radius of Lone Star Executive Airport, excluding that airspace within the 4.1-mile radius north and east of the intersection of the IAH 357° radial and the TNV 083° radial. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in Fort Worth, TX, on December 9, 2008.

**Walter L. Tweedy,**

*Acting Manager, Operations Support Group, Central Service Center.*

[FR Doc. E8–29756 Filed 12–16–08; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2008–0985; Airspace Docket No. 08–ASW–18]**

## Establishment of Class E Airspace; Edinburg, TX

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action establishes Class E airspace at South Texas International Airport, Edinburg, TX. Addition of Standard Instrument Approach Procedures (SIAPs) have made this action necessary for the safety of Instrument Flight Rule (IFR) operations at the airport.

**DATES:** *Effective Date:* 0901 UTC, March 12, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Ft. Worth, TX 76193–0530; telephone (817) 222–5582.

**SUPPLEMENTARY INFORMATION:**

### History

On, October 7, 2008, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace at Edinburg, TX (73 FR 58513, Docket No. FAA–2008–0985). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designations listed in this document will be published subsequently in that Order.

### The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by establishing Class E airspace at South Texas International Airport, Edinburg, TX. Controlled airspace is necessary to accommodate SIAPs at South Texas International Airport.

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. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at South Texas International Airport, Edinburg, TX.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**Adoption of the Amendment**

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

## PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

### § 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, signed October 3, 2008, and effective October 31, 2008, is amended as follows:

*Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface.*

* * * * *

**ASW TX E5 Edinburg, TX [New]**

South Texas International Airport, TX
(Lat. 26°26′30″ N., long. 98°07′20″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of South Texas International Airport.

* * * * *

Issued in Fort Worth, TX, on December 9, 2008.

**Walter L. Tweedy,**

*Acting Manager, Operations Support Group, Central Service Center.*

[FR Doc. E8–29752 Filed 12–16–08; 8:45 am]

BILLING CODE 4910–13–P

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2008–0986; Airspace Docket No. 08–ASO–15]**

## Modification of Class E Airspace; Franklin, NC

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Direct final rule, request for comments.

**SUMMARY:** This action modifies the Class E Airspace at Franklin, NC to include the controlled airspace that is needed to support new Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAPs) that has been developed for Macon County Airport. As a result, controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain the SIAP and for Instrument Flight Rule (IFR) operations at Macon County Airport. The operating status of the airport will change from Visual Flight Rules (VFR) to include IFR operations concurrent with the publication of the SIAP. This action enhances the safety and management of IFR operations in the area by providing the required controlled airspace to support the SIAPs at Franklin, NC.

**DATES:** Effective 0901 UTC, March 12, 2009. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments. Comments for inclusion in the Rules Docket must be received on or before February 2, 2009.

**ADDRESSES:** Send comments on this rule to: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001; *Telephone:* 1–800–647–5527; *Fax:* 202–493–2251. You must identify the Docket Number FAA–2008–0986; Airspace Docket No. 08–ASO–15, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov*.

You may review the public docket containing the rule, any comments received, and any final disposition in person in the Dockets Office (*see* **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays. An informal docket may also be examined during normal business hours at the office of the Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Avenue, College Park, Georgia 30337.

**FOR FURTHER INFORMATION CONTACT:** Melinda Giddens, Operations Support Group, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; Telephone (404) 305–5610, Fax 404–305–5572.

**SUPPLEMENTARY INFORMATION:**

### The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comments, and, therefore, issues it as a direct final rule. The FAA has determined that this rule only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Unless a written adverse or negative comment or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the effective date. If the FAA receives, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

### Comments Invited

Although this action is in the form of a direct final rule, and was not preceded by a notice of proposed rulemaking, interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. The direct final rule is used in this case to facilitate the timing of the charting schedule and enhance the operation at the airport, while still allowing and requesting public comment on this rulemaking action. An electronic copy of this document may be downloaded from and comments submitted through *http://www.regulations.gov*. Communications should identify both docket numbers and be submitted in triplicate to the address specified under the caption **ADDRESSES** above or through the Web site. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action would be needed. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. Those wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following

statement is made: ''Comments to Docket No. FAA–2008–0986; Airspace Docket No. 08–ASO–15.'' The postcard will be date stamped and returned to the commenter.

**The Rule**

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 modifies Class E5 airspace at Franklin, NC, to provide the controlled airspace that is required to support the Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAPs) that have been developed for Macon County Airport. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface of the Earth are published in Paragraph 6005 of FAA Order 7400.9S, signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

**Agency Findings**

The regulations adopted herein 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 various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. 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. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies controlled airspace at Franklin, NC.

**Lists of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (Air).

**Adoption of the Amendment**

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

## PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

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

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

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, signed October 3, 2008, effective October 31, 2008, is amended as follows:

*Paragraph 6005 Class E Airspace Designated as Surface Areas.*

* * * * *

**ASO NC E5 Franklin, NC [Amended]**

Macon County Airport,
(Lat. 35°13′21″ N., long 83°25′09″ W.)

Angel Medical Center, Franklin, NC Point In Space Coordinates
(Lat. 35°10′37″ N., long 83°22′04″ W.)

That airspace extending upward from 700 feet or more above the surface of the Earth within a 6.4-mile radius of Macon County Airport and that airspace within a 6-mile radius of the Point in Space Coordinates (Lat. 35°10′37″ N., Long. 83°22′04″ W.) serving the Angel Medical Center.

* * * * *

Issued in College Park, Georgia, on November 20, 2008.

**Barry A. Knight,**

*Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.*

[FR Doc. E8–29753 Filed 12–16–08; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF JUSTICE

### Office of Justice Programs

### 28 CFR Part 32

**[Docket No.: OJP (BJA) 1478]**

**RIN 1121–AA75**

## Public Safety Officers' Benefits Program

**AGENCY:** Office of Justice Programs, Justice.

**ACTION:** Final rule.

**SUMMARY:** The Office of Justice Programs (OJP) of the U.S. Department of Justice published the proposed rule for the Public Safety Officers' Benefits (PSOB) Program on July 10, 2008, 73 FR 39632. During the comment period, OJP received comments on its proposed rule from numerous parties. After further review of the proposed rule and careful consideration and analysis of all comments, OJP has made amendments that are incorporated into this final rule, which is intended (insofar as consistent with law) to be effective and applicable to all claims from and after the effective date hereof, whether pending (in any stage) as of that date or subsequently filed.

**DATES:** Effective January 16, 2009.

**FOR FURTHER INFORMATION CONTACT:** Hope Janke, Counsel to the Director, Bureau of Justice Assistance, at (202) 514–6278, or toll-free at 1 (888) 744–6513.

**SUPPLEMENTARY INFORMATION:**

Further to Executive Order 12866's call upon agencies to examine existing regulations for opportunities to achieve their intended regulatory goal more effectively, and pursuant to 42 U.S.C. 3796c(a), 3796(a) & (b), 3796d–3(a) & (b), and 3782(a) (each of which expressly authorizes the issuance of regulations), on July 10, 2008, OJP published the proposed rule for the PSOB Program. During the comment period, BJA received comments on its proposed rule from numerous interested parties: National police and fire associations; municipal police, fire, and rescue departments; survivors of fallen public safety officers; and individual concerned citizens, including claims attorneys. Additionally, Members of Congress commented on the proposal.

Some commentators approved of the specific provisions proposed, but others were dissatisfied with them, finding one or another proposed provision confusing, unclear, or too restrictive, and expressing concerns about BJA's implementation of the program. One

Member of Congress, Representative Donald A. Manzullo, made the following comments in the *Congressional Record:*

Madam Speaker, I rise to recognize the Department of Justice for recently proposed regulations relating to the Public Safety Officers' Benefit Program. The program provides death benefits for the survivors of public safety officers who die in the line of duty; and disability benefits to those officers who have been permanently and totally disabled by a catastrophic personal injury sustained in the line of duty, and thereby prevented from performing any gainful work; and also educational assistance benefits for surviving family members. Among other things, these proposed regulations will help to shore up the program against fraud and abuse by clarifying the requirements for certifications and their effect. I strongly support the mission of the Public Safety Officers' Benefit Program, and I commend the Department of Justice for keeping the regulations up to date and for taking action to ensure that the funds available go to those public safety officers (and their survivors) that deserve them. I would like to take a moment to comment on the statutory predicate for some of these regulations.

As the 9th Circuit Court of Appeals recognized,[1] Public Law 94–430 creates a ''limited program,'' whose principal purpose is to help ensure that the families of ''public'' officers be protected from financial calamity that is likely to result from the death or permanent and total disability, in the line of duty, of the primary money-maker. The statute (including the two parallel 2001 benefits statutes, which do not, strictly speaking, amend the Public Law or directly affect the precise program it creates) enshrines various and competing policy considerations and purposes that it proposes to achieve by particular means that have been worked out, over the last 30 years and more, in the legislative process. Because no law pursues its ends at all costs, the limitations expressly or implicitly contained in its text and structure are no less an articulation of its purposes (and the intent, goals, and policies that inform it), than its substantive grants of authority are. Benefits under these statutes-charges on the public fisc—are to be granted fairly, but not speculatively, or beyond what the statutory language unequivocally requires and unequivocally expresses, or beyond the letter of the difficult judgments reached in the legislative process and clearly reflected in the statutory text. It is precisely to enable the Department to balance and harmonize these various considerations into a single workable and coherent program that the law confers extraordinary administrative and interpretive authority on the Department. For example, at least seven distinct statutory provisions—42 U.S.C. 3796c(a) (twice), 3796(a) & (b), 3796d–3(a) & (b), 3782(a)—expressly authorize the Department to issue program regulations and policies here, and the law expressly provides that those regulations and policies are determinative of conflict of law issues relating to the program, and that responsibility for making final determinations shall rest with the Department. Under the Public Law (as under the parallel 2001 statutes), the very right to a death or disability benefit, which the Supreme Court correctly has recognized as a legal '''gratuity''' [2] (and thus not ''remedial'' in nature), is not freestanding, but contingent, rather, upon a determination by the Department.

When Public Law 94–430 was enacted in 1976, only the Circuit Courts or the old Court of Claims (of similar rank) heard appeals from final rulings of the Department of Justice thereunder, which meant that only one level of judicial review ordinarily was available to claimants and the Department, alike. In 1982 (when the appellate functions of the Court of Claims generally were merged into the newly-created Court of Appeals for the Federal Circuit), jurisdiction over these appeals—apparently as a result of an oversight—was not transferred to the Federal Circuit, and thus (unlike the case with other administrative appeals, *see, e.g.*, 28 U.S.C. 1295, 1296), by default, lay in what is now the Court of Federal Claims, established under Article I of the Constitution, rather than Article III, with an additional level of appeals available in the Federal Circuit. Although there are notable and distinguished exceptions,[3] over the past decade or so, many of the Federal Claims Court's rulings on these appeals applied the law incorrectly,[4] sometimes disregarding the express terms of the relevant statute [5] or implementing regulations,[6] or binding and applicable Federal Circuit/Court of Claims precedent,[7]

[1] *Russell*, 637 F.2d 1261 (1980); *Holstine*, No. 80–7477 (Aug. 4, 1982), 688 F.2d 846 (table).

[2] *Rose* v. *Arkansas State Police*, 479 U.S. 1, 4 (1986) (quoting legislative history).

[3] *E.g., Dawson*, 75 Fed. Cl. 53 (2007); *LaBare*, 72 Fed. Cl. 111 (2006); *Cook*, No. 05–1050C (Jun. 15, 2006); *Porter*, 64 Fed. Cl. 143 (2005); *One Feather*, 61 Fed. Cl. 619 (2004); *Davison*, No. 99–361C, (Apr. 19, 2002); *Brister*, No. 01–180C (Mar. 27, 2002); *Yanco*, 45 Fed. Cl. 782 (2000); *Ramos-Vélez*, No. 93–588C (Jan. 31, 1995); *Chacon*, 32 Fed. Cl. 684 (1995); *Nease*, No. 91–1518C (Mar. 29, 1993); *see also Cartwright*, 16 Cl. Ct. 238 (1989); *Durco*, 14 Cl. Ct. 423 (1988); *Wydra*, No. 764–83C (Jan. 31, 1986); *Tafoya*, 8 Cl. Ct. 256 (1985); *North*, 555 F.Supp. 832 (1982). When appealed, these decisions invariably have been affirmed.

[4] *E.g., Winuk*, 77 Fed. Cl. 207 (2007) (holding that the Department was required to accept, as legally sufficient certifications, instruments and language that would have been insufficient even for an ordinary certificate of service in court); *White,* 74 Fed. Cl. 769 (2006), *appeal filed*, No. 2007–5126; *Hillensbeck*, 74 Fed. Cl. 477 (2006) (holding that the position of the Department (which was actually correct, *see, e.g.*, *Nease, supra*, slip op. at 5 n.4; 132 Cong. Rec. 27,928–929 (1986) (colloquy between Sens. Sasser and Thurmond)) was ''substantially unjustified''); *Bice,* 72 Fed. Cl. 432 (2006); *Groff*, 72 Fed. Cl. 68 (2006); *Messick*, 70 Fed. Cl. 319 (2006); *Hillensbeck*, 69 Fed. Cl. 369 (2006) (this holding immediately occasioned the enactment of corrective legislation, Pub. L. 109–162, § 1164(a)(2)); *Cassella*, 68 Fed. Cl. 189 (2005); *Hawkins*, 68 Fed. Cl. 74 (2005) (this holding immediately occasioned the enactment of corrective legislation, *see* Pub. L. 109–162, § 1164(a)(4)); *Hillensbeck*, 68 Fed. Cl. 62 (2005); *Bice*, 61 Fed. Cl. 420 (2004); *Davis*, 50 Fed. Cl. 192 (2001); *Demutiis*, 48 Fed. Cl. 81 (2000); *Davis,* 46 Fed. Cl. 421 (2000); *Greeley*, 30 Fed. Cl. 721 (1994); *see also Canfield*, No. 339–79C (July 27, 1982).

[5] *E.g., Winuk*, 77 Fed. Cl. at 225 (directing the agency to pay only one of two living parents the full benefit amount, despite the statutory command that the amount be divided between living parents ''in equal shares''), *and* at 224 (holding certain instruments to be legally sufficient certifications, even though they did not contain elements expressly required by the statute—e.g., ''identification of all eligible payees of benefits,'' and acknowledgment that the decedent actually was ''employed by [the certifying] agency'' itself), *and* at 220–21 (holding that ''under the statute the [agency] is directed to expedite payment without further inquiry upon the requisite certification,'' even though the statute distinguishes between ''eligible payees of benefits'' (i.e., individuals—potentially eligible for payment of benefits under the statute—for whom the certifications are made by the public safety agencies), on the one hand, and ''qualified beneficiaries'' (i.e., individuals whose claims the Department of Justice determines to qualify for benefits under the statute and implementing regulations, upon considering those certifications as *prima facie* evidence), on the other), *and* at 218–225 (holding that a certification under the 2001 statutes could go to status (i.e., that they authorize certification that an individual was an officer at the time of injury), even though, under those statutes, such certifications may go only to line-of-duty (i.e., properly speaking, they authorize certification only that an individual, acknowledged otherwise to have the requisite status, ''was killed or suffered a catastrophic injury'' under the required circumstances); *Hillensbeck*, 69 Fed. Cl. 381–82 and 68 Fed. Cl. at 73–74 (holding, despite an express statutory reference to ''public employee member of a rescue squad or ambulance crew,'' that the agency committed legal error in understanding the statute to require members of rescue squads or ambulance crews to be public employees).

[6] *E.g., Winuk*, 77 Fed. Cl. at 222 (holding the agency to have committed legal error, ''in the absence* * * of a regulatory definition of service to a public agency in an official capacity''); *but see* 28 CFR 32.3 (containing a highly relevant definition of ''Official capacity''), *and* at 220–21 (holding that ''under the statute the [agency] is directed to expedite payment without further inquiry upon the requisite certification''); *but see* 28 CFR 32.3 (definitions of ''Eligible payee'' ¶ (1), ''Employed by a public agency'' ¶ (1), & ''Qualified beneficiary'' ¶ (1)(i)), 32.6(b)(2)(ii), 32.53(b)(2)); *Bice*, 61 Fed. Cl. at 434 (finding the agency to have committed prejudicial legal error when it declined to consider action by a private non-profit memorial foundation chartered under State law to be ''evidence [or a] finding[] of fact presented by [a] State, local, [or] Federal administrative [or] investigating agenc[y]'' under since-repealed 28 CFR § 32.5).

[7] *E.g., (a) Winuk*, 77 Fed. Cl. at 221–22, 225 (giving dispositive effect to post-hoc State government action purporting to alter the actual facts at issue; *but see Chacon*, 48 F.3d 508, 513 (1995) (post-hoc State government actions ''do not erase the fact[s]''); *cf. also Groff*, 493 F.3d 1343, 1355 (2007) (''post-mortem statements'' of government agencies do not ''transform[ private parties] into government employees'')), *and* at 218–21 (declaring it erroneous for the agency not to have understood ''should'' to mean ''must''; *but see Maggit*, 202 F.3d 1370, 1378 (2000) (''should'' in benefits law not understood to mean ''must'')), and at 224 (holding the decedent's lack of any legal authority or legal duty to engage in public safety activity to be irrelevant to whether he was a public safety officer (as opposed to being a good Samaritan); *but see Amber-Messick*, 483 F.3d 1316, 1323–25 (2007) (public safety officer status turns on actual legal authority to engage in requisite public safety activity); *Cassella*, 469 F.3d 1376, 1386 (2006) (public safety officer status turns on whether one is ''appointed for and given the authorization or obligation to perform [requisite public safety]

Continued

and even Supreme Court precedent.[8] To order the administering agency to pay on a claim when payment is not clearly warranted by the programmatic statutes and their implementing regulations and administrative interpretive superstructure is as much an affront to the law as for the agency not to pay when payment is clearly required by those statutes and regulations.

Overall, the sixteen opinions issued to date by the Federal Circuit (and its predecessor) under the statute[9] indicate a proper understanding of the law and the application of the *Chevron* doctrine to the Department's determinations. (All but two of these opinions were affirmances of the administering agency; in *Demutiis,* the agency was affirmed on all points but a very minor one (relating to application of a (now-repealed) regulation),[10] and the 1980 holding in Harold, which reversed the Department's determination, itself soon thereafter was rendered moot, as a practical matter, by a statutory amendment consonant with the Department's position.) For these reasons, the corrective proviso in the consolidated appropriations legislation, entrusting judicial appeals under Public Law 94–430 (and the two 2001 statutes) exclusively to the Federal Circuit[11] (and returning to a single level of judicial review, as originally intended) should further the purposes of the program, reduce litigation costs for claimants and the taxpayers, and serve the interests of justice.

154 Cong. Rec. E1,833 (daily ed., Sept. 18, 2008) (some minor formatting changes made).

Finally, the Department held a conference call with representatives from the following organizations, shortly after the notice of proposed rulemaking was issued, in which it provided a briefing on the proposals and offered an opportunity for questions and answers: Fraternal Order of Police, National Sheriffs' Association, International Association of Fire Chiefs, National Fallen Firefighters Foundation, National Association of Police Organizations, Major County Sheriffs' Association, Sergeants Benevolent Association of New York City, Concerns of Police Survivors, Congressional Fire Services Institute, National Organization of Black Law Enforcement Executives, National Fire Protection Association, National Volunteer Fire Council, International Association of Women Police.

After careful consideration and analysis of all comments received, BJA made amendments that are incorporated into this final rule. In addition, the final rule contains a few clarifying changes to provisions in the proposed rule where there were some previously unnoticed ambiguities, or where the language was more complex than necessary. This final rule is intended (insofar as consistent with law) to be effective and applicable to all claims from and after the effective date hereof, whether pending (in any stage) as of that date or subsequently filed. A general discussion of the comments received and changes made, broken out generally by topic area, follows:

• *Authorized commuting.* Several comments on this proposed definition were received, some of which questioned whether the proposed changes (which generally are intended to broaden the scope of coverage) were unduly narrow. Overall, the comments focused particularly on four points. *First,* some commentators objected to the proposed addition of ''(as authorized)'' to paragraph (1) of the definition, opining that the added term could preclude eligibility for benefits ''unless the qualifying public safety officer was specifically 'authorized' to respond to the public safety emergency.'' These commentators misunderstand the term, which is in no way limited to direct, particular, or specific authorizations and would not require that the responses at issue be ''specifically'' authorized. Nothing in the proposed rule indicated, or should be understood to indicate, such a result, which would be sharply contrary to OJP's intention, which is to cover both general authorizations (*e.g.*, any response obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, under the auspices of the relevant public agency), and *specific* authorizations (*e.g.*, any response obligated or authorized by particular direction, indication, or command).

*Second,* some commentators questioned the use of ''and extraordinary'' in the portion of paragraph (1) of the definition that was proposed to expand coverage, asking whether the term were ''a reference to dangerous circumstances''—as opposed to a reference to something that ''simply is not commonplace''—and insisted that eligibility should not be precluded in cases where the injury was sustained during travel ''pursuant to a particular request'' by the public safety agency, to perform even non-dangerous line of duty public safety activity. OJP agrees, and nothing in the proposed rule indicated, or should be understood to indicate, otherwise. In the proposed rule, the term ''extraordinary'' was intended to mean nothing more and

duties''); *Hawkins*, 469 F.3d 993 (2006) (the decedent's ''*actual* responsibilities or obligations as appointed, rather than some theoretical authorizations, are controlling'' for determining public safety officer status); *Howard*, 231 Ct. Cl. 507, 510 (1981) (''eligibility under the Act turns on whether the specific activity causing death was an inherent part of employment as an officer and whether it was required'' of the decedent); *Budd*, 225 Ct. Cl. 725, 726–27 n.6 (1980) (the activity causing ''the death must be 'authorized, required, or normally associated with' an officer's * * * duties''));

(b) *White*, 74 Fed. Cl. at 776–79 (terming ''ridiculous'' the agency's position that the inchoate right to the gratuity expired upon the death of the statutory beneficiary prior to actually receiving it); *but see Semple*, 24 Ct. Cl. 422 (1889) (the inchoate right to a legal gratuity expires upon the death of a statutory beneficiary prior to actually receiving it); *cf. also* 16 Att'y Gen. 408 (1879));

(c) *Hillensbeck*, 74 Fed. Cl. at 481 (directly contrary to the precise rationale that informs the Federal Circuit's reversal of the same judge, a few days earlier, in a substantially-similar case, Hawkins, 469 F.3d 993, 1002 (2006)), *and* at 482–84 (adjusting and awarding attorney fees in a manner directly contrary to the holding in *Levernier Constr.*, 947 F.2d 497, 503–04 (1997)); and

(d) *Davis*, 50 Fed. Cl. at 211 and 46 Fed. Cl. at 424–25 (declaring controlling language in *Budd,* 225 Ct. Cl. at 727 n.6, to be mere ''dicta'' and ''non-precedential,'' and either ''erroneous[]'' or ''mistaken[]''); *but see Howard*, 229 Ct. Cl. at 510 (holding that same *Budd* language to be legally ''dispositive'')).

[8] *E.g., Winuk*, 77 Fed. Cl. at 225 (declaring the 2001 statutes to be ''remedial laws''); *White*, 74 Fed. Cl. 773 (declaring Pub.L. 94–430 to be a ''remedial statute''); *LaBare*, 72 Fed. Cl. at 124 (a correct ruling, overall, but unfortunately describing P.L. 94–430 as ''remedial legislation''); *Bice*, 72 Fed. Cl. at 450 (declaring Pub. L. 94–430 to be a ''remedial statute''); *Groff*, 72 Fed. Cl. at 79 (declaring P.L. 94–430 to be ''remedial in nature''); *Bice*, 61 Fed. Cl. at 435 (declaring P.L. 94–430 to be a ''remedial statute''); *Davis*, 50 Fed. Cl. at 208 (describing P.L. 94–430 in remedial terms); *Demutiis*, 48 Fed. Cl. at 86 (declaring P.L. 94–430 to be ''remedial in nature''); *but see Rose*, 479 U.S. at 4 (holding the program benefit to be a legal '''gratuity''' (*cf. Lynch*, 292 U.S. 571, 577 (1934); 36 Att'y Gen. 227, 230 (1930))). No opinion of the Federal Circuit/Court of Claims describes the program as ''remedial.''

[9] *Groff,* 493 F.3d 1343 (2007) (two cases); *Amber-Messick,* 483 F.3d 1316 (2007); *Cassella,* 469 F.3d 1376 (2006); *Hawkins,* 469 F.3d 993 (2006); *Demutiis,* 291 F.3d 1373 (2002); *Yanco,* 258 F.3d 1356 (2001); *Greeley,* 50 F.3d 1009 (1995); *Chacon,* 48 F.3d 508 (1995); *Canfield,* No. 339–79 (Dec. 29, 1982); *Russell,* 231 Ct. Cl. 1022 (1982); *Melville,* 231 Ct. Cl. 776 (1982); *Howard,* 231 Ct. Cl. 507 (1981); *Smykowski,* 647 F.2d 1103 (1981); *Morrow,* 647 F.2d 1099 (1981); Budd, 225 Ct. Cl. 725 (1980); *Harold,* 634 F.2d 547 (1980). No opinion was issued in Bice, 227 Fed. App'x 927 (2007); *Porter,* 176 Fed. App'x 111 (2006); or *One Feather,* 132 Fed. App'x 840 (2005).

[10] Without opinion, in Bice, the Federal Circuit affirmed the Federal Claims Court judgment, which was based entirely on a misapplication of this same now-repealed regulation.

[11] In providing that the ''appeals from final decisions of the Bureau'' that it refers to specifically include those ''under any statute authorizing payment of benefits described under subpart 1'' of Pub. L. 90–351, title I, part L (i.e., the 2001 statutes), the legislation (among other things) is framed to counter the holding in *Winuk,* 77 Fed. Cl. at 220–21, that ''under the statute the [agency] is directed to expedite payment without further inquiry upon the requisite certification,'' as a result of which holding the Department was ordered by the court to accept as ''certified'' purported ''facts'' that were known not to be true, and, further, to accept such ''certification'' not as mere *prima facie* evidence (rebuttable by other evidence) of those purported ''facts,'' but as dispositive and binding on the Department, thus purporting to deny it its legal authority to render meaningful, substantive ''final decisions'' under those statutes.

nothing less than what it says on its face: ''not ordinary.'' As was stated in the preamble to the PSOB rule promulgated on August 10, 2006,

> although the PSOB Act does not cover all conceivable commuting injuries, neither does it or the term ''line of duty'' exclude all commuting injuries. [T]he definition of ''authorized commuting'' in the proposed regulation is consistent with this understanding. The definition is based on the concept of ''line of duty'' under both the current and final rules: When a public safety officer is engaged in activities or actions that he is obligated or authorized to perform as a public safety officer, he is acting in the line of duty, or is, in effect, ''on duty.'' In general, under workers' compensation law, injuries incurred while commuting to and from work are not necessarily regarded as occurring within the scope of employment, except under certain circumstances where it can be shown that there is a '' 'sufficient nexus between the employment and the injury to conclude that it was a circumstance of employment.' '' *Russell,* 637 F.2d at 1265 (quoting *Hicks* v. *General Motors,* 238 N.W.2d 194, 196 (Mich. Ct. App. 1975)). * * * In the case of officers who are commuting to or from work [other than under certain circumstances], the ordinary line of duty analysis would apply: Where it can be shown that they were injured while engaging in line of duty activities or actions, or that they sustained the injury as a result of their status as public safety officers, they would be considered as acting in the line of duty.

71 FR 46,028, 46,032–033. The term ''extraordinary'' accordingly is used in the provision to preclude any suggestion or inference that the portion of paragraph (1) that would expand coverage encompasses ordinary commuting.

*Third,* some commentators made the excellent suggestion that the definition also should cover travel pursuant to a public safety agency's call for one of its public safety officers to perform emergency response activity within the agency's authority (as opposed to a call to perform only one of the four specific species of public safety activity otherwise defined in the regulations). OJP agrees and accordingly has made changes in paragraph (1) of this definition, in paragraph (1)(ii)(B) of the definition of *Line of duty activity or line of duty action,* and in section 32.5(i).

*Finally,* one commentator expressed sound concerns that the proposed definition did not make clear that the word ''situs'' therein referred to any place designated for the performance of public safety activity. A conforming change has been made to the rule.

• *Divorce.* One commentator correctly pointed out that the definition of this term, as proposed, did not make clear on its face that a legal divorce (discussed in the first half of the definition) always trumps the *de-facto*-divorce provisions in the second half thereof. A change has been made accordingly.

• *Certification.* The proposed provisions generated several different comments, but overall the general concern was that the provisions—particularly as applied to prerequisite certifications currently described in sections 32.15 and 32.25 of the PSOB regulations and most particularly as applied to ''claimants, who may not be sophisticated''—potentially could ''result in the improper rejection of certain claims on non-substantive, technical grounds'' by ''requiring a near-impossible-to-attain level of precision.'' These comments, which often were grounded in significant misconceptions of the facts and holdings of decisions of the Court of Federal Claims, are somewhat inapposite, because (as indicated in the preamble to the proposed rule) the thrust of these provisions is merely to incorporate *current* general agency practice into the body of the regulations: The primary purpose of placement in the regulations, therefore, is to provide the public with clear notice of what the agency in main *already* has been doing in the PSOB Program for years (in an effort to ''help to shore up the program against fraud and abuse,'' as Rep. Manzullo recognized), not to provide the agency with a regulatory predicate to start a new practice. (This is in keeping with the holdings of the Federal Circuit in *Amber-Messick* v. *United States,* 483 F.3d 1316 (2007), *cert.* denied, 128 S.Ct. 648 (2007); *Groff* v. *United States,* 493 F.3d 1343 (2007), *cert.* denied, 128 S.Ct. 1219 (2008), that the agency's practice *already* has ''the force of law,'' even if not in the regulation) In sum, the apprehensions of the commentators on this point are unwarranted, particularly as sections 32.15 and 32.25 both contain express provisions for administrative waiver of the certification requirements. In connection with the hundreds of claims that it has processed with the basic substance of the proposed definition of *Certification* in place, BJA has not hesitated to waive the certification requirements as appropriate. Moreover, where there has been a significant defect (as to form or substance) in certifications that have been received, BJA's invariable practice has been to offer the certifying party (almost always a public agency, rather than a claimant) ample notice of the defect and ample opportunity to cure it.

• *Commonly accepted.* Several commentators, apprehensive as to how it might come to be applied, objected to what they seem to have believed was a proposed ''new'' definition of *Commonly accepted.* No ''new'' definition of that term was proposed: The same definition, rather, currently found in the regulation at section 32.13 (and applied to hundreds of PSOB claims, without incident, for several years), simply was proposed to be moved, without any change whatsoever, to section 32.3.

• *Training.* Several comments (one of which was very favorable) were received in connection with the proposed provisions relating to training. The critical comments focused particularly on four points. *First,* some commentators objected variously to the proposed inclusion of ''official'' and/or ''his public agency'' in connection with ''training program'' within the definitions of *Line of duty activity or line of duty action* and *Participation in a training exercise,* and suggested that the words ''official'' and/or ''his public agency'' be removed, because ''a plain reading of the proposed language would seem to suggest that a local or State law enforcement officer who attends a training program conducted by the Federal government and dies as a result of his participation in the program would not be considered as having died in the line of duty, even if the officer's employing agency approved or even directed that the officer participate in the training program.'' These commentators misunderstand the rule; specifically, the commentators appear to misapprehend the significance of the definition (included in the proposed rule) of *Official training program of a public agency,* which expressly encompassed any program whatsoever—''(1) That is officially sponsored, -conducted, or -authorized by the public agency; and (2) Whose purpose is to train public safety officers in (or to improve their skills in), specific activity or actions encompassed within their respective lines of duty.'' OJP intended this proposed definition to be applied to the term found in the proposed definitions of *Line of duty activity or line of duty action* and *Participation in a training exercise,* and nothing in the proposed rule indicated, or should be understood to indicate, otherwise or to require that the officer's public agency itself offer the training: Under the rule, it suffices on this point merely that the training be sponsored, conducted, or authorized by the officer's public agency. To clarify any possible confusion here, OJP has amended the term defined to read ''*Official training program of a public safety officer's public agency,*'' and has made conforming changes in its text.

*Second,* some commentators objected variously to the proposed inclusion of ''mandatory'' in connection with training activity in the definition of *Participation in a training exercise,* and suggested that it be removed, because it could ''exclude officers who, even with their agencies' approval, participate in voluntary training.'' As to the word ''mandatory,'' the comments have persuaded OJP that the provision as proposed would (inadvertently) make the rule more restrictive than the statute; accordingly (as described immediately below) it has made changes in the final rule to ensure that non-mandatory activity also is covered.

*Third,* as to the proposed inclusion of ''formal'' and/or ''structured,'' the comments appear to misapprehend the statute. For the presumption established by 42 U.S.C. 3796(k) to arise, a public safety officer must have ''engaged in a situation * * * involv[ing certain public safety] activity'' or ''participated in a training exercise.'' Applying the traditional interpretive canon *noscitur a sociis, see, e.g., Hibbs* v. *Winn,* 542 U.S. 88 (2004); *Gutierrez* v. *Ada,* 528 U.S. 250, 255 (2000) (''Words and people are known by their companions.''), BJA has understood the use of ''participation in a training exercise'' in the statute to be informed by the parallel use there of ''engagement in a situation involving public safety activity'': There is a distinction between ''engagement *in a situation* involving public safety activity'' (which is what the statute requires as a predicate for the presumption, and notionally would include such things as—

> involvement in a physical struggle with a suspected or convicted criminal; performing a search and rescue mission; performing or assisting with emergency medical treatment; performing or assisting with fire suppression; involvement in a situation that requires either a high speed response or pursuit on foot or in a vehicle; participation in hazardous material response; responding to a riot that broke out at a public event; and physically engaging in the arrest or apprehension of a suspected criminal[,]

149 Cong. Rec. H12,299 to H12,300 (daily ed., Nov. 21, 2003) (statement of Rep. Sensenbrenner); id. at S16,053 (Nov. 25, 2003) (statement of Sen. Leahy)), on the one hand, and mere ''engagement in public safety activity'' (which could include—

> sitting at a desk; typing on a computer; talking on the telephone; reading or writing paperwork or other literature; watching a police or corrections facility's monitors of cells or grounds; teaching a class; cleaning or organizing an emergency response vehicle; signing in or out a prisoner; driving a vehicle on routine patrol; and directing traffic at or participating in a local parade[,]

149 Cong. Rec. at H12,300; id. at S16,053—all of which are important public safety activities, but nonetheless do not give rise to the presumption), on the other. And just as ''engagement *in a situation* involving public safety activity'' is not the same thing as mere ''engagement in public safety activity,'' so ''participation *in a training exercise*'' (which is what the statute requires as a predicate for the presumption and suggests a certain concreteness analogous to that implied by ''engagement *in a situation*'') is not the same thing as mere ''training.'' The use of ''formal'' and ''structured'' (and other terms) in the current, proposed, and final definitions of *Participation in a training exercise* thus are intended to effectuate the term (''a training exercise'') actually used in 42 U.S.C. 3796(k). In sum, the single word ''mandatory'' in the proposed definition of *Participation in a training exercise* has been replaced with ''mandatory, rated (i.e., officially tested, -graded, -judged, -timed, etc.), or directly supervised, -proctored, or -monitored,'' which BJA believes to conform accurately to the concreteness implied by statutory term ''a training exercise.'' Of course, in the definition of *Line of duty activity or line of duty action* where section 3796(k) is not implicated (and thus where there is no statutory requirement that there be ''a training exercise''), mere ''training'' in the line of duty, rather than ''participation in a training exercise,'' would be sufficient on this point.

*Finally,* BJA received one comment on its proposal to include ''trainers,'' expressly, within paragraph (1)(ii)(B) of the definition of *Line of duty activity or line of duty action* (i.e., within the provision relating to ''secondary-duty'' officers); specifically, the commentator urged the agency to include ''primary-duty'' trainers, as well. The commentator appears to have misunderstood the structure of the regulation. Assuming the training activity to be obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, under the auspices of the relevant public agency, ''primary-duty'' trainers (like ''primary duty'' trainees, and ''secondary-duty'' trainees) *already* are covered by the provisions of paragraph (1). The change in the regulation will enable ''secondary-duty'' trainers to be covered, as well.

• *Heart attack.* One commentator thought the proposed definition of this term to be too broad. Other commentators suggested that the proposed definition, which is broader than the definition currently found in the regulations, should be broadened further to cover ''situations where the heart stops due to chest trauma'' (e.g., from ''a lethal, heart-stopping blow to the chest'' received in the line of duty). These latter commentators misunderstand the function of this definition, which applies only where the provisions of 42 U.S.C. 3796(k) (which create a legal *presumption* of injury under certain circumstances where there is no *actual* injury) are implicated. The principal operative provision of the PSOB Program, however, is 42 U.S.C. 3796(a), which comes into play whenever ''a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty.'' (A similar provision, applicable only to permanent and total disability, rather than death, is found at 42 U.S.C. 3796(b).) Since the very beginning of the program (in 1976), the Department consistently has understood 42 U.S.C. 3796(a) (and also 42 U.S.C. 3796(b), since its enactment) to cover every situation where the heart of a public safety officer has stopped due to chest trauma received in the line of duty. In other words, a claim based on an officer who, in the line of duty, receives a heart-stopping blow to the chest that causes his death has no need of the presumption established by 42 U.S.C. 3796(k), because that blow in principle would be an ''injury'' that *already* is covered under 42 U.S.C. 3796(a), without any regard whatsoever to the provisions of 42 U.S.C. 3796(k). As was stated in the preamble to the PSOB rule proposed on July 26, 2005,

> Where the requirements of [42 U.S.C. 3796(k)] are not met (e.g., where disability (rather than death) results), the absence of the statutory presumption does not necessarily entail the failure of claims based on heart attack or stroke; all such claims, rather, are governed by the ordinary rules applicable to the PSOB program. *See, e.g., Greeley* v. *United States,* 50 F.3d 1009 (Fed. Cir. 1995); *Durco* v. *United States,* 14 Cl. Ct. 424 (1988); *North* v. *United States,* 555 F.Supp. 382 (Cl. Ct. 1982); *Russell* v. *United States,* 231 Ct. Cl. 1022 (1982); *Smykowski* v. *United States,* 647 F.2d 1103 (Ct. Cl. 1981); *Morrow* v. *United States,* 647 F.2d 1099 (Ct. Cl. 1981).

71 FR 43,078, 46,079; *see also Cook* v. *United States,* No. 05–1050C (Fed. Cl., June 15, 2006); *Askew* v. *United States,* No. 542–83C (Cl. Ct., Aug. 27, 1984); *Gudzunas* v. *United States,* No. 446–83C (Cl. Ct., July 2, 1984); *Canfield* v. *United States,* No. 339–79 (Fed. Cir., Dec. 29, 1982).

One commentator also proposed adding a list of medical conditions to the definition of *Heart attack* (and to the definition of *Stroke*). All of the items on

the two suggested lists that actually *are* heart attacks or strokes are covered by the proposed change in the regulations.

BJA understands the proposed definition of *Heart attack,* to which no change has been made, to cover everything that is commonly understood within the medical profession to be a ''heart attack'' (and nothing more) and thus to give full effect to the provisions of 42 U.S.C. 3796(k).

• *Notice of potential existence of ''competent medical evidence to the contrary'' (32.14(c)).* The proposed provisions relating to requests for information in connection with the potential existence of ''competent medical evidence to the contrary'' appear to have generated considerable confusion, which may have arisen through an apparent misapprehension on the part of some commentators (though not all) as to the purpose of proposed section 32.14(c), and the October 2, 2007, policy memorandum from which it derives. Contrary to this misapprehension, proposed section 32.14(c) (like the policy memorandum) relates *only* to the question of when BJA should ''*request'' specific medical history records from the claimant* relating to ''competent medical evidence to the contrary''; neither the memorandum nor the proposed section relates at all to the very different question of whether ''competent medical evidence to the contrary'' actually exists or not, such that the claim should be denied. In other words, the purpose of the proposed provision (like that of the policy memorandum) was to govern when (and under what circumstances) the PSOB Office would provide the claimant with notice that the claim file appeared to contain ''competent medical evidence to the contrary'' that made it possible/likely that the claim was going to fail, unless sufficient medical history records (or other evidence) could be provided to counter it; in sharp contrast, nothing in the proposed provision (or the memorandum) spoke to what the PSOB Office should, or should not, consider ''competent medical evidence to the contrary'' itself to be: *That* term is defined in (and governed by) the regulations, at section 32.13. Thus, the provision in the memorandum that ''the mere presence of cardio-vascular disease/risk factors * * * shall not be considered'' means that those factors ''shall not be considered'' for purposes of determining whether or not to provide the claimant with notice (i.e., for purposes of ''requesting'' medical history records); it does not mean that the presence of those factors ''shall not be considered'' in determining if there is ''competent medical evidence to the contrary.'' It is important to recall that the memorandum was issued in response to the Congressional outcry (late in the summer of 2007) over an agency practice (in place from September 2006 to early spring of 2007) to obtain 10 years of medical history records as a matter of course in connection with every claim that implicated the provisions of 42 U.S.C. 3796(k), even where there were nothing in the claim file that affirmatively suggested that ''competent medical evidence to the contrary'' might be a relevant consideration in determining the claim. As indicated in the report by the Department's Office of the Inspector General on the Department's ''Implementation of the Hometown Heroes Survivors Benefits Act of 2003'' (# I–2008–05, p. 27 (March 2008)), the Director of BJA issued the memorandum to enshrine in writing a policy that the PSOB Office should ''request'' such records only where there was such a suggestion:

> On October 2, 2007, the BJA Director issued a memorandum directing the PSOB Office to request 10 years of medical records for Hometown Heroes Act claims only if the evidence in a case file suggests that something other than the line-of-duty activity caused the heart attack or stroke. If an autopsy report, coroner's report, or death certificate identifies the presence of cardiovascular disease or other risk factors, this information will not be considered unless the case file shows that the decedent knew of and continued to aggravate these conditions.

Nonetheless, as indicated above, many commentators appear to have misunderstood the purpose of the proposed provision (and the policy memorandum); in contrast, one very-detailed comment, from a claims attorney, clearly did grasp the essence of the matter correctly: This latter comment, although generally favorable to the proposed rule, was severely critical of proposed section 32.14(c). In particular, the commentator was disturbed by proposed paragraph 32.14(c)(3), because—

> [b]y its terms, unless the extremely restrictive conditions specified at (c)(1) and (c)(2) are satisfied, it would seem to forbid the PSOB Office from informing a practitioner/claimant that there is a problem with the claim that medical history records could cure, even if the problem is only a minor one and easily curable.

The commentator found it difficult to understand why the provision was proposed,

> which would doom some claims to be denied at the initial level, when a simple notice to the claimants or their counsel could save them. * * * A more perfect plan to deny claims, or make them more expensive by forcing appeals unnecessarily, could hardly be devised. I hope this was not intentional.

In addition, the commentator objected to proposed paragraph 32.14(c)(4):

> * * * I had thought the Department's job was to ''consider'' all the evidence filed in connection with a claim, whether supportive of the claim or not. Does this proposed provision mean that the Department will not be ''considering'' all evidence filed in connection with claims? If so, what, exactly, will the Department be doing with such evidence, and on what legal basis will it not be ''considering'' it? If not, what possible purpose can be served by specifying, in just this one limited circumstance, that the evidence will be considered? Has no lawyer in the Administration ever heard of the ''*expressio unius exclusio alterius*'' canon of construction?

The commentator also criticized the use of the term ''request'' in proposed paragraphs 32.14(c)(1) and (c)(3), as being inconsistent with the regulatory provisions governing burdens of proof; to this end (unless the term were removed in the final rule), the commentator requested clarification ''[i]f the 'request' reference is intended to mean anything other than merely offering practitioners/claimants a reminder notice of their open and ongoing opportunity to file evidence.'' Finally, the commentator asked for clarification as to the relationship between the term *Risky behavior*, found in the current regulations, and the term ''reckless behavior,'' used in proposed section 32.14(c)(2)(i), opining that it would have a deleterious effect on claims if the two terms were not defined identically; the commentator suggested that, to avoid this deleterious effect, in that section the latter term should be replaced by the former, because ''the term 'risky' behavior here offers distinct advantages, in that the term, as defined in the regulation, has a very precise and strictly limited meaning, while 'reckless' behavior, unless otherwise defined in some restrictive way, would seem to have a free ranging and very broad meaning.'' The commentator went on to suggest that, because ''all PSOB claims are subject to the provisions of section 1202(1), (2), and (3)'' of title I of the Omnibus Crime Control and Safe Streets Act of 1968, the relationship between those statutory provisions and the regulatory definition of *Risky behavior* should be specified in the regulations so as to avoid uncertainty.

Some aspects of the immediately-foregoing comments (though not the particular and concrete details) were echoed in the comments received from a national organization, which added its

concern that under ''the rules as written * * * officers may choose not to seek medical attention * * * since it could be in their best interests not to document those issues in their medical record,'' and expressed regret that, under the proposed rule, ''now, PSOB is being looked at as an entitlement.'' Finally, several other commentators indicated dissatisfaction with the structure of proposed paragraphs 32.14(c)(1) and (c)(2), finding it to be confusing and unnecessarily complex.

Further to the foregoing comments, the agency has made several changes to this provision, simplifying the structure of what was proposed as paragraphs 32.14(c)(1) and (c)(2) (largely, though not exactly, along the lines suggested by several commentators), and removing the predicates for the ''*expressio unius exclusio alterius*'' and ''forbidden communications'' problems correctly pointed out by the commentator (discussed in detail above). Lest there be any misunderstanding, the agency wishes to emphasize that the provisions of paragraph 32.14(c) will govern when medical history records will be ''requested'' in connection with PSOB Office determinations of whether there is ''competent medical evidence to the contrary'' or not: Under the provision, the mere existence of cardio-vascular-disease risk factors (even severe ones) will not trigger such a ''request''; rather, only where the claim file *already* contains indications that there may be ''competent medical evidence to the contrary'' (i.e., evidence that could defeat the claim) will the agency ''request'' information from the claimant. In other words, although a claimant always may provide the agency with evidence, information, and legal arguments in support of the claim, under section 32.14(c) the agency itself will take the proactive step of advising the claimant of a perceived weakness in the claim (relating to ''competent medical evidence to the contrary''), so that the claimant may act (if he wishes) to remedy that weakness.

• *Definition of ''Act'' (and effective-date provisions).* One comment correctly pointed out that, despite express reference to *Dawson* v. *United States*, 75 Fed. Cl. 53 (2007) (involving the issue of when and how statutory amendments become effective), the proposed rule, which contained ''numerous references to the effective dates of statutory enactments where those enactments themselves specify precisely how and when they become effective'' omitted any ''provision indicating the effective date, or the manner of application, where those enactments do not so specify.'' The rule has been changed to correct this omission, in keeping with *Dawson* and *Bice* v. *United States*, 61 Fed. Cl. 420, 437 (2004). (The change relates strictly to statutory amendments, however; regulatory amendments, including this final rule, will continue to be governed by a different principle, *see generally, e.g., Rodriguez* v. *Peake*, 511 F.3d 1147 (Fed. Cir. 2008); *Bellsouth Telecomms.* v. *Southeast Telephone*, 462 F.3d 650 (6th Cir. 2006); *Combs* v. *Comm'r of Social Security*, 459 F.3d 640 (6th Cir. 2006) (en banc); *Nat'l Mining Ass'n* v. *Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *Pine Tree Medical Assocs.* v. *Sec'y of Health & Human Servs.*, 127 F.3d 118 (1st Cir. 1997); *see also*, *e.g.*, *Groff*, 493 F.3d, at 1350–1351 & n.2; *cf.*, *e.g.*, *Morrow* v. *United States*, 647 F.2d 1099, 1101 (Fed. Cir. 1981) (in which the court applied PSOB regulations (effective May 6, 1977) that post-dated the Oct. 8, 1976, alleged injury); *Smykowski* v. *United States*, 647 F.2d 1103, 1105 (Ct. Cl. 1981) (in which the court applied PSOB regulations (effective May 6, 1977) that post-dated the Oct. 5, 1976, alleged injury); *Canfield* v. *United States*, No. 339–79 (Fed. Cir., Dec. 29, 1982), 703 F.2d 583, 585 (table) (in which the court applied PSOB regulations (effective May 6, 1977) that post-dated the Dec. 20, 1976, alleged injury). Consistent with that principle governing regulations, therefore, as indicated above this final rule is intended (insofar as consistent with law) to be effective and applicable to all claims from and after the effective date hereof, whether pending (in any stage) as of that date or subsequently filed.) Another comment correctly indicated that some of the parenthetical statements contained within the proposed definition of Act in section 32.3 were misleading or inaccurate, because they lumped death and disability provisions together, where the law distinguishes between them. (The comment went on to point out a similar problem in the definition of *Public employee* in that section.) BJA agrees and has made corresponding changes.

• *Miscellaneous.* In keeping with one of the principal purposes of the proposed rule, which was to remove ''previously unnoticed flaws, gaps, or ambiguities,'' one commentator correctly pointed an ambiguity out in paragraph 32.4(a), which provides that ''[t]he first three provisions of 1 U.S.C. 1 (rules of construction) shall apply.'' As stated by the commentator, ''[t]he intention of this provision seems to be that those rules of construction apply to the regulations, but by its terms I think the provision strictly indicates only that those rules apply to the PSOB Act.'' BJA agrees, and a conforming change has been made to clarify that the rules apply to the regulations.

Further to the changes proposed in section 32.15, a commentator asked if the term ''ruling'' in section 32.15(a)(2)—which also is found in section 32.25(a)(2)(ii)—means ''only *formal* rulings, or does it also include *ordinary* findings?'' The latter meaning is intended and a clarifying change has been made to both sections.

In connection with proposed section 32.5(d)(3), one commentator asked if it were ''sufficient merely to apply for the benefits in order to avoid the possibility of the adverse inference, or must the claimant also pursue the application as well?'' The application must be pursued, and a change has been made to the rule accordingly.

One commentator suggested that the proposed 32.5(f)(3) be reformatted into separate subparagraphs (without changing the substance of the provision) so as to make it less confusing; and suggested a similar change (again, without changing the substance of the provision) for the definitions of *Nonroutine strenuous physical activity* and *Nonroutine stressful physical activity* in section 32.13. As the commentator put it: ''Some of the component elements of those definitions are 'excluded,' while others are listed as conditions. It would be far less confusing if all the elements of these definitions were formatted similarly [in separate subparagraphs], either all as exclusions, or all as conditions.'' BJA agrees and has made conforming changes.

A commentator suggested a few (non-substantive) syntactical changes to the proposed definition of Routine in section 32.13, with which BJA agrees.

An inquiry was received in connection with proposed section 32.45(a): Specifically, asking what would happen if, with respect to the same deceased officer, there were claimants in different cities, who could not ''agree'' upon a location for the hearing. BJA agrees that the provision does not specifically address such a situation (but should) and has made a change so as to do so.

One commentator suggested that the Department should begin to implement an unenacted bill; this, of course, is beyond the authority of the Executive Branch. Other commentators variously found fault with the Department for not including ''inspectors and code officials'' appointed to assess damage and building safety, ''emergency management personnel,'' ''volunteer haz mat responders,'' and ''emergency

services personnel'' as ''public safety officers''; under the statute, the term ''public safety officer'' is limited to law enforcement officers, firefighters, certain chaplains, and public-employee members of a rescue squad or ambulance crew, and certain disaster-relief workers (which does appear to include at least some of the emergency response personnel described in some of the comments, at least under some circumstances), and the Executive Branch is not at liberty to expand the categories beyond the limits prescribed in the statute; this having been said, it should be noted that the definition of *Suppression of fire* in section 32.3 expressly includes ''on-site hazard evaluation.''

Another commentator opined that the educational assistance benefits available under 42 U.S.C. 3796d to 3796d–7 ''should be the FIRST source of funding for college not the LAST source''; the Executive Branch is not at liberty to implement this suggestion, because, notwithstanding the commentator's expressed belief that ''it was Congress' intent to provide scholarship funds to surviving spouses and children of fallen public safety officers without being directed to other sources first,'' in fact, 42 U.S.C. 3796d–1(a)(3)(A) expressly commands that the amount of the PSOB educational assistance benefit ''shall be reduced by the sum of * * * the amount of educational assistance benefits from other Federal, State, or local governmental sources to [*sic*] which the eligible dependent would otherwise be entitled to receive.''

One comment expressed concern that the proposed definition of *Prison security activity* might allow security personnel who were not ''sworn officers'' to be covered; the current definition of Involvement, found at section 32.3, which runs counter to such a result, remains in force. Another comment, in connection with proposed section 32.6(a), expressed concerns as to the difficulty inherent in determining who may have had ''the closest relationship'' with an officer who is deceased at the time of the determination; BJA agrees that such a determination well may be difficult in particular cases, but a similar difficulty currently exists under section 32.16(a), which has similar language and has proven to be workable nonetheless. Yet another comment sought clarification as to what life insurance policy would be ''the most recent'' if the one on file with the agency were older than one not on file; the statute, 42 U.S.C. 3796(a)(4)(B), decrees that the relevant policy is the ''most recently executed life insurance policy on file at the time of death with such officer's public safety agency, organization, or unit,'' thus making any policy not so on file irrelevant, regardless of when it may have been executed.

One commentator opined that the benefits available for government employees surpass those available for similarly-situated individuals in the private sector and objected that more resources are being allocated to government employees; the commentator should refer his views to the Congress, as the regulations do but implement a series of statutory enactments that enshrine the policy choice that funds collected from taxpayers by the federal government should be used to pay the benefits authorized thereby: It is not the regulations, but the statutes, that establish the program. Finally, one commentator asked for clarification regarding the meaning of the regulatory term ''purported spouse'' (a term used in several places in the program regulations): A ''purported spouse'' is any person who is *alleged* (on any basis or pretext) to be a spouse within the meaning of the PSOB Act and its implementing regulations.

## III. Regulatory Certifications

### *Regulatory Flexibility Act*

In accordance with the Regulatory Flexibility Act, the Office of Justice Programs has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the following reasons: This rule addresses federal agency procedures; furthermore, this rule makes amendments to clarify existing regulations and agency practice concerning death, disability, and education payments and assistance to eligible public safety officers and their survivors and does nothing to increase the financial burden on any small entities.

### *Executive Order 12866*

This rule has been drafted and reviewed in accordance with Executive Order No. 12866, § 1(b). The costs of implementing this rule are minimal. The only costs to OJP consist of appropriated funds, and the benefits of the rule far exceed the costs. As discussed in more detail in the ''Background'' section above, all of the substantive regulatory changes in this rule tend to relieve unnecessary burdens and restrictions placed on claimants by the current rule. The non-substantive changes largely incorporate existing law and clarify the regulation so that it reflects current agency practice. The rest of the changes, in main, are grammatical and syntactical.

The Office of Justice Programs has determined that this rule is a ''significant regulatory action'' under § 3(f) of the Executive Order, and accordingly this rule has been reviewed by the Office of Management and Budget.

### *Executive Order 13132*

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. The PSOB Act provides benefits to individuals and does not impose any special or unique requirements on States or localities. Therefore, in accordance with Executive Order No. 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

### *Executive Order 12988—Civil Justice Reform*

This rule meets the applicable standards set forth in §§ 3(a) & (b)(2) of Executive Order No. 12988. Pursuant to § 3(b)(1)(I) of the Executive Order, nothing in this or any previous rule (or in any administrative policy, directive, ruling, notice, guideline, guidance, or writing) directly relating to the Program that is the subject of this rule is intended to create any legal or procedural rights enforceable against the United States, except as the same may be contained within part 32 of title 28 of the Code of Federal Regulations.

### *Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. The PSOB Act is a federal benefits program that provides benefits directly to qualifying individuals. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### *Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse

effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

*Paperwork Reduction Act*

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

**List of Subjects in 28 CFR Part 32**

Administrative practice and procedure, Claims, Disability benefits, Education, Emergency medical services, Firefighters, Law enforcement officers, Reporting and recordkeeping requirements, Rescue squad.

■ Accordingly, for the reasons set forth in the preamble, part 32 of chapter I of Title 28 of the Code of Federal Regulations is amended as follows:

## PART 32—PUBLIC SAFETY OFFICERS' DEATH, DISABILITY, AND EDUCATIONAL ASSISTANCE BENEFITS CLAIMS

■ 1. Revise the authority citation for part 32 to read as follows:

**Authority:** 42 U.S.C. ch. 46, subch. XII; 42 U.S.C. 3782(a), 3787, 3788, 3791(a), 3793(a)(4) &(b), 3795a, 3796c–1, 3796c–2; sec. 1601, title XI, Public Law 90–351, 82 Stat. 239; secs. 4 through 6, Public Law 94–430, 90 Stat. 1348; secs. 1 and 2, Public Law 107–37, 115 Stat. 219.

■ 2. Revise § 32.0 to read as follows:

### § 32.0 Scope of part.

This part implements the Act, which, as a general matter, authorizes the payment of three different legal gratuities:

(a) Death benefits;

(b) Disability benefits; and

(c) Educational assistance benefits.

■ 3. Amend § 32.3 as follows:

a. Revise the definitions of ''*Act*'', ''*Authorized commuting*'', ''*Determination*'', ''*Divorce*'', ''*Eligible payee*'', ''*Fire protection*'', ''*Fire, rescue, or police emergency*'', ''*Firefighter*'', ''*Hazardous-materials emergency response*'', ''*Heart attack*'', ''*Injury*'', ''*Injury date*'', ''*Intentional misconduct*'', ''*Law enforcement*'', ''*Line of duty activity or action*'', ''*Occupational disease*'', ''*Posthumous child*'', ''*Public employee*'', ''*Qualified beneficiary*'', ''*Substantial factor*'', and ''*Voluntary intoxication at the time of death or catastrophic injury*''.

b. Add the definitions of ''*Biological*'', ''*Certification*'', ''*Certification described in the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37*'', ''*Commonly accepted*'', ''*Consequences of an injury that permanently prevent an individual from performing any gainful work*'', ''*Direct and proximate cause*'', ''*Emergency response activity*'', ''*Employment in a civilian capacity*'', ''*Official training program of a public safety officer's public agency*'', ''*Prison security activity*'', and ''*Public safety activity*'' in alphabetical order.

### § 32.3 Definitions.

*Act* means the Public Safety Officers' Benefits Act of 1976 (generally codified at 42 U.S.C. 3796, *et seq.*; part L of title I of the Omnibus Crime Control and Safe Streets Act of 1968) (including (uncodified) sections 4 through 6 thereof (payment in advance of appropriations, rule of construction and severability, and effective date and applicability)), as applicable (*cf.* § 32.4(d)) according to its effective date and those of its various amendments (*e.g.*, Sept. 29, 1976 (deaths of State and local law enforcement officers and firefighters); Jan. 1, 1978 (educational assistance (officer died)); Oct. 1, 1984 (deaths of federal law enforcement officers and firefighters); Oct. 18, 1986 (deaths of rescue squad and ambulance crew members); Nov. 29, 1990 (disabilities); Oct. 3, 1996 (educational assistance (officer disabled)); Oct. 30, 2000 (disaster relief workers); Sept. 11, 2001 (chaplains and insurance beneficiaries); Dec. 15, 2003 (certain heart attacks and strokes); and Apr. 5, 2006 (designated beneficiaries)); and also includes Public Law 107–37 and section 611 of the USA PATRIOT Act (both of which relate to payment of benefits, described under subpart 1 of such part L, in connection, respectively, with the terrorist attacks of Sept. 11, 2001, or with such terrorist attacks as may occur after Oct. 26, 2001), as well as the proviso under the Public Safety Officers Benefits heading in title II of division B of section 6 of Public Law 110–161.

* * * * *

*Authorized commuting* means travel (not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or a detour) by a public safety officer—

(1) In the course of actually responding (as authorized) to a fire-, rescue-, or police emergency, or to a particular and extraordinary request (by the public agency he serves) for that specific officer to perform public safety activity (including emergency response activity the agency is authorized to perform), within his line of duty; or

(2) Between home and work (at a situs (for the performance of line of duty activity or action) authorized or required by the public agency he serves), or between any such authorized or required situs and another—

(i) Using a vehicle provided by such agency, pursuant to a requirement or authorization by such agency that he use the same for commuting; or

(ii) Using a vehicle not provided by such agency, pursuant to a requirement by such agency that he use the same for work.

* * * * *

*Biological* means genetic, but does not include circumstances where the genetic donation (under the laws of the jurisdiction where the offspring is conceived) does not (as of the time of such conception) legally confer parental rights and obligations.

* * * * *

*Certification* means a formal assertion of a fact (or facts), in a writing that is—

(1) Expressly intended to be relied upon by the PSOB determining official in connection with the determination of a claim specifically identified therein;

(2) Expressly directed to the PSOB determining official;

(3) Legally subject to the provisions of 18 U.S.C. 1001 (false statements) and 1621 (perjury), and 28 U.S.C. 1746 (declarations under penalty of perjury), and expressly declares the same to be so;

(4) Executed by a natural person with knowledge of the fact (or facts) asserted and with legal authority to execute the writing (such as to make the assertion legally that of the certifying party), and expressly declares the same (as to knowledge and authority) to be so;

(5) In such form as the Director may prescribe from time to time;

(6) True, complete, and accurate (or, at a minimum, not known or believed by the PSOB determining official to contain any material falsehood, incompleteness, or inaccuracy); and

(7) Unambiguous, precise, and unequivocal, in the judgment of the PSOB determining official, as to any fact asserted, any matter otherwise certified, acknowledged, indicated, or declared, and any provision of this definition.

*Certification described in the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37,* means a certification, acknowledging all the matter specified in § 32.5(f)(1) and (2)—

(1) In which the fact (or facts) asserted is the matter specified in § 32.5(f)(3);

(2) That expressly indicates that all of the terms used in making the assertion described in paragraph (1) of this definition (or used in connection with such assertion) are within the meaning of the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37, and of this part; and

(3) That otherwise satisfies the provisions of the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37, and of this part.

* * * * *

*Commonly accepted* means generally agreed upon within the medical profession.

*Consequences of an injury that permanently prevent an individual from performing any gainful work* means an injury whose consequences permanently prevent an individual from performing any gainful work.

* * * * *

*Determination* means the approval or denial of a claim (including an affirmance or reversal pursuant to a motion for reconsideration under § 32.27), the determination described in the Act, at 42 U.S.C. 3796(c), or any recommendation under § 32.54(c)(3).

* * * * *

*Direct and proximate cause*—Except as may be provided in the Act, at 42 U.S.C. 3796(k), something directly and proximately causes a wound, condition, or cardiac-event, if it is a substantial factor in bringing the wound, condition, or cardiac-event about.

* * * * *

*Divorce* means a legally-valid divorce from the bond of wedlock (i.e., the bond of marriage), except that, otherwise, and notwithstanding any other provision of law, a spouse (or purported spouse) of an individual shall be considered to be divorced from that individual within the meaning of this definition if, subsequent to his marriage (or purported marriage) to that individual (and while that individual is living), the spouse (or purported spouse)—

(1) Holds himself out as being divorced from, or not being married to, the individual;

(2) Holds himself out as being married to another individual; or

(3) Was a party to a ceremony purported by the parties thereto to be a marriage between the spouse (or purported spouse) and another individual.

* * * * *

*Eligible payee* means—

(1) An individual (other than the officer) described in the Act, at 42 U.S.C. 3796(a), with respect to a claim under subpart B of this part; or

(2) An individual described in the Act, at 42 U.S.C. 3796(b), with respect to a claim under subpart C of this part.

* * * * *

*Emergency response activity* means response to a fire-, rescue-, or police emergency.

* * * * *

*Employment in a civilian capacity* refers to status as a civilian, rather than to the performance of civilian functions.

* * * * *

*Fire protection* means—

(1) Suppression of fire;

(2) Hazardous-material response; or

(3) Emergency medical services or rescue activity of the kind performed by firefighters.

*Fire-, rescue-, or police emergency* includes disaster-relief emergency.

*Firefighter* means an individual who—

(1) Is trained in—

(i) Suppression of fire; or

(ii) Hazardous-material response; and

(2) Has the legal authority and responsibility to engage in the suppression of fire, as—

(i) An employee of the public agency he serves, which legally recognizes him to have such (or, at a minimum, does not deny (or has not denied) him to have such); or

(ii) An individual otherwise included within the definition provided in the Act, at 42 U.S.C. 3796b(4).

* * * * *

*Hazardous-material response* means emergency response to the threatened or actual release of hazardous materials, where life, property, or the environment is at significant risk.

*Heart attack* means—

(1) A myocardial infarction; or

(2) A cardiac-event (i.e., cessation, interruption, arrest, or other similar disturbance of heart function), not included in paragraph (1) of this definition, that is—

(i) Acute; and

(ii) Directly and proximately caused by a pathology (or pathological condition) of the heart or of the coronary arteries.

* * * * *

*Injury* means a traumatic physical wound (or a traumatized physical condition of the body) directly and proximately caused by external force (such as bullets, explosives, sharp instruments, blunt objects, or physical blows), chemicals, electricity, climatic conditions, infectious disease, radiation, virii, or bacteria, but does not include—

(1) Any occupational disease; or

(2) Any condition of the body caused or occasioned by stress or strain.

*Injury date*—Except with respect to claims under the Act, at 42 U.S.C. 3796(k) (where, for purposes of determining beneficiaries under the Act, at 42 U.S.C. 3796(a), it generally means the time of the heart attack or stroke referred to in the Act, at 42 U.S.C. 3796(k)(2)), injury date means the time of the line of duty injury that—

(1) Directly and proximately results in the public safety officer's death, with respect to a claim under—

(i) Subpart B of this part; or

(ii) Subpart D of this part, by virtue of his death; or

(2) Directly (or directly and proximately) results in the public safety officer's total and permanent disability, with respect to a claim under—

(i) Subpart C of this part; or

(ii) Subpart D of this part, by virtue of his disability.

* * * * *

*Intentional misconduct*—A public safety officer's action or activity is intentional misconduct if—

(1) As of the date it is performed,

(i) Such action or activity—

(A) Is in violation of, or otherwise prohibited by, any statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law; or

(B) Is contrary to the ordinary, usual, or customary practice of similarly-situated officers within the public agency in which he serves; and

(ii) He knows, or reasonably should know, that it is so in violation, prohibited, or contrary; and

(2) Such action or activity—

(i) Is intentional; and

(ii) Is—

(A) Performed without reasonable excuse; and

(B) Objectively unjustified.

* * * * *

*Law enforcement* means enforcement of the criminal laws, including—

(1) Control or reduction of crime or of juvenile delinquency;

(2) Prosecution or adjudication of individuals who are alleged or found to have violated such laws;

(3) Prison security activity; and

(4) Supervision of individuals on parole or probation for having violated such laws.

*Line of duty activity or action*—Activity or an action is performed in the line of duty, in the case of a public safety officer who is—

(1) A law enforcement officer, a firefighter, or a member of a rescue squad or ambulance crew—

(i) Whose primary function (as applicable) is public safety activity, only if, not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour, it is activity or an action that he is obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, to perform (including any social, ceremonial, or athletic functions (or any official training programs of his public agency)

to which he is assigned, or for which he is compensated), under the auspices of the public agency he serves, and such agency (or the relevant government) legally recognizes that activity or action to have been so obligated or authorized at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); or

(ii) Whose primary function is not public safety activity, only if, not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour—

(A) It is activity or an action that he is obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, to perform, under the auspices of the public agency he serves, and such agency (or the relevant government) legally recognizes that activity or action to have been so obligated or authorized at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); and

(B) It is performed (as applicable) in the course of public safety activity (including emergency response activity the agency is authorized to perform), or taking part (as a trainer or trainee) in an official training program of his public agency for such activity, and such agency (or the relevant government) legally recognizes it to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such);

(2) A disaster relief worker, only if, not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour, it is disaster relief activity, and the agency he serves (or the relevant government), being described in the Act, at 42 U.S.C. 3796b(9)(B) or (C), legally recognizes it to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); or

(3) A chaplain, only if, not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour—

(i) It is activity or an action that he is obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, to perform, under the auspices of the public agency he serves, and such agency (or the relevant government) legally recognizes it to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); and

(ii) It is performed in the course of responding to a fire-, rescue-, or police emergency, and such agency (or the relevant government) legally recognizes it to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such).

* * * * *

*Occupational disease* means a disease (including an ailment or condition of the body) that routinely constitutes a special hazard in, or is commonly regarded as a concomitant of, an individual's occupation.

* * * * *

*Official training program of a public safety officer's public agency* means a program—

(1) That is officially sponsored, -conducted, or -authorized by the public agency in which he serves; and

(2) Whose purpose is to train public safety officers of his kind in (or to improve their skills in), specific activity or actions encompassed within their respective lines of duty.

* * * * *

*Posthumous child*—An individual is a posthumous child of a public safety officer only if he is a biological child of the officer, and the officer is—

(1) Alive at the time of his conception; and

(2) Deceased at or before the time of his birth.

*Prison security activity* means correctional or detention activity (in a prison or other detention or confinement facility) of individuals who are alleged or found to have violated the criminal laws.

* * * * *

*Public employee* means—

(1) An employee of a government described in the Act, at 42 U.S.C. 3796b(8), (or of a department or agency thereof) and whose acts and omissions while so employed are legally those of such government, which legally recognizes them as such (or, at a minimum, does not deny (or has not denied) them to be such); or

(2) An employee of an instrumentality of a government described in the Act, at 42 U.S.C. 3796b(8), who is eligible to receive disability benefits (or whose survivors are eligible to receive death benefits) from such government on the same basis as an employee of that government (within the meaning of paragraph (1) of this definition), or his survivors, would.

* * * * *

*Public safety activity* means any of the following:

(1) Law enforcement;

(2) Fire protection;

(3) Rescue activity; or

(4) The provision of emergency medical services.

*Qualified beneficiary*—An individual is a qualified beneficiary under the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37, only if he is an eligible payee—

(1) Who qualifies as a beneficiary pursuant to a final agency determination that—

(i) The requirements of the Act, at 42 U.S.C. 3796(a) or (b) (excluding the limitations relating to appropriations), as applicable, have been met; and

(ii) The provisions of this part, as applicable, relating to payees otherwise have been met; and

(2) Whose actions were not a substantial contributing factor to the death of the public safety officer (with respect to a claim under subpart B of this part).

* * * * *

*Substantial factor*—A factor substantially brings about a death, injury, disability, wound, condition, cardiac-event, heart attack, or stroke if—

(1) The factor alone was sufficient to have caused the death, injury, disability, wound, condition, cardiac-event, heart attack, or stroke; or

(2) No other factor (or combination of factors) contributed to the death, injury, disability, wound, condition, cardiac-event, heart attack, or stroke to so great a degree as it did.

* * * * *

*Voluntary intoxication at the time of death or catastrophic injury* means the following, as shown by any commonly-accepted tissue, -fluid, or -breath test or by other competent evidence:

(1) With respect to alcohol, (i) In any claim arising from a public safety officer's death in which the death was simultaneous (or practically simultaneous) with the injury, it means intoxication as defined in the Act, at 42 U.S.C. 3796b(5), unless convincing evidence demonstrates that the officer did not introduce the alcohol into his body intentionally; and

(ii) In any claim not described in paragraph (1)(i) of this definition, unless convincing evidence demonstrates that the officer did not introduce the alcohol into his body intentionally, it means intoxication—

(A) As defined in the Act, at 42 U.S.C. 3796b(5), *mutatis mutandis* (i.e., with ''post-mortem'' (each place it occurs) and ''death'' being substituted, respectively, by ''post-injury'' and ''injury''); and

(B) As of the injury date; and

(2) With respect to drugs or other substances, it means intoxication as defined in the Act, at 42 U.S.C. 3796b(5), as evidenced by the presence (as of the injury date) in the body of the public safety officer—

(i) Of any controlled substance included on Schedule I of the drug

control and enforcement laws (*see* 21 U.S.C. 812(a)), or any controlled substance included on Schedule II, III, IV, or V of such laws (*see* 21 U.S.C. 812(a)) and with respect to which there is no therapeutic range or maximum recommended dosage, unless convincing evidence demonstrates that such introduction was not a culpable act of the officer's under the criminal laws; or

(ii) Of any controlled substance included on Schedule II, III, IV, or V of the drug control and enforcement laws (*see* 21 U.S.C. 812(a)) and with respect to which there is a therapeutic range or maximum recommended dosage—

(A) At levels above or in excess of such range or dosage, unless convincing evidence demonstrates that such introduction was not a culpable act of the officer's under the criminal laws; or

(B) At levels at, below, or within such range or dosage, unless convincing evidence demonstrates that—

(*1*) Such introduction was not a culpable act of the officer's under the criminal laws; or

(*2*) The officer was not acting in an intoxicated manner immediately prior to the injury date.

■ 4. Revise § 32.4 to read as follows:

**§ 32.4 Terms; construction, severability; effect.**

(a) In determining the meaning of any provision of this part, unless the context should indicate otherwise, the first three provisions of 1 U.S.C. 1 (rules of construction) shall apply.

(b) If benefits are denied to any individual pursuant to the Act, at 42 U.S.C. 3796a(4), or otherwise because his actions were a substantial contributing factor to the death of the public safety officer, such individual shall be presumed irrebuttably, for all purposes, not to have survived the officer.

(c) Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

(d) Unless the same should expressly provide otherwise (e.g., by use of the word ''hereafter'' in an appropriations proviso), any amendment to the Act (or any statutory enactment otherwise directly referent or -applicable to the program that is the subject of this part), shall apply only with respect to injuries (or, in connection with claims under the Act, at 42 U.S.C. 3796(k), shall apply only with respect to heart attacks or strokes referred to in the Act, at 42 U.S.C. 3796(k)(2)) occurring on or after the date it takes effect.

■ 5. Revise § 32.5 to read as follows:

**§ 32.5 Evidence.**

(a) Except as otherwise may be expressly provided in the Act or this part, a claimant has the burden of persuasion as to all material issues of fact, and by the standard of proof of ''more likely than not.''

(b) Except as otherwise may be expressly provided in this part, the PSOB determining official may, at his discretion, consider (but shall not be bound by) the factual findings of a public agency.

(c) Rules 301 (presumptions), 401 (relevant evidence), 402 (admissibility), 602 to 604 (witnesses), 701 to 704 (testimony), 901 to 903 (authentication), and 1001 to 1007 (contents of writings, records, and photographs) of the Federal Rules of Evidence shall apply, *mutatis mutandis,* to all filings, hearings, and other proceedings or matters. No extrinsic evidence of authenticity as a condition precedent to admissibility shall be required with respect to any document purporting to bear the signature of an expert engaged by the BJA.

(d) In determining a claim, the PSOB determining official may, at his discretion, draw an adverse inference if, without reasonable justification or excuse—

(1) A claimant fails or refuses to file with the PSOB Office—

(i) Such material- or relevant evidence or -information within his possession, control, or ken as may reasonably be requested from time to time by such official; or

(ii) Such authorizations or waivers as may reasonably be requested from time to time by such official to enable him (or to assist in enabling him) to obtain access to material- or relevant evidence or -information of a medical, personnel, financial, or other confidential nature;

(2) A claimant under subpart C of this part fails or refuses to appear in person—

(i) At his hearing under subpart E of this part (if there be such a hearing); or

(ii) Before such official (or otherwise permit such official personally to observe his condition), at a time and location reasonably convenient to both, as may reasonably be requested by such official; or

(3) A claimant under subpart B or C of this part fails or refuses to apply for (or to pursue to completion), in timely fashion, the benefits, if any, described in § 32.15(a)(1)(i) or § 32.25(a)(1)(i), respectively.

(e) In determining a claim, the PSOB determining official may, at his discretion, draw an inference of voluntary intoxication at the time of death or catastrophic injury if, without reasonable justification or excuse, appropriate toxicologic analysis (including autopsy, in the event of death) is not performed, and/or the results thereof are not filed with the PSOB Office, where there is credible evidence suggesting that intoxication may have been a factor in the death or injury, or that the public safety officer—

(1) As of or near the injury date, was—

(i) A consumer of alcohol—

(A) In amounts likely to produce a blood-alcohol level of .10 per centum or greater in individuals similar to the officer in weight and sex; or

(B) In any amount, after ever having been treated at an inpatient facility for alcoholism;

(ii) A consumer of controlled substances included on Schedule I of the drug control and enforcement laws (*see* 21 U.S.C. 812(a)); or

(iii) An abuser of controlled substances included on Schedule II, III, IV, or V of the drug control and enforcement laws (see 21 U.S.C. 812(a)); or

(2) Immediately prior to the injury date, was under the influence of alcohol or drugs or other substances or otherwise acting in an intoxicated manner.

(f) In determining a claim under the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37, the certification described therein shall constitute *prima facie* evidence—

(1) Of the public agency's acknowledgment that the public safety officer, as of the injury date, was—

(i) A public safety officer of the kind described in the certification;

(ii) Employed by the agency (i.e., performing official functions for, or on behalf of, the agency); and

(iii) One of the following:

(A) With respect to a law enforcement officer, an officer of the agency;

(B) With respect to a firefighter,

(*1*) An officially recognized or designated member of the agency (if it is a legally organized volunteer fire department); or

(*2*) An employee of the agency;

(C) With respect to a chaplain,

(*1*) An officially recognized or designated member of the agency (if it is a legally organized police or volunteer fire department); or

(*2*) An officially recognized or designated public employee of the agency (if it is a legally organized police or fire department);

(D) With respect to a member of a rescue squad or ambulance crew, an officially recognized or designated public employee member of one of the agency's rescue squads or ambulance crews; or

(E) With respect to a disaster relief worker, an employee of the agency (if it is described in the Act, at 42 U.S.C. 3796b(9)(B) or (C));

(2) Of the public agency's acknowledgment that there are no eligible payees other than those identified in the certification; and

(3) That the public safety officer—

(i) Sustained a line of duty injury in connection with public safety activity (or, otherwise, with efforts described in the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37) related to a terrorist attack (under the former statute) or to the terrorist attacks of September 11, 2001 (under the latter statute); and

(ii) As a direct and proximate result of such injury, was (as applicable)—

(A) Killed (with respect to a claim under subpart B of this part); or

(B) Totally and permanently disabled (with respect to a claim under subpart C of this part).

(g) In determining a claim, the PSOB determining official shall have, in addition to the hearing-examiner powers specified at 42 U.S.C. 3787 (hearings, subpoenas, oaths, witnesses, evidence), and to the authorities specified at 42 U.S.C. 3788(b)–(d) (experts, consultants, government resources) and in the Act and this part, the authority otherwise and in any reasonable manner to conduct his own inquiries, as appropriate.

(h) Acceptance of payment (by a payee (or on his behalf)) shall constitute *prima facie* evidence that the payee (or the pay agent)—

(1) Endorses as his own (to the best of his knowledge and belief) the statements and representations made, and the evidence and information provided, pursuant to the claim; and

(2) Is aware (in connection with the claim) of no—

(i) Fraud;

(ii) Concealment or withholding of evidence or information;

(iii) False, incomplete, or inaccurate statements or representations;

(iv) Mistake, wrongdoing, or deception; or

(v) Violation of 18 U.S.C. 287 (false, fictitious, or fraudulent claims), 1001 (false statements), or 1621 (perjury), or 42 U.S.C. 3795a (falsification or concealment of facts).

(i) A public safety officer's response to an emergency call from his public agency for him to perform public safety activity (including emergency response activity the agency is authorized to perform) shall constitute prima facie evidence of such response's non-routine character.

■ 6. Revise § 32.6 to read as follows:

**§ 32.6 Payment and repayment.**

(a) No payment shall be made to (or on behalf of) more than one individual, on the basis of being a particular public safety officer's spouse. If more than one should qualify, payment shall be made to the one with whom the officer considered himself, as of the injury date, to have the closest relationship, except that the individual (if any) who was a member of the officer's household (as of such date) shall be presumed rebuttably to be such one, unless legal proceedings (by the officer against such member, or vice versa) shall have been pending then in any court.

(b) No payment shall be made, save—

(1) To (or on behalf of) a living beneficiary; and

(2) Pursuant to—

(i) A written claim filed by (or on behalf of) such beneficiary; and

(ii) Except as provided in the Act, at 42 U.S.C. 3796(c), approval of such claim.

(c) Any amounts that would be paid but for the provisions of paragraph (b) of this section shall be retained by the United States and not paid.

(d) With respect to the amount paid to a payee (or on his behalf) pursuant to a claim, the payee shall repay the following, unless, for good cause shown, the Director grants a full or partial waiver pursuant to the Act, at 42 U.S.C. 3796(m):

(1) The entire amount, if approval of the claim was based, in whole or in material part, on the payee's (or any other person's or entity's) fraud, concealment or withholding of evidence or information, false, incomplete, or inaccurate statements or representations, mistake, wrongdoing, or deception; or

(2) The entire amount subject to divestment, if the payee's entitlement to such payment is divested, in whole or in part, such as by the subsequent discovery of individuals entitled to make equal or superior claims.

(e) At the discretion of the Director, repayment of amounts owing or collectable under the Act or this part may, as applicable, be executed through setoffs against future payments on financial claims under subpart D of this part.

■ 7. Revise § 32.12 to read as follows:

**§ 32.12 Time for filing claim.**

(a) Unless, for good cause shown, the Director extends the time for filing, no claim shall be considered if it is filed with the PSOB Office after the later of—

(1) Three years after the public safety officer's death; or

(2) One year after—

(i) A final determination of entitlement to receive, or of denial of, the benefits, if any, described in § 32.15(a)(1)(i); or

(ii) The receipt of the certification described in § 32.15(a)(1)(ii).

(b) A claimant may file with his claim such supporting documentary, electronic, video, or other nonphysical evidence and legal arguments as he may wish to provide.

■ 8. Amend § 32.13 as follows:

a. Remove the definitions of ''*Circumstances other than engagement or participation*'', ''*Commonly accepted*'', and ''*Engagement in a situation*''.

b. Revise the definitions of ''B*eneficiary of a life insurance policy of a public safety officer*'', ''*Beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A)*'', ''*Competent medical evidence to the contrary*'', ''*Most recently executed life insurance policy of a public safety officer*'', ''*Nonroutine strenuous physical activity*'', ''*Nonroutine stressful physical activity*'', ''*Participation in a training exercise*'', ''*Public safety agency, organization, or unit*'', and ''*Risky behavior*''.

c. Add the definitions of ''*Designation on file*'', ''*Extrinsic circumstances*'', ''*Engagement in a situation involving law enforcement, fire suppression, rescue, hazardous material response, emergency medical services, prison security, disaster relief, or other emergency response activity*'', ''*Life insurance policy on file*'', and ''*Routine*'' in alphabetical order.

**§ 32.13 Definitions.**

* * * * *

*Beneficiary of a life insurance policy of a public safety officer*—An individual (living or deceased on the date of death of the public safety officer) is designated as beneficiary of a life insurance policy of such officer as of such date, only if the designation is, as of such date, legal and valid (as a designation of beneficiary of a life insurance policy) and unrevoked (by such officer or by operation of law) or otherwise unterminated, except that—

(1) Any designation of an individual (including any designation of the biological or adoptive offspring of such individual) made in contemplation of such individual's marriage (or purported marriage) to such officer shall

be considered to be revoked by such officer as of such date of death if the marriage (or purported marriage) did not take place, unless preponderant evidence demonstrates that—

(i) It did not take place for reasons other than personal differences between the officer and the individual; or

(ii) No such revocation was intended by the officer; and

(2) Any designation of a spouse (or purported spouse) made in contemplation of or during such spouse's (or purported spouse's) marriage (or purported marriage) to such officer (including any designation of the biological or adoptive offspring of such spouse (or purported spouse)) shall be considered to be revoked by such officer as of such date of death if the spouse (or purported spouse) is divorced from such officer after the date of designation and before such date of death, unless preponderant evidence demonstrates that no such revocation was intended by the officer.

*Beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A)*—An individual (living or deceased on the date of death of the public safety officer) is designated, by such officer (and as of such date), as beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A), only if the designation is, as of such date, legal and valid and unrevoked (by such officer or by operation of law) or otherwise unterminated, except that—

(1) Any designation of an individual (including any designation of the biological or adoptive offspring of such individual) made in contemplation of such individual's marriage (or purported marriage) to such officer shall be considered to be revoked by such officer as of such date of death if the marriage (or purported marriage) did not take place, unless preponderant evidence demonstrates that—

(i) It did not take place for reasons other than personal differences between the officer and the individual; or

(ii) No such revocation was intended by the officer; and

(2) Any designation of a spouse (or purported spouse) made in contemplation of or during such spouse's (or purported spouse's) marriage (or purported marriage) to such officer (including any designation of the biological or adoptive offspring of such spouse (or purported spouse)) shall be considered to be revoked by such officer as of such date of death if the spouse (or purported spouse) is divorced from such officer subsequent to the date of designation and before such date of death, unless preponderant evidence demonstrates that no such revocation was intended by the officer.

* * * * *

*Competent medical evidence to the contrary*—The presumption raised by the Act, at 42 U.S.C. 3796(k), is overcome by competent medical evidence to the contrary, when evidence indicates to a degree of medical probability that extrinsic circumstances, considered in combination (as one circumstance) or alone, were a substantial factor in bringing the heart attack or stroke about.

*Designation on file*—A designation of beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A), is on file with a public safety agency, -organization, or -unit, only if it is deposited with the same by the public safety officer making the designation, for it to maintain with its personnel or similar records pertaining to him.

* * * * *

*Engagement in a situation involving law enforcement, fire suppression, rescue, hazardous material response, emergency medical services, prison security, disaster relief, or other emergency response activity*—A public safety officer is so engaged only when, within his line of duty—

(1) He is in the course of actually—

(i) Engaging in law enforcement;

(ii) Suppressing fire;

(iii) Responding to a hazardous-material emergency;

(iv) Performing rescue activity;

(v) Providing emergency medical services;

(vi) Performing disaster relief activity; or

(vii) Otherwise engaging in emergency response activity; and

(2) The public agency he serves (or the relevant government) legally recognizes him to have been in such course at the time of such engagement (or, at a minimum, does not deny (or has not denied) him so to have been).

* * * * *

*Extrinsic circumstances* means—

(1) An event or events; or

(2) An intentional risky behavior or intentional risky behaviors.

*Life insurance policy on file*—A life insurance policy is on file with a public safety agency, -organization, or -unit, only if—

(1) It is issued through (or on behalf of) the same; or

(2) The original (or a copy) of one of the following is deposited with the same by the public safety officer whose life is insured under the policy, for it to maintain with its personnel or similar records pertaining to him:

(i) The policy (itself);

(ii) The declarations page or -statement from the policy's issuer;

(iii) A certificate of insurance (for group policies);

(iv) Any instrument whose execution constitutes the execution of a life insurance policy; or

(v) The substantial equivalent of any of the foregoing.

* * * * *

*Most recently executed life insurance policy of a public safety officer* means the most recently executed policy insuring the life of a public safety officer that, being legal and valid (as a life insurance policy) upon its execution, as of the date of death of such officer—

(1) Designates a beneficiary; and

(2) Remains legally unrevoked (by such officer or by operation of law) or otherwise unterminated.

*Nonroutine strenuous physical activity* means line of duty activity that—

(1) Is not excluded by the Act, at 42 U.S.C. 3796(l);

(2) Is not performed as a matter of routine; and

(3) Entails an unusually-high level of physical exertion.

* * * * *

*Nonroutine stressful physical activity* means line of duty activity that—

(1) Is not excluded by the Act, at 42 U.S.C. 3796(l);

(2) Is not performed as a matter of routine;

(3) Entails non-negligible physical exertion; and

(4) Occurs—

(i) With respect to a situation in which a public safety officer is engaged, under circumstances that objectively and reasonably—

(A) Pose (or appear to pose) significant dangers, threats, or hazards (or reasonably-foreseeable risks thereof), not faced by similarly-situated members of the public in the ordinary course; and

(B) Provoke, cause, or occasion an unusually-high level of alarm, fear, or anxiety; or

(ii) With respect to a training exercise in which a public safety officer participates, under circumstances that objectively and reasonably—

(A) Simulate in realistic fashion situations that pose significant dangers, threats, or hazards; and

(B) Provoke, cause, or occasion an unusually-high level of alarm, fear, or anxiety.

* * * * *

*Participation in a training exercise*—A public safety officer participates (as a trainer or trainee) in a training exercise only when actually taking formal part in a structured activity that itself is—

(1) Within an official training (or -fitness) program of his public agency; and

(2) Mandatory, rated (i.e., officially tested, -graded, -judged, -timed, etc.), or directly supervised, -proctored, or -monitored.

Public safety agency, -organization, or -unit means a department or agency (or component thereof)—

(1) In which a public safety officer serves in an official capacity, with or without compensation, as such an officer (of any kind but disaster relief worker); or

(2) Of which a public safety officer is an employee, performing official duties as described in the Act, at 42 U.S.C. 3796b(9)(B) or (C), as a disaster relief worker.

*Risky behavior* means—

(1) Failure (without reasonable justification or excuse) to undertake treatment—

(i) Of any commonly-accepted cardiovascular-disease risk factor associated with clinical values, where such risk factor is—

(A) Known (or should be known) to be present; and

(B) Present to a degree that substantially exceeds the minimum value commonly accepted as indicating high risk;

(ii) Of any disease or condition commonly accepted to be associated with substantially increased risk of cardiovascular disease, where such associated disease or condition is known (or should be known) to be present; or

(iii) Where a biological parent, -sibling, or -first-generation offspring, is known to have (or have a history of) cardiovascular disease;

(2) Smoking an average of more than one-half of a pack of cigarettes (or its equivalent) per day;

(3) Excessive consumption of alcohol;

(4) Consumption of controlled substances included on Schedule I of the drug control and enforcement laws (*see* 21 U.S.C. 812(a)), where such consumption is commonly accepted to be associated with increased risk of cardiovascular disease;

(5) Abuse of controlled substances included on Schedule II, III, IV, or V of the drug control and enforcement laws (*see* 21 U.S.C. 812(a)), where such abuse is commonly accepted to be associated with increased risk of cardiovascular disease; or

(6) Any activity or action, specified in the Act, at 42 U.S.C. 3796a(1), (2), or (3), that is commonly accepted to be associated with substantially increased risk of cardiovascular disease.

*Routine*—Neither of the following shall be dispositive in determining whether an activity or action shall be understood to have been performed as a matter of routine:

(1) Being generally described by the public agency as routine or ordinary; or

(2) The frequency with which it may be performed.

* * * * *

■ 9. Revise § 32.14 to read as follows:

**§ 32.14 PSOB Office determination.**

(a) Upon its approving or denying a claim, the PSOB Office shall serve notice of the same upon the claimant (and upon any other claimant who may have filed a claim with respect to the same public safety officer). In the event of a denial, such notice shall—

(1) Specify the factual findings and legal conclusions that support it; and

(2) Provide information as to requesting a Hearing Officer determination.

(b) Upon a claimant's failure (without reasonable justification or excuse) to pursue in timely fashion the determination, by the PSOB Office, of his filed claim, the Director may, at his discretion, deem the same to be abandoned. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

(c) In connection with its determination (pursuant to a filed claim) of the existence of competent medical evidence to the contrary, the PSOB Office shall serve the claimant with notice (indicating that he may file such documentary, electronic, video, or other non-physical evidence (such as medical-history records, as appropriate) and legal arguments in support of his claim as he may wish to provide), where there is evidence before it that affirmatively suggests that—

(1) The public safety officer actually knew or should have known that he had cardio-vascular disease risk factors and appears to have worsened or aggravated the same through his own intentional and risky behavior (as opposed to where the evidence affirmatively suggests merely that cardio-vascular disease risk factors were present); or

(2) It is more likely than not that a public safety officer's heart attack or stroke was imminent.

■ 10. Revise § 32.15 to read as follows:

**§ 32.15 Prerequisite certification.**

(a) Except as provided in the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37, and unless, for good cause shown, the Director grants a waiver, no claim shall be approved unless the following (which shall be necessary, but not sufficient, for such approval) are filed with the PSOB Office:

(1) Subject to paragraphs (b) and (d) of this section, a certification from the public agency in which the public safety officer served (as of the injury date) that he died as a direct and proximate result of a line of duty injury, and either—

(i) That his survivors (listed by name, address, relationship to him, and amount received) have received (or legally are entitled to receive) the maximum death benefits legally payable by the agency with respect to deaths of public safety officers of his kind, rank, and tenure; or

(ii) Subject to paragraph (c) of this section, that the agency is not legally authorized to pay—

(A) Any benefits described in paragraph (a)(1)(i) of this section, to any person; or

(B) Any benefits described in paragraph (a)(1)(i) of this section, to public safety officers of the kind, rank, and tenure described in such paragraph;

(2) A copy of any findings or rulings made by any public agency that relate to the officer's death; and

(3) A certification from the claimant listing every individual known to him who is or might be the officer's child, spouse, or parent.

(b) The provisions of paragraphs (a)(1) and (d) of this section shall also apply with respect to every public agency that legally is authorized to pay death benefits with respect to the agency described in that paragraph.

(c) No certification described in paragraph (a)(1)(ii) of this section shall be deemed complete for purposes of this section unless it—

(1) Lists every public agency (other than BJA) that legally is authorized to pay death benefits with respect to the certifying agency; or

(2) States that no public agency (other than BJA) legally is authorized to pay death benefits with respect to the certifying agency.

(d) Subject to paragraphs (b) and (c) of this section, if the Director finds that the conditions specified in the Act, at 42 U.S.C. 3796(k), are satisfied with respect to a particular public safety officer's death, and that no circumstance specified in the Act, at 42 U.S.C. 3796a(1), (2), or (3), applies with respect thereto—

(1) The certification as to death, described in paragraph (a)(1) of this section, shall not be required; and

(2) The certification as to benefits, described in paragraph (a)(1)(ii) of this section, shall be deemed complete for purposes of this section if it—

(i) Describes the public agency's understanding of the circumstances

(including such causes of which it may be aware) of the officer's death; and

(ii) States that, in connection with deaths occurring under the circumstances described in paragraph (d)(2)(i) of this section, the public agency is not legally authorized to pay any benefits described in paragraph (a)(1)(i) of this section.

■ 11. Revise § 32.16 to read as follows:

**§ 32.16 Payment.**

(a) No payment shall be made to (or on behalf of) more than one individual, on the basis of being a public safety officer's parent as his mother, or on that basis as his father. If more than one parent qualifies as the officer's mother, or as his father, payment shall be made to the one with whom the officer considered himself, as of the injury date, to have the closest relationship, except that any biological or legally adoptive parent whose parental rights have not been terminated as of the injury date shall be presumed rebuttably to be such one.

(b) Any amount payable with respect to a minor or incompetent shall be paid to his legal guardian, to be expended solely for the benefit of such minor or incompetent.

(c) If more than one individual should qualify for payment—

(1) Under the Act, at 42 U.S.C. 3796(a)(4)(i), payment shall be made to each of them in equal shares, except that, if the designation itself should manifest a different distribution, payment shall be made to each of them in shares in accordance with such distribution; or

(2) Under the Act, at 42 U.S.C. 3796(a)(4)(ii), payment shall be made to each of them in equal shares.

■ 12. Revise § 32.22 to read as follows:

**§ 32.22 Time for filing claim.**

(a) Unless, for good cause shown, the Director extends the time for filing, no claim shall be considered if it is filed with the PSOB Office after the later of—

(1) Three years after the injury date; or

(2) One year after—

(i) A final determination of entitlement to receive, or of denial of, the benefits, if any, described in § 32.25(a)(1)(i); or

(ii) The receipt of the certification described in § 32.25(a)(1)(ii).

(b) A claimant may file with his claim such supporting documentary, electronic, video, or other nonphysical evidence and legal arguments as he may wish to provide.

■ 13. Revise § 32.29 to read as follows:

**§ 32.29 Request for Hearing Officer determination.**

(a) In order to exhaust his administrative remedies, a claimant seeking relief from the denial of his claim shall request a Hearing Officer determination under subpart E of this part—

(1) Of—

(i) His entire claim, if he has not moved for reconsideration of a negative disability finding under § 32.27; or

(ii) Consistent with § 32.42(c), the grounds (if any) of the denial that are not the subject of such motion, if he has moved for reconsideration of a negative disability finding under § 32.27; and

(2) Of a negative disability finding that is affirmed pursuant to his motion for reconsideration under § 32.27.

(b) Consistent with § 32.8, the following shall constitute the final agency determination:

(1) Any denial not described in § 32.27 that is not the subject of a request for a Hearing Officer determination under paragraph (a)(1)(i) of this section;

(2) Any denial described in § 32.27 that is not the subject of a request for a Hearing Officer determination under paragraph (a)(1)(ii) of this section, unless the negative disability finding is the subject of a motion for reconsideration; and

(3) Any affirmance that is not the subject of a request for a Hearing Officer determination under paragraph (a)(2) of this section.

■ 14. Revise § 32.32 to read as follows:

**§ 32.32 Time for filing claim.**

(a) Subject to the Act, at 42 U.S.C. 3796d–1(c), and to paragraph (b) of this section, a claim may be filed with the PSOB Office at any time after the injury date.

(b) Unless, for good cause shown, the Director grants a waiver, no financial claim may be filed with the PSOB Office, with respect to a grading period that commences more than six months after the date of filing.

(c) A claimant may file with his claim such supporting documentary, electronic, video, or other nonphysical evidence and legal arguments as he may wish to provide.

■ 15. Revise § 32.41 to read as follows:

**§ 32.41 Scope of subpart.**

Consistent with § 32.1, this subpart contains provisions applicable to requests for Hearing Officer determination of claims denied under subpart B, C (including affirmances of negative disability findings described in § 32.27), or D of this part, and of claims remanded (or matters referred) under § 32.54(c).

■ 16. Revise § 32.42 to read as follows:

**§ 32.42 Time for filing request for determination.**

(a) Subject to paragraph (c) of this section, and unless, for good cause shown, the Director extends the time for filing, no claim shall be determined if the request therefor is filed with the PSOB Office later than thirty-three days after the service of notice of—

(1) The denial (under subpart B, C (except as may be provided in paragraph (a)(2) of this section), or D of this part) of a claim; or

(2) The affirmance (under subpart C of this part) of a negative disability finding described in § 32.27.

(b) A claimant may file with his request for a Hearing Officer determination such supporting documentary, electronic, video, or other non-physical evidence and legal arguments as he may wish to provide.

(c) The timely filing of a motion for reconsideration under § 32.28(a) shall be deemed to constitute a timely filing, under paragraph (a) of this section, of a request for determination with respect to any grounds described in § 32.29(a)(1)(ii) that may be applicable.

■ 17. Revise § 32.43 to read as follows:

**§ 32.43 Appointment and assignment of Hearing Officers.**

(a) Pursuant to 42 U.S.C. 3787 (employment and authority of hearing officers), Hearing Officers may be appointed from time to time by the Director, to remain on the roster of such Officers at his pleasure.

(b) Upon the filing of a request for a Hearing Officer determination (or upon remand or referral), the PSOB Office shall assign the claim to a Hearing Officer on the roster; the PSOB Office may assign a particular claim to a specific Hearing Officer if it judges, in its discretion, that his experience or expertise suit him especially for it.

(c) Upon its making the assignment described in paragraph (b) of this section, the PSOB Office shall serve notice of the same upon the claimant, with an indication that any evidence or legal argument he wishes to provide is to be filed simultaneously with the PSOB Office and the Hearing Officer.

(d) With respect to an assignment described in paragraph (b) of this section, the Hearing Officer's consideration shall be—

(1) *De novo* (unless the Director should expressly prescribe otherwise, with respect to a particular remand or referral), rather than in review of the findings, determinations, affirmances,

reversals, assignments, authorizations, decisions, judgments, rulings, or other actions of the PSOB Office; and

(2) Consistent with subpart B, C, or D of this part, as applicable.

(e) OJP's General Counsel shall provide advice to the Hearing Officer as to all questions of law relating to any matter assigned pursuant to paragraph (b) of this section.

■ 18. Revise § 32.45 to read as follows:

**§ 32.45 Hearings.**

(a) Except with respect to a remand or referral, at the election of a claimant under subpart B or C of this part, the Hearing Officer shall hold a hearing, at a location agreeable to the claimant and the Officer (or, otherwise, at a location ruled by the Hearing Officer to be suitable), for the sole purposes of obtaining, consistent with § 32.5(c),

(1) Evidence from the claimant and his fact or expert witnesses; and

(2) Such other evidence as the Hearing Officer, at his discretion, may rule to be necessary or useful.

(b) Unless, for good cause shown, the Director extends the time for filing, no election under paragraph (a) of this section shall be honored if it is filed with the PSOB Office later than ninety days after service of the notice described in § 32.43(c).

(c) Not less than seven days prior to any hearing, the claimant shall file simultaneously with the PSOB Office and the Hearing Officer a list of all expected fact or expert witnesses and a brief summary of the evidence each witness is expected to provide.

(d) At any hearing, the Hearing Officer—

(1) May exclude any evidence whose probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and

(2) Shall exclude witnesses (other than the claimant, or any person whose presence is shown by the claimant to be essential to the presentation of his claim), so that they cannot hear the testimony of other witnesses.

(e) Each hearing shall be recorded, and the original of the complete record or transcript thereof shall be made a part of the claim file.

(f) Unless, for good cause shown, the Director grants a waiver, a claimant's failure to appear at a hearing (in person or through a representative) shall constitute a withdrawal of his election under paragraph (a) of this section.

(g) Upon a claimant's failure to pursue in timely fashion his filed election under paragraph (a) of this section, the Director may, at his discretion, deem the same to be abandoned. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

■ 19. Revise § 32.52 to read as follows:

**§ 32.52 Time for filing Director appeal.**

(a) Unless, for good cause shown, the Director extends the time for filing, no Director appeal shall be considered if it is filed with the PSOB Office later than thirty-three days after the service of notice of the denial (under subpart E of this part) of a claim.

(b) A claimant may file with his Director appeal such supporting documentary, electronic, video, or other nonphysical evidence and legal arguments as he may wish to provide.

■ 20. Revise § 32.54 to read as follows:

**§ 32.54 Director determination.**

(a) Upon the Director's approving or denying a claim, the PSOB Office shall serve notice of the same simultaneously upon the claimant (and upon any other claimant who may have filed a claim with respect to the same public safety officer), and upon any Hearing Officer who made a determination with respect to the claim. In the event of a denial, such notice shall—

(1) Specify the factual findings and legal conclusions that support it; and

(2) Provide information as to judicial appeals (for the claimant or claimants).

(b) Upon a claimant's failure (without reasonable justification or excuse) to pursue in timely fashion the determination of his claim pursuant to his filed Director appeal, the Director may, at his discretion, deem the same to be abandoned, as though never filed. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

(c) With respect to any claim before him, the Director, as appropriate, may—

(1) Remand the same to the PSOB Office, or to a Hearing Officer;

(2) Vacate any related determination under this part; or

(3) Refer any related matters to a Hearing Officer (as a special master), to recommend factual findings and dispositions in connection therewith.

■ 21. Revise § 32.55 to read as follows:

**§ 32.55 Judicial appeal.**

(a) Consistent with § 32.8, any approval or denial described in § 32.54(a) shall constitute the final agency determination.

(b) A claimant seeking relief from the denial of his claim may appeal judicially pursuant to the Act, at 42 U.S.C. 3796c–2.

Dated: December 10, 2008.

**Jeffrey L. Sedgwick,**

*Assistant Attorney General.*

[FR Doc. E8–29703 Filed 12–16–08; 8:45 am]

BILLING CODE 4410–18–P

## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 165

**[Docket No. USCG–2008–1001]**

**RIN 1625–AA87**

## Security Zone; Potomac and Anacostia Rivers, Washington, DC, Arlington and Fairfax Counties, VA, and Prince George's County, MD

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary security zone encompassing certain waters of the Potomac and Anacostia Rivers. This action is necessary to ensure the security of persons and property, and to prevent terrorist acts or incidents before, during, and after scheduled activities associated with the 2009 U.S. Presidential Inauguration. This rule prohibits vessels and persons from entering the security zone and requires vessels and persons in the security zone to depart the security zone during the effective time frame, and to immediately depart the security zone when requested to do so by government authorities.

**DATES:** This rule is effective from 4 a.m. on January 14, 2009, through 10 p.m. on January 25, 2009.

**ADDRESSES:** Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2008–1001 and are available online by going to *http://www.regulations.gov*, selecting the Advanced Docket Search option on the right side of the screen, inserting USCG–2008–1001 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. This material is also available for inspection or copying at two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays and the Commander, U.S. Coast Guard Sector Baltimore, 2401 Hawkins Point Road,

Baltimore, Maryland 21226–1791, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this temporary rule, call Ronald L. Houck, Waterways Management Division, at 410–576–2674 or 2693. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

**SUPPLEMENTARY INFORMATION:**

## Regulatory Information

On October 27, 2008, we published a notice of proposed rulemaking (NPRM) entitled ''Security Zone; Potomac and Anacostia Rivers, Washington, DC, Arlington and Fairfax Counties, VA, and Prince George's County, MD'' in the **Federal Register** (73 FR 63663). We received one letter commenting on the proposed rule. No public meeting was requested, and none was held.

## Background and Purpose

The Coast Guard has determined that the Coast Guard Captain of the Port must have the means to be aware of, deter, detect, intercept, and respond to asymmetric threats, acts of aggression, and attacks by terrorists on the American homeland while still maintaining our freedoms and sustaining the flow of commerce. This proposed security zone is part of a comprehensive port security regime designed to safeguard human life, vessels, and waterfront facilities against sabotage or terrorist attacks.

The Captain of the Port Baltimore is proposing to establish a security zone to address the aforementioned security concerns and to take steps to prevent the catastrophic impact that a terrorist attack against the large gatherings of high-ranking United States officials, the public at large, and surrounding waterfront areas and communities would have. The proposed security zone is necessary to safeguard life and property on the navigable waters before, during, and after scheduled activities associated with the 2009 U.S. Presidential Inauguration and will help the Coast Guard prevent vessels or persons from bypassing the security measures established on shore for the events and engaging in waterborne terrorist actions during the highly-publicized events.

## Discussion of Comments and Changes

The Coast Guard received one comment in response to the NPRM. No public meeting was requested and none was held. What follows is a review of, and the Coast Guard's response to, the issues that were presented by the commenter concerning the proposed regulations.

The commenter, who was anonymous, stated that although they agree a secure perimeter is needed for the U.S. Presidential Inauguration, they do not agree that certain details of the security zone, such as the enforcement period and boundaries, should be provided to the general public beforehand. The commentor believes such information could be used by an adversary to devise a plan to circumvent the government's security efforts.

The Administrative Procedures Act directs Federal agencies to ensure that adequate notice is provided to the public concerning actions that the Federal Government is considering for implementation. In addition, we do not feel that issuing the proposed rule adversely affects the patrol and enforcement of the security zone.

## Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

## Regulatory Planning and Review

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. There is no vessel traffic associated with recreational boating and commercial fishing during the effective period, and vessels may seek permission from the Captain of the Port Baltimore to enter and transit the zone.

## Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule would affect the following entities, some of which might be small entities: The owners or operators of vessels intending to operate or transit on (1) all waters of the Potomac River, from shoreline to shoreline, bounded on the north by the Francis Scott Key (U.S. Route 29) Bridge, downstream to and bounded on the south from a position at latitude 38°46′42″ N, longitude 077°02′55″ W on the Virginia shoreline to a position at latitude 38°46′42″ N, longitude 077°01′33″ W on the Maryland shoreline, including the waters of the Georgetown Channel Tidal Basin; and (2) all waters of the Anacostia River, from shoreline to shoreline, bounded on the north by the New York Avenue (U.S. Route 50) Bridge, downstream to and bounded on the south by its confluence with the Potomac River. This security zone would not have a significant economic impact on a substantial number of small entities because vessels with compelling interests that outweigh the port's security needs may be granted waivers from the requirements of the security zone.

## Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). 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 effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

**Civil Justice Reform**

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

**Protection of Children**

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

**Indian Tribal Governments**

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

**Energy Effects**

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

**Technical Standards**

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

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

**Environment**

We have analyzed this rule under Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.lD, 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 under the Instruction 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. This rule establishes a security zone.

An environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

**List of Subjects in 33 CFR Part 165**

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

**Authority:** 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 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.T05–1001 to read as follows:

**§ 165.T05–1001 Security Zone; Potomac and Anacostia Rivers, Washington, DC, Arlington and Fairfax Counties, VA, and Prince George's County, MD.**

(a) *Location.* The following area is a security zone: (1) All waters of the Potomac River, from shoreline to shoreline, bounded on the north by the Francis Scott Key (U.S. Route 29) Bridge, downstream to and bounded on the south from a position at latitude 38°46′42″ N, longitude 077°02′55″ W on the Virginia shoreline to a position at latitude 38°46′42″ N, longitude 077°01′33″ W on the Maryland shoreline, including the waters of the Georgetown Channel Tidal Basin; and

(2) All waters of the Anacostia River, from shoreline to shoreline, bounded on the north by the New York Avenue (U.S. Route 50) Bridge, downstream to and bounded on the south by its confluence with the Potomac River.

(b) *Definitions.* As used in this section:

*Captain of the Port Baltimore* means the Commander, U.S. Coast Guard Sector Baltimore, Maryland.

*Designated representative* means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port Baltimore to assist in enforcing the security zone described in paragraph (a) of this section.

(c) *Regulations.* (1) All persons are required to comply with the general regulations governing security zones found in 33 CFR 165.33.

(2) Entry into or remaining in this zone is prohibited unless authorized by the Coast Guard Captain of the Port Baltimore. Vessels already at berth, mooring, or anchor at the time the security zone is implemented do not have to depart the security zone. All vessels underway within this security zone at the time it is implemented are to depart the zone. The Captain of the Port Baltimore may, in his discretion, grant waivers or exemptions to this rule, either on a case-by-case basis or categorically to a particular class of vessel that otherwise is subject to adequate control measures.

(3) Persons desiring to transit the area of the security zone must first obtain authorization from the Captain of the Port Baltimore or his designated representative. To seek permission to transit the area, the Captain of the Port

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

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

(d) *Enforcement period.* This section will be enforced from 4 a.m. on January 14, 2009, through 10 p.m. on January 25, 2009.

Dated: December 5, 2008.

**Austin J. Gould,**

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

[FR Doc. E8–29726 Filed 12–16–08; 8:45 am]

**BILLING CODE 4910–15–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 51

**[EPA–HQ–OAR–2004–0489; FRL–8749–5]**

**RIN 2060–AN20**

## Air Emissions Reporting Requirements

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This action finalizes changes to EPA's emission inventory reporting requirements. This action consolidates, reduces, and simplifies the current requirements; adds limited new requirements; provides additional flexibility to states in the ways they collect and report emissions data; and accelerates the reporting of emissions data to EPA by state and local agencies.

**DATES:** This final rule is effective on December 17, 2008.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2004–0489. All documents in the docket are listed on 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 form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Emissions Reporting Requirements Docket, EPA/DC, EPA West Building, 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:** For general questions, please contact Dennis Beauregard, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Assessment Division, Mail Code C339–02, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5512; fax number: (919) 541–0684; e-mail address: *beauregard.dennis@epa.gov.* For legal questions, please contact Kristi Smith, U.S. EPA, Office of General Counsel, Mail Code 2344A, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, telephone (202) 564–3068, e-mail at *smith.kristi@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

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## I. General Information

### *A. Does this action apply to me?*

Categories and entities potentially regulated by this action include:

| Category | NAICS code [a] | Examples of regulated entities |
|---|---|---|
| State/local/tribal government. | 92411 | State, territorial, and local government air quality management programs. Tribal governments are not affected, unless they have sought and obtained treatment as state status under the Tribal Authority Rule and, on that basis, are authorized to implement and enforce the Air Emissions Reporting Requirements rule. |

[a] 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.[1] This action requires states to report their emissions to us. It is possible that some states will require facilities within their jurisdictions to report emissions to the states. To determine whether your facility will be regulated by this action, you should examine the applicability criteria in 40 CFR 51.1 of this rule. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. Where can I get a copy of this document and other related information?*

In addition to being available in the docket, an electronic copy of this final action will also be available on the worldwide Web (WWW) through the Technology Transfer Network (TTN). Following the Administrator's signature, a copy of the final amendments will be placed on the TTN's Clearing House for Inventories and Emission Factors (CHIEF) Web site at *http://www.epa.gov/ttn/chief.*

*C. Public Comments on Proposed Rule*

The 120-day comment period for the proposed rule expired on May 3, 2006. We received comments from 39 correspondents. These comments were submitted by 22 state and local agency representatives, 1 organization of state and local clean air agencies, 9 industries, 2 chambers of commerce and 5 commenters with no identified affiliation. While several comments were received days after the comment period ended, EPA did not treat these comments differently from comments received during the comment period. EPA has carefully considered all comments in developing the final amendments. Summaries of significant comments and EPA's responses are contained in this preamble. All comments are summarized and addressed in the document titled ''Response to Comments,'' which is available from the docket.

[1] As prescribed by the Tribal Authority Rule (63 FR 7253, Feb. 12, 1998), codified at 40 CFR part 49, subpart A, tribes may elect to seek treatment as State (TAS) status and obtain approval to implement rules such as the AERR through a Tribal Implementation Plan (TIP), but tribes are under no obligation to do so. However, those tribes that have obtained TAS status are subject to the AERR to the extent allowed in their TIP. Accordingly, to the extent a tribal government has applied for and received TAS status for air quality control purposes and is subject to the AERR under its TIP, the use of the term State(s) in the AERR shall include that tribal government.

*D. Judicial Review*

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by February 17, 2009. Only those objections to this final rule that were raised with reasonable specificity during the period for public comment may be raised during judicial review. Under section 307(b)(2) of the CAA, the requirements that are the subject of this final rule may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

Section 307(d)(7)(B) of the CAA further provides a mechanism for us to convene a proceeding for reconsideration, ''[i]f the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

## II. Background and Purpose of This Rulemaking

In today's action, EPA is amending the emission inventory reporting requirements in 40 CFR part 51, subpart A, and in 40 CFR 51.122. This action harmonizes reporting requirements under the $NO_X$ SIP Call and the Consolidated Emissions Reporting Rule (CERR). It also removes and simplifies some existing emissions reporting requirements which we believe are not necessary or appropriate; allows states to better track changes in source emissions, shutdowns, and startups over time by using the 40 CFR 70 definition of major source for point source reporting; deletes a requirement for states to report biogenic emissions; and offers states the option of reporting emission model inputs in lieu of reporting emissions for certain source categories. These changes were widely supported by states because they will simplify and reduce the states' reporting burden.

In the preamble to the January 3, 2006, AERR proposed rulemaking (71 FR 69) we discussed state reporting requirements under the Clean Air Interstate Rule (CAIR) and included requirements for CAIR reporting in 40 CFR 51.123–51.125 under Subpart A. On July 11, 2008, the United States Court of Appeals for the District Court of Columbia Circuit vacated CAIR in its entirety. Accordingly, all references to CAIR and its reporting requirements have been removed from the final AERR. If CAIR (or some similar rule) becomes effective in the future, EPA will initiate a new rulemaking, as necessary, to address emission reporting requirements for that rule.

Because we are consolidating, harmonizing and updating two pre-existing sets of state emissions reporting requirements, we are reviewing the purpose, authority, and history of emissions reporting requirements in general.

Emission inventories are critical for the efforts of state, local, and Federal agencies to attain and maintain the National Ambient Air Quality Standards (NAAQS) that EPA has established for criteria pollutants, such as ozone, particulate matter (PM) and carbon monoxide (CO). To assist these efforts, EPA initiated an effort in the early 1990's to develop a central repository of inventory data for all states that is now known as the National Emission Inventory (NEI). Emission inventory data reported electronically under the CERR is stored in the NEI database and used by EPA and by states for air quality modeling, tracking progress in meeting CAA requirements, setting policy, and answering questions from the public. States often use the NEI as a starting point in developing emission inventories for support of State implementation plans (SIPs).

Pursuant to its authority under sections 110 and 172 of the CAA, EPA has required SIPs to include inventories containing information regarding criteria pollutant emissions and their precursors (*e.g.*, volatile organic compounds (VOC)). The EPA codified these inventory requirements in subpart Q of 40 CFR part 51 in 1979 and amended them in 1987.

The 1990 Amendments to the CAA revised many of the CAA provisions related to the attainment of the NAAQS and the protection of visibility in Class I areas. These revisions established new periodic emission inventory requirements applicable to certain areas that were designated nonattainment for

certain pollutants. For example, section 182(a)(3)(A) required states to submit an emission inventory every 3 years for ozone nonattainment areas beginning in 1993. Similarly, section 187(a)(5) required states to submit an inventory every 3 years for CO nonattainment areas. The EPA, however, did not immediately codify these statutory emission reporting requirements in the CFR, but simply relied on the statutory language to implement them.

Title IV of the 1990 CAA Amendments also added requirements for reporting of emissions by sources subject to the Acid Rain Program (ARP). Affected sources must report hourly $NO_X$, $SO_X$ and $CO_2$ data to EPA's Clean Air Markets Division on a quarterly basis. Generally, these sources report annual $NO_X$ and $SO_X$ data aggregated from the hourly ARP data as well as other criteria and precursor pollutant emissions to states to satisfy reporting requirements for state permitting and emission inventory programs.

In 1998, EPA promulgated the $NO_X$ SIP Call which required the affected states and the District of Columbia to submit SIP revisions providing nitrogen oxides ($NO_X$) reductions to reduce their adverse impact on downwind ozone nonattainment areas. See 63 FR 57356 (October 27, 1998). As part of that rule, codified in 40 CFR 51.122, EPA established emissions reporting requirements to be included in the SIP revisions required under that action.

Another set of emissions reporting requirements, the CERR, was promulgated by EPA in 2002, and is codified at 40 CFR part 51, subpart A. See 67 FR 39602 (June 10, 2002). These requirements replaced the requirements previously contained in subpart Q of 40 CFR part 51, expanding their geographic and pollutant coverages, while simplifying them in other ways.

The principal statutory authority for the emission inventory reporting requirements outlined in this preamble is found in CAA section 110(a)(2)(F), which provides that SIPs must require ''as may be prescribed by the Administrator * * * (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources.'' Section 301(a) of the CAA provides authority for EPA to promulgate regulations under this provision.[2] At present, the emissions reporting requirements applicable to states are contained in two different locations: Subpart A of 40 CFR part 51 (the CERR) and 40 CFR 51.122 in subpart G (the $NO_X$ SIP Call). This final rule will consolidate these requirements, with modifications as described below. The modifications are intended to harmonize, reduce, and simplify the emissions reporting requirements, and also make emissions reporting easier.

Under the $NO_X$ SIP Call requirements in 40 CFR 51.122, $NO_X$ emissions for a defined 5-month ozone season (May 1 through September 30) from sources that the state has subjected to emissions control to comply with the $NO_X$ SIP Call are required to be reported by the affected states to EPA every year. However, $NO_X$ emissions from sources reporting directly to EPA as part of the $NO_X$ trading program are not required to be reported by the states to EPA every year. The affected states are also required to report ozone season emissions and typical summer work weekday emissions of $NO_X$ from all sources every third year (2002, 2005, 2008, etc.). This triennial reporting process does not have an exemption for sources participating in the $NO_X$ SIP Call emissions trading program. Section 51.122 requires that a number of data elements be reported in addition to ozone season $NO_X$ emissions. These data elements describe some of the source's specific physical and operational parameters.

Emissions reporting under the $NO_X$ SIP Call (promulgated October 27, 1998) was required for the 2002 inventory year which was the year prior to the emissions reductions requirement. The reports are due to EPA on December 31 of the year following the inventory year. For example, emissions from all sources and types in the 2002 ozone season were required to be reported on December 31, 2003. However, because the Court which heard challenges to the $NO_X$ SIP Call delayed the implementation by one year to 2004, see *Michigan* v. *EPA,* 213 F.3d 663 (D.C. Cir. 2000), *cert. denied,* 121 S. Ct. 1225, 149 L. ED. 135 (2001), no state was required to start reporting until the 2003 inventory year. In addition, EPA subsequently promulgated a rule to subject Georgia and Missouri to the $NO_X$ SIP Call with an implementation date of 2007. See 69 FR 21604 (April 21, 2004). For these states, emissions reporting began with 2006. The emissions reporting requirements under the $NO_X$ SIP Call presently affect the District of Columbia and 20 states.

As noted above, the other set of emissions reporting requirements is codified at subpart A of part 51. Although entitled the ''Consolidated Emissions Reporting Rule,'' the CERR left in place separate reporting requirements for the $NO_X$ SIP Call under 40 CFR 51.122. The CERR requirements were aimed at obtaining emissions information to support a broader set of purposes under the CAA than were the reporting requirements under the $NO_X$ SIP Call. The CERR requirements apply to all states and include the reporting of all criteria pollutants and criteria pollutant precursors.

The CERR and the $NO_X$ SIP Call both require states to report emissions of all sources at 3-year intervals (inventory years 2002, 2005, 2008, etc.). However, there are a number of differences between the two rules. The CERR also requires reporting of certain large sources every year, and the required reporting date under the CERR is 5 months later than under the $NO_X$ SIP Call reporting requirements. Also under the CERR, emissions must be reported by all states as a total for the entire inventory year, for a typical work weekday in winter, and for a typical work weekday in summer, but not a total for the 5-month ozone season as is required by the $NO_X$ SIP Call. The $NO_X$ SIP Call requires a special all-sources report by affected states for the year 2007 due December 31, 2008.[3] Finally, the CERR and the $NO_X$ SIP Call differ in what non-emissions data elements must be reported.

## III. Response to Comments

We have addressed all comments in detail and placed them in the Response to Comments document in the docket. The comments that concern significant proposed changes have been summarized and addressed, as discussed below. As an aid to the reader, we have grouped related comments under headings that generally correspond to the organization of the proposed rulemaking.

### *A. Major Source Definition for Point Source Reporting*

In all states, we proposed to expand the definition of sources that must be reported in the point source format,

[2] Other CAA provisions relevant to these proposed amendments include section 172(c)(3) (requires SIPs for nonattainment areas to include comprehensive, current inventory of actual emissions, including periodic revisions); section 182(a)(3)(A) (requires emission inventories from ozone nonattainment areas); and section 187(a)(5) (requires emission inventories from CO nonattainment areas).

[3] It is important to note that the $NO_X$ SIP Call requires a special all-sources report by affected States for the 2007 inventory year due December 31, 2008. While the CAIR had removed the requirement to submit the special all-sources report, the recent vacatur of CAIR in its entirety means that the special all-sources report is once again a requirement under the $NO_X$ SIP Call.

resulting in fewer sources included in the nonpoint source formats.[4] We proposed to base the requirement for point source format reporting on whether the source is a major source under 40 CFR part 70 for the pollutants for which reporting is required, *i.e.*, for CO, VOC, $NO_X$, sulfur dioxide ($SO_2$), $PM_{2.5}$, $PM_{10}$, lead and ammonia ($NH_3$). Those major sources were further classified as Type A (large sources) and Type B (small sources), with differing reporting requirements for each type. Currently, the requirement for point source reporting is based on thresholds of actual emissions during the inventory year. While it has always been an option for states to include all such sources, and we know that some states already do, expanding the point source definition may require more sources to be reported as point sources every third year. Affected states would continue to report their actual emissions, but the new approach would make it possible to better track changes in source emissions, shutdowns, and start-ups over time. Because states have existing lists of sources subject to 40 CFR part 70 requirements, this approach would result in a more stable universe of reporting point sources, which in turn would facilitate elimination of overlaps and gaps in estimating point source emissions, as compared to nonpoint source emissions. Under this proposal, states would know well in advance of the start of the inventory year which sources would need to be reported. We proposed that these new requirements begin with the 2008 inventory year.

We received a number of comments on the provision regarding point source format reporting. All commenters supported changing the definition of a point source for reporting purposes to that used in 40 CFR part 70. Therefore, EPA intends to implement this reporting change but with certain caveats prompted by other comments, as discussed below.

One commenter thought that the table included in the definition for point source in the proposed rule was inconsistent with the proposed reporting requirements using the Title V definition. The commenter noted that the definition for ''type A source'' seemed inconsistent with the proposed change from actual emissions to ''potential to emit.''

The EPA agrees with the commenter that there were some inconsistencies in the proposed rule. The preamble for the proposed rule stated that EPA is ''proposing to base the requirement for point source format reporting on whether the source is a major source under 40 CFR part 70 for the pollutants for which reporting is required * * *.'' This indicated that reporting thresholds for all point sources would be based upon the 40 CFR part 70 definition of ''potential to emit'' (PTE). However, we further stated that ''we are proposing to expand the definition of what sources must be reported in point source format so that fewer sources would be included in nonpoint source emissions.'' Later in the preamble, we stated that ''this change may require more sources to be reported as point sources every third year.'' Both sentences imply that the change would apply only to Type B sources. Application of the 40 CFR part 70 point source definition to all point sources would likely require some existing Type B point sources to be reported each year as Type A sources, which was not identified as a likely change in point source reporting.

The EPA used the definition for point source to establish that use of the 40 CFR part 70 major source definition would begin with the 2008 inventory year. Point source reporting for years prior to 2008 would continue to be based upon use of ''actual emissions.'' However, the point source definition includes a table for reporting Type A and B sources, and that table indicates that the reporting thresholds in the table are ''in tons per year of actual emissions.'' While EPA intended that the emissions reported would continue to be actual emissions, PTE was to be used to determine point source reporting requirements, and no consideration of this change is included in the table.

The proposed definition for Type A sources required use of ''actual annual emissions'' to determine reporting requirements. However, the use of actual annual emissions to determine Type A sources appears to conflict with the point source definition (applicable to both Type A and B point sources), which indicated that emission reporting for 2008 and later years would be determined using the 40 CFR part 70 definition of ''major source,'' which uses PTE.

Given the confusing preamble language and apparent conflict in the text of the regulation, EPA will accept use of either approach to determine Type A point source reporting requirements for the 2009 inventory year. For the inventory years following 2009, EPA will expect states to use the 40 CFR part 70 major source definition for all point sources to simplify reporting requirements, as discussed in the proposal preamble. Accordingly, EPA has revised the definition of Type A sources and Table 1 in Appendix A to subpart A to make clear that the 40 CFR part 70 definition of major source will be used to determine point source reporting requirements following the 2009 inventory year.

*B. Harmonizing Report Due Dates*

The CERR reporting dates are 5 months later than the $NO_X$ SIP Call. The $NO_X$ SIP Call rule requires the affected states to submit emission inventory reports for a given ozone season to EPA by December 31 of the following year, 12 months after the end of the inventory year. The CERR requires similar but not identical reports from all states by the following May 31, 17 months after the end of the inventory year. The EPA believes that harmonizing these reporting dates would be efficient for both states and EPA.

The EPA proposed to shorten the timeline of 17 months for reporting under the CERR to be consistent with the 12 months for reporting under the $NO_X$ SIP Call. A second alternative requiring 12 months for reporting of point sources and 17 months for nonpoint and mobile sources was also proposed.

Most commenters expressed support for the concept of harmonizing the reporting requirements under the $NO_X$ SIP Call and the CERR, but were concerned about the alternative of using the 12-month timeline for some or all sources for the 2008 inventory year. In general, the commenters were concerned that a 12-month timeline might compromise the quality of the data and urged EPA to harmonize the report due date at 17 months for all emission sectors (point, nonpoint, and mobile).

The EPA agrees with the concerns of the commenters regarding the proposal to tighten the timeline to 12 months for the 2008 inventory year, and accordingly, has decided to delay implementing the AERR and the 12-month timeline for reporting of all emission sectors until 2009. Since the 2009 and 2010 inventory years require reporting for Type A (large point) sources only, one impact of this action

[4] We use the term ''nonpoint source'' to refer to a stationary source that is treated for inventory purposes as part of an aggregated source category rather than as an individual facility. In the existing subpart A of part 51, such emissions sources are referred to as ''area sources.'' However, the term ''area source'' is used in section 112 of the CAA to indicate a nonmajor source of hazardous air pollutants, which could or could not be a point source. As emission inventory activities increasingly encompass both NAAQS-related pollutants and hazardous air pollutants, the differing uses of ''area source'' can cause confusion. Accordingly, EPA is substituting the term ''nonpoint source'' for the term ''area source'' in subpart A and in subpart G (§ 51.122 to avoid confusion.

is to delay implementing a 12-month timeline for reporting of all sources until the 2011 inventory year, which is the next 3-year comprehensive emission inventory year. For the 2008 inventory year, retaining the existing 17-month timeline under the CERR will provide additional stability for states using the new data submittal and operating procedures for the Emission Inventory System (EIS), which will be operational for the 2008 inventory year. The 17-month timeline will allow state agencies to adapt to the new data reporting and system requirements without introducing additional constraints and uncertainty to the process. It will also provide a complete inventory cycle for EPA to correct any problems with the new system procedures.

The EPA notes that although some commenters supported a 17-month timeline for reporting of all source emissions for the 2008 inventory year, we did not propose to extend the existing 12-month timeline for reporting under the $NO_X$ SIP Call. Thus, the $NO_X$ SIP Call 12-month timeline will be retained for the 2008 inventory year, and harmonized reporting under the AERR will be implemented for the 2009 inventory year.

*C. Accelerating Report Due Dates*

The EPA believes that the public is best served by making environmental information available as soon as possible. Therefore, we proposed that the reporting schedule be further accelerated for the triennial year 2011 and all following years by requiring that emissions data from all point sources be reported within 6 months from the end of the inventory year, *i.e.*, by June 30 of the following year. Under the proposed rule, reporting on all other sources would be required within 12 months, *i.e.*, by December 31 of the following year. There is precedent for requiring reporting of point source emissions data within 6 months. For example, beginning with the year 1979, states were required, under subpart Q, to report point source emissions data within 6 months. We invited comment on alternative reporting schedules of 6 to 12 months for point sources and 12 to 17 months for all other sources.

Most commenters were concerned with the proposed 6-month timeline for states to submit point source data for the 2011 inventory year. The commenters generally indicated that the accelerated schedule would create a very short timeframe for point sources to gather the emissions data needed to report to states and for states to process and quality assure the data, resulting in incomplete and inconsistent data quality. Several commenters thought that tightening the timeline for point sources to 9 to 12 months would be possible. Some of the commenters thought that 17 months would continue to be needed for the nonpoint and mobile source inventory sectors due to the unavailability of data on a shorter schedule from other agencies needed to develop the emission estimates.

Two commenters wanted to retain the existing 17-month timeline for reporting point, nonpoint, and mobile source data. One of the commenters expressed concerns that were based primarily on having to conduct a similar data collection and compilation effort within California. The commenter thought that the time to conduct this state-based effort made accelerating the Federal emissions reporting timeline to less than 17 months unrealistic and could compromise data quality. The other commenter expressed opposition to the concept of a bifurcated reporting system which would require submittal of point and nonpoint/mobile source sector data on separate dates.

Two commenters thought that Web-based submittal tools needed to move beyond the developmental stage before it would be possible to shorten the reporting timeframe to 12 months. One of the two commenters further indicated that much of the activity data needed to develop the nonpoint source estimates are not available until 12 to 15 months after the inventory year and thought EPA should consider using previous year data as a surrogate for the current year.

The EPA agrees with the concerns expressed by most of the commenters regarding the proposed 6-month timeline for submittal of point source data by the 2011 inventory year. When EPA developed the proposed rulemaking, a project known as the ''Rapid Inventory Development Pilot'' was initiated. The EPA has now evaluated the results of the project and believes that a 6-month timeline for developing and submitting inventory data is not yet achievable on a consistent basis with application of proper quality assurance procedures for all emission inventory source sectors. However, the project did demonstrate that a timeline shorter than the existing 17 months is possible, since a number of states involved in the project were able to submit data to EPA 10 months after the emission inventory year.

The EPA understands that some difficulties were encountered by several of the states participating in the project, which indicates that additional time is needed to refine both the electronic tools and the procedures to support, on a consistent basis, development and submittal of emissions data on an expedited timeline. To allow additional time for technological improvements, EPA will implement a 12-month timeline for data submittals beginning with the 2009 inventory year. The effect of this will be to require reporting of Type A (large point) sources using a 12-month timeline for the 2 years before the comprehensive triennial emission inventory effort for the 2011 inventory year. This will allow for additional development of electronic tools and refinement of data submittal procedures and for states to become familiar with operation of the new EIS before the 2011 triennial inventory is due.

*D. Reporting Biogenic Emissions*

We proposed to remove a requirement in the existing CERR for states to report annual and typical ozone season day biogenic emissions. Biogenic emissions are estimated by a computer model using meteorological and land use/land cover data as inputs. Because EPA can develop these data inputs directly without having them reported by state, local, and tribal agencies, we believe the requirement for reporting biogenic emissions serves no useful purpose. This change does not affect our expectation that biogenic emissions be appropriately considered in ozone and $PM_{2.5}$ attainment demonstrations.

Many comments were submitted on the biogenic emissions reporting requirement, and all supported EPA's proposal to not include biogenic emissions reporting in the AERR. Based upon the support expressed by the commenters, EPA will implement this part of the AERR as proposed by not including the existing reporting requirements (under the CERR) for annual and typical ozone season day biogenic emissions.

*E. Reporting Emission Model Inputs*

We proposed a new provision that would allow states the option of providing emission inventory estimation model inputs in lieu of the actual emissions estimates developed from those inputs. This provision was limited to source categories for which, prior to the report due date, EPA developed or adopted emissions estimation models and through guidance defined their necessary inputs. This provision would allow states to take advantage of new emissions estimation tools for greater efficiency, although the states would continue to be required to provide inputs representative of their conditions. Under this option, EPA will run the emissions model(s) to calculate

emissions and will enter the emissions data into the appropriate database. Section 51.15(d) limited this option to ''* * * models capable of estimating emissions from a certain source type on a national scale * * *.'' and thus restricted its application to nonpoint and mobile source emission categories. We proposed that this option would be available starting with the reports on 2005 emissions. Furthermore, we invited comment on requiring states to provide model inputs for source categories for which they have utilized a widely available emissions model as a means of improving the transparency of the emission estimates themselves and the overall utility of the submissions in meeting the objectives of the emissions reporting requirements. Providing model inputs would improve EPA's ability to assess the quality of the states' emission estimates and to project future emissions.

We received several comments on this provision. Most of the comments were in favor of allowing the option to report model inputs in lieu of the emissions estimated from the models. However, many of the commenters did not want to see the reporting of model inputs become a reporting requirement.

The EPA agrees with the majority of commenters who supported the option of submitting input data in lieu of emission estimates and will make this an option. Although the proposed rule indicated this option would be available for reporting emissions for the 2005 inventory year, EPA intends to delay implementation of this option until the 2007 inventory year (due date May 31, 2009) since this rule was not published before the due date for data from the 2005 inventory year (May 31, 2007). Although EPA encourages states to submit model inputs where they have used a widely available model to develop emission estimates, states will not be required to submit input data when they provide emission estimates.

The EPA notes that emissions data based upon physical measurements are generally preferred over estimates developed using models or emission factors, but the Agency believes that models and emission factors are appropriate emission estimation tools when addressing the ubiquitous nature of some sources and attempting to account for the many variables affecting certain annual emission estimates. To improve the application of models and emission factors, EPA urges states to develop locally derived input data based upon physical measurements wherever possible.

*F. Reporting Summer Day Emissions*

We proposed to retain the requirement for reporting of summer day emissions from all sources (except biogenic sources) at three-year intervals, but to restrict the requirement to only those states with ozone nonattainment areas or states covered by the $NO_X$ SIP Call. We proposed to restrict the requirement to VOC and $NO_X$ emissions, but we invited comment on whether CO emissions should be required also.

Several commenters supported EPA's proposal for reporting of summer day emissions of $NO_X$ and VOC. Two commenters thought that ozone season-day $NO_X$, VOC and CO emissions should be reported for all areas, while two other commenters questioned the value of reporting summer day VOC and $NO_X$ emissions. Another commenter thought that requiring ozone season and daily emissions for point, nonpoint, and nonroad sources was redundant since the temporal parameters needed to calculate these emissions were required to be reported.

One commenter thought that summer day emissions of CO should not be reported, while two other commenters believed that reporting CO summer day emissions was necessary but only for CO nonattainment areas.

The EPA agrees with the majority of the commenters that the reporting requirements for summer day emissions (VOC and $NO_X$) from all sources (except biogenic sources) at 3-year intervals should only include states with ozone nonattainment areas and states covered by the $NO_X$ SIP Call. However, EPA believes that it is appropriate to also include summer day emissions reporting for sources in attainment counties that are covered by the nonattainment area modeling domain used to demonstrate reasonable further progress (RFP). The EPA's current guidance requires RFP calculations to be done on an ''average summer weekday emissions'' basis. If the state takes credit for reductions from outside the nonattainment area, the requirement will be to determine whether there were reductions in average summer weekday emissions from those sources.

The EPA believes that reporting of CO summer day emissions is not necessary since, as noted by one commenter, other data elements already reported allow summer day emissions to be derived and CO emissions, unlike VOC and $NO_X$ emissions, are not used for tracking RFP. Therefore, reporting of CO summer day emissions regardless of ozone attainment status will not be a requirement under the AERR.

The proposed rule indicated that ''We are proposing to retain the requirement for reporting of summer day emissions * * *.'' However, the CERR actually requires reporting of ''work weekday emissions.'' for point sources and ''summer work weekday emissions'' for nonpoint and mobile sources. Although we did not receive comments on the work weekday versus summer day emissions issue, we realize that the preamble language indicated that no changes would be made to the summer day emissions definition contained in the CERR (beyond the proposal to restrict the requirement to ozone nonattainment and $NO_X$ SIP Call areas), but the proposed AERR regulatory language made additional changes to the definition of ''summer day emissions'' since the CERR required ''work weekday emissions'' for point sources and ''summer work weekday emissions'' for nonpoint, nonroad mobile and onroad mobile sources.

Accordingly, in recognition of the conflicting language and as indicated in the preamble to the proposed rule, the final rule will retain the definition of and requirement to report ''summer day emissions'' for all sources revised only to the extent that it will restrict the requirement to ozone nonattainment areas (including sources in counties that are covered by the modeling domain used to demonstrate RFP) and $NO_X$ SIP Call areas. In addition, the definition for summer day emissions has been revised to require the use of work weekday emissions (as required under the CERR) when estimating summer day emissions for reporting.

*G. Reporting Winter Work Weekday Emissions*

We proposed to delete the existing requirement that all states report emissions for a winter work weekday. This requirement was originally aimed at tracking progress towards attainment of the CO NAAQS. We stated our belief that applying this requirement to all states was no longer warranted given that CO violations are currently observed in few areas and indicated that we would work directly with the few remaining affected states to monitor efforts to attain the CO NAAQS without requiring formal submission of CO inventories.

Most commenters supported EPA's proposal to delete the reporting requirement for winter work weekday emissions of CO. However, one commenter opposed EPA's proposal to eliminate the existing reporting requirement. The commenter thought that the requirement should be retained for states that are required to submit

emission inventory data as part of their CO maintenance plans.

The EPA finds the comment that CO reporting is needed for CO maintenance plans to be compelling. This need was not considered in the proposed rule. As noted by the commenter, CO maintenance plans require tracking of emission reductions to ensure continued maintenance of the CO NAAQS. Reporting emissions under this rule will aid in standardizing the data reported and facilitate review of the data by interested parties.

A concern not raised by commenters but brought to EPA's attention since the proposed rule was published relates to requests from states to discontinue monitoring of ambient CO concentrations in certain areas that have been redesignated to attainment for CO. The EPA's approval of such requests is conditioned on the expectation that emissions will not increase and areas will continue to maintain the CO NAAQS. To provide a means of ensuring that the CO NAAQS are maintained in areas that no longer have ambient CO monitors, emissions reporting becomes even more critical.

The proposed rule indicated that EPA could work on a case-by-case basis with the few remaining CO nonattainmment areas regarding reporting of winter work weekday emissions. However, in this final rule, EPA has determined that for those areas in which EPA determines that reporting is still needed, reporting emissions under this rule will ensure that CO emissions are reported periodically and that the data are in a standardized format that will facilitate data review and thus help ensure attainment and maintenance of the CO NAAQS. Therefore, to monitor progress toward attaining and maintaining the CO NAAQS, EPA will retain the requirement for reporting winter work weekday emissions of CO, but will limit it to CO nonattainment areas and areas with CO maintenance plans.

*H. New Data Elements*

We proposed to add several required data elements to the existing rule. These were contact name, contact phone number, emission release point type, control status, emission type, and method accuracy description (MAD) codes.

The contact name and phone number are for the lead contact in the organization submitting the data and are needed to ensure that EPA knows who to contact if issues arise with a data submission.

The emission release point type is a code for the physical configuration of the emission release point (*e.g.*, vertical stack, fugitive, etc.). It is needed to correctly model how emissions are released into the atmosphere.

The control status is a code that represents whether reported emissions are controlled or uncontrolled. It is needed to project future emissions correctly and to evaluate the impact of emission control programs correctly. We also invited comment on whether, with this addition, the current data elements that describe emissions control equipment type and efficiency were adequate. We indicated our belief that it is important for states to report on the manner in which emissions from sources are currently controlled so that opportunities for control strategy and regulatory development could be assessed. We questioned whether the existing data elements were adequate and appropriate for that purpose. The existing data elements related to control measures are primary control efficiency, secondary control efficiency, control device type, and rule effectiveness for point sources; and total capture/control efficiency, rule effectiveness, and rule penetration for nonpoint sources and nonroad mobile sources.[5]

The emission type is a code describing the temporal period of emissions reported (*e.g.*, annual, day, etc.). It is needed to ensure that emissions estimates are used properly.

The MAD codes provide information about geographic coordinates, including the collection method, accuracy, and other descriptors. We proposed to add MAD codes to this rule because EPA's Latitude/Longitude Data Standard[6] requires their collection when latitude and longitude are collected. The MAD codes are horizontal collection method code, horizontal accuracy measure, horizontal reference datum code, reference point code, source map scale number, and coordinate data source code. The EPA believed that many states would be able to report these codes based on existing information. However, in the event that the information needed to report these codes was not available, states would not be required to do additional work since there is a ''don't know'' code.

While several commenters supported EPA's proposal to add new data elements to this rule, a number of other commenters appeared to be confused by EPA's proposal since the NEI Input Format (NIF) included many of the new data elements, and they were already reporting the data to EPA. These commenters believed that adding the new data elements to this rule was not necessary and that the proper place for such detailed information was in the NIF data reporting format or in guidance documents. Two commenters in this group suggested that a Federal-state task force be established to review, revise, finalize, and implement changes in code details.

The EPA believes that both data reporting rules and data reporting formats, such as the NIF, are needed for effective data reporting. Although this rule and NIF address many common data elements for reporting to EPA, their purposes are somewhat different. Data reporting rules identify data elements and timelines for reporting. Data reporting formats such as the NIF address the details of how the data are to be reported to facilitate handling of the data by EPA.

The EPA does not believe that using a data formatting protocol such as the NIF is an effective way to communicate data needs with state agencies. The EPA has codified data reporting requirements since states need to understand what data will be required and when it will be required by EPA to implement programs under the Clean Air Act. The EPA continues to believe that data elements for reporting and timelines for submitting data are fundamental requirements for states and therefore are appropriate levels of detail to be addressed through the rulemaking process.

One commenter suggested that a Federal-state task force be established to review, revise, finalize, and implement changes in code details. Such a task force has since been established to help with developing the new EIS. The EPA expects the task force to update tools and guidance materials for data reporting, as well as periodically review data elements and reporting codes for use by state agencies.

Two commenters thought that the addition of a control status code would not make the status of a facility any more clear and believed that the control status of a facility could be determined from other data elements already required for reporting under the CERR and proposed under the AERR (*e.g.*, control device codes and control efficiency).

One of the commenters pointed out that EPA's detailed reporting instructions provide for the ''control device'' data element to specify

[5] Additional information on emissions data elements and the formats and valid codes presently in use for State reporting to EPA is available on the EPA Web site *http://www.epa.gov/ttn/chief/nif/index.html.*

[6] *Environmental Data Registry: Latitude/Longitude Standard.* 2000. U.S. EPA. December 11, 2000. *http://oaspub.epa.gov/edr/edr_proc_qry.navigate?P_LIST_OPTION_CD=CSDIS&P_REG_AUTH_IDENTIFIER=1&P_DATA_IDENTIFIER=19939&P_VERSION=2.*

nonphysical equipment control techniques such as ''low solvent coatings,'' ''water-borne coatings,'' ''process change,'' and several varieties of combustion modifications.

The EPA notes that ''control status'' was the only new data element in the proposal that was not already in the NIF Version 3.0 and thus was perceived as a new data reporting requirement by several commenters. This new data element would require states to indicate if a source is controlled or uncontrolled. The EPA agrees with the concerns expressed by the commenters that this new data element is not needed. The data reporting requirements proposed under this action for control types and efficiencies in combination with reporting codes for those data elements will be sufficient to discern whether or not sources are uncontrolled or controlled and to what extent. Therefore, EPA has decided to not include Control Status as a new data element in this action.

One commenter stated that the current data fields for point sources do not ask for the total capture/control efficiency, which is required for nonpoint sources. The commenter thought that the capture efficiency along with the total capture/control efficiency should be required for point sources since the current requirements for primary and secondary control efficiencies do not provide a way to determine the overall control efficiency. The EPA believes that the ''total capture and control efficiency'' data element proposed for point source reporting addresses the commenter's concern since this data element is intended to require data reporting on the overall effects of multiple control systems.

One commenter did not believe that ''Rule Effectiveness'' had ever been explained adequately and stated that it was not apparent how or if it could be used without knowledge of how it relates to the other terms. The EPA disagrees with the commenter's concerns. In the spring of 2004, EPA convened a workgroup consisting of emission inventory staff from state, local, and EPA offices to review existing rule effectiveness (RE) guidance and develop a consensus recommendation for improvements to this guidance. The revised RE guidance developed by the workgroup is found in Appendix B of the document titled *Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations*—EPA–454/R–05–001 (August 2005, updated November 2005). The EPA believes the workgroup presented a clear rationale regarding development and implementation of the new approach to adjusting emission inventories to address RE, explaining how RE can be used to adjust the control efficiency, from what could be realized under ideal conditions to what is actually emitted in practice due to less than ideal conditions. Accordingly, EPA has expanded the regulatory definition of RE to explain how it is used in making these adjustments.

Several commenters were generally opposed to any additional reporting requirements for states that would be passed on to businesses but offered no specific concerns with the individual requirements. The reporting requirements of this rule will apply to states and not to sources. However, we recognize that in some cases, states will need to modify their data reporting rules to meet the requirements of this rule for data elements to be reported and the new timelines for reporting. The EPA notes that the burden estimate from the proposed rule's Supporting Statement for the Information Collection Request (ICR) indicates the AERR will not increase the reporting burden on states or impose an additional burden on sources.

*I. Identification of New Emissions Related Data Requirements*

We invited comment on whether or not additional emissions related data should be required. Several commenters encouraged EPA to include specific requirements in this rule for reporting hazardous air pollutants (HAPs) emissions data for Title V facilities. One commenter encouraged EPA to include requirements for reporting HAPs from all emission sources.

The EPA is not including requirements for reporting HAPs in this rule. However, EPA has developed national level inventories of HAP emissions on a 3-year cycle since 1990. These inventories have provided support for development of HAP control programs, helped assess HAP air quality trends, and provided a means to track EPA's progress on controlling HAP emissions under the Government Performance Results Act. The success of EPA's efforts rests in large measure on the cooperation of states in submitting HAP data to EPA to support the development of national HAP emission inventories. Each emission inventory cycle has benefited from increased state agency participation in submitting HAP data. The EPA believes it will be possible to continue developing and improving national level HAP inventories using the cooperative approach employed to date but intends to closely monitor the participation of state agencies in this effort. The EPA understands the concerns of some state agencies regarding the need for a HAP data reporting rule and may, should the need arise, revisit this issue in the future.

*J. Revisions to Specific Data Elements*

The $NO_X$ SIP Call rule and the CERR contain detailed lists of required data elements in addition to emissions, and each rule has its own set of definitions. The two sets of data elements overlap but are not identical. The $NO_X$ SIP Call rule requires a few more data elements to be reported and defines some data elements differently than the CERR. The EPA reviewed both lists in light of more recent reporting experiences and EPA's insight into the difficulty states face in collecting and submitting these data elements and their utility to EPA, other states, and other users. We proposed to combine the separate lists of required elements for the $NO_X$ SIP Call and the CERR into a single new list in this rule. The EPA proposed that the following data elements from the $NO_X$ SIP Call be eliminated: ''Area Designation'', ''Federal ID code (plant)'', ''Federal ID code (point)'', ''Federal ID code (process)'', ''Federal ID code (stack number)'', ''Maximum design rate'', ''Work weekday emissions'', ''Secondary control efficiency'', ''Source of fuel heat content data'', ''Source of activity/throughput data'', ''Source of emission factor,'' and ''Source of emissions data''. We proposed that these relatively minor changes become applicable starting with the first required emissions reports following promulgation of this rule.

There were a number of data elements required in the proposed amendments on which we invited comment as to whether they should be dropped in the final amendments based upon their current usefulness and sufficiency. These were heat content (fuel), ash content (fuel), sulfur content (fuel) for fuels other than coal, activity/throughput, hours per day in operation, days per week in operation, weeks per year in operation, and start time in the day. These data elements were carried forward from emissions reporting systems previously used by EPA.

At present, states are required to report three particular data elements for point source stacks: stack diameter, exit gas velocity, and exit gas flow rate. The requirement to report all three elements is redundant since any one of these can be calculated from the other two. We invited comment on which of these data elements, if any, to drop from the required list. Our preference was to

collect the data element that was most closely tied to an actual operating measurement. Alternatively, we proposed to allow states to report either exit gas flow or exit gas velocity, at their option.

Finally, we proposed to modify 40 CFR part 51.35 to allow states that obtained one-third of their necessary emissions estimates from point sources and/or prepared one-third of their nonpoint or mobile source emissions estimates each year on a rolling basis, to submit their data as a single package on the required every third year submission date. The existing requirement allows states to report these partial emissions estimates annually as they are completed. Our proposal required that states accumulate all 3 years of work and then make a single data submission by the due date for the triennial emission inventory year. The EPA believes that a single submission would allow states to correct and/or update data prior to submitting it to EPA thereby facilitating a more consistent data set. A single submission would also make it more efficient for EPA to quality assure the complete data set rather than doing it on a piecemeal basis. There would also be increased efficiencies in resolving any identified discrepancies with the states.

Most commenters agreed with EPA's proposal to combine the separate lists of required data elements for the CERR and the $NO_X$ SIP Call into a single new list of required data elements, thus eliminating several requirements from the $NO_X$ SIP Call: area designation, Federal ID code (plant), Federal ID code (point), Federal ID code (process), maximum design rate, work weekday emissions, secondary control efficiency, source of fuel heat content data, source of activity/throughput data, source of emission factor, and source of emissions data. Several commenters suggested that the list of data elements be maintained in the NIF rather than in this rule to allow for changes in required data elements without the need for rulemaking.

The EPA agrees with the commenters who expressed support for the proposed deletion of some data elements related to the $NO_X$ SIP Call. The data elements for Federal ID Codes (Plant, Point, Process, and Stack Number) were assigned to sources subject to the $NO_X$ SIP Call and perform similar ID functions to the data elements in the proposed rule for Facility ID code, Unit ID code, Process ID code, and Stack ID code. The $NO_X$ SIP Call ID codes are redundant with other ID codes in the proposed rule and will be deleted.

The source of fuel heat content data, source of activity/throughput data, source of emission factor and source of emissions data are not used by EPA and no commenters addressed the need for these data elements specifically. Therefore, EPA will delete these data reporting requirements as proposed. The EPA notes that a code for ''emission calculation method code'' is planned for the EIS, which is similar in application to the ''source of emission factor'' data element. The ''emission calculation method code'' will allow users to indicate calculation methods used for developing emission estimates, including emission factors, for all inventory sectors.

Many commenters indicated that the following data elements proposed for deletion were used for a variety of applications and should be retained: Heat content (fuel), ash content (fuel), sulfur content (fuel) for fuels other than coal, activity/throughput, hours per day in operation, days per week in operation, weeks per year in operation and start time in the day). One commenter supported deleting only the data element for ash content (fuel), while several commenters thought that the data element for start time should be deleted. Only one commenter thought that all the data elements that had been carried forward from earlier systems should be deleted.

The EPA agrees with the majority of commenters that data elements for heat content (fuel), ash content (fuel), sulfur content (fuel) for fuels other than coal, activity/throughput, hours per day in operation, days per week in operation, weeks per year in operation should be retained since these elements are used for a variety of applications. Start time in the day (hour) was identified by three commenters as not being useful, and EPA agrees that this data element should be deleted.

Several commenters indicated that any one of the data elements for point source stacks could be deleted while others specifically asked for deletion of the exit gas velocity data element. One commenter indicated their state collected stack diameter and exit gas velocity data and thought that both should be retained.

Many other commenters requested that all three data elements be retained for a variety of reasons including providing a means to make sure that data were in agreement and to check data entry errors. One commenter indicated that his state would continue to meet the needs of their end users who are accustomed to having all three data elements reported and requested that EPA handle any data reporting changes as software modifications until states could extract only the data that EPA requests.

One commenter thought that allowing states the option of selecting which two stack parameters to report among flow rate, velocity and diameter would require having all three available for use and suggested that no changes be made to the existing reporting format.

Although the stack diameter can be calculated by dividing the gas flow rate by the gas velocity, no commenters suggested deleting the stack diameter from the list of data elements. The EPA believes it is appropriate to report stack diameter data since it can be readily determined and has the least amount of uncertainty of the stack-related data elements. One commenter who indicated that all existing stack-related data elements would need to be reported if states had the flexibility of selecting two out of the three for reporting appeared to interpret EPA's proposal in the broadest sense. It was EPA's intent to select stack-related data elements based upon state preferences and apply those requirements universally to all point sources.

The EPA believes that given the variety of practices among state agencies evidenced in the comments, flexibility in reporting should be included in this rule for stack-related data elements. Therefore, this rule will offer states three reporting options: (1) Report all three data elements, (2) report only stack diameter and exit gas flow rate, or (3) report only stack diameter and exit gas velocity.

Section 51.35 of the CERR allows states the option of obtaining estimates from point sources and/or preparing one-third of their nonpoint or mobile source emissions estimates each year on a rolling basis and submitting data annually as they are completed. The EPA proposed to allow states to continue the option of obtaining estimates from point sources and/or prepare one-third of their nonpoint or mobile source emissions estimates each year on a rolling basis, but would have limited data submissions to a single package on the required third year submission date.

One commenter expressed support for the proposed requirement that states submit their data as a single package for triennial inventories since his state followed this practice. Another commenter said his state agency had always developed a single year's inventory and submitted it as a single package. This commenter preferred to continue this practice. One commenter thought that allowing states to develop triennial inventories over 3 years was

not practical due to staff turnover and EPA's changing requirements. The commenter went on to suggest that a 5-year rolling basis be used to be consistent with the cycle his state uses for smaller sources.

Aside from the comment noted above, this proposal did not generate much interest. The few comments received suggest that the existing provision under Section 51.35 of the CERR, which allows triennial emission inventory development over a three-year period, is impractical and is not utilized by the states. However, all commenters were supportive of the change to require one submission for triennial inventories. The EPA agrees with the commenters that the change to require one submission under section 51.35 is appropriate and is modifying this provision as proposed. The EPA notes that states may use the provisions of 40 CFR 51.35 to equalize workloads but are not required to do so.

The CERR included a data element for reporting of SIC/NAICS codes for point sources but did not specify whether the codes should also be reported at the emission unit level, in addition to the facility level. Table 2A to subpart A of part 51 in the AERR proposal clarified this requirement by including data element #41 for reporting of ''SIC/NAICS at the facility and unit levels.''

One commenter thought that reporting these codes at the unit level is not necessary for emission inventory purposes. Guidance from the Census Bureau, which develops the SIC/NAICS codes, indicates that they are designed to reflect the primary economic activity of a source, which also brings into question the reporting of these codes at the unit level. Based upon this information, EPA has reconsidered the need for reporting these codes at the unit level and revised data element #41 to require the reporting of ''SIC/NAICS at the facility level.'' One additional revision concerns the reporting of SIC codes as an alternative to NAICS codes. Since the January 3, 2006, proposal, users of SIC codes have transitioned to the new NAICS codes, and EPA finds that retaining the reference to ''SIC'' as a reporting alternative is no longer necessary. Therefore, data element #41 has been revised to require the reporting of ''NAICS at the facility level'' and the definition for ''SIC/NAICS'' has been revised to address only NAICS codes.

## IV. This Action

Today's action further consolidates the detailed requirements for emissions reporting by states entirely into 40 CFR part 51 subpart A. This final rule also harmonizes the reporting requirements from several CAA rules and reduces and simplifies them in several ways. The major changes included in this final rule are described below.

### *A. Consolidation of Reporting Requirements*

The EPA hereby amends subpart A, which contains 40 CFR 51.1 through 51.45, with conforming amendments to 40 CFR 51.122. These amendments also add 40 CFR 51.50 and new tables to subpart A of part 51.

In 40 CFR 51.122, we are abolishing some requirements entirely and replacing other requirements with a cross reference to subpart A, thus allowing detailed lists of required data elements to appear only in subpart A. As amended, 40 CFR 51.122 will continue to specify what pollutants, sources, and time periods the states subject to the $NO_X$ SIP Call must report and when, but will no longer list the detailed data elements required for those reports. The amended subpart A will list the detailed data elements as well as provide information on submittal procedures, definitions, and other generally applicable provisions.

### *B. Point Source Reporting*

In all states, we are expanding the definition of what sources must be reported in point source format, so that fewer sources will be included in nonpoint source emissions. We are basing the requirement for point source format reporting on whether the source is a major source under 40 CFR part 70 for the pollutants for which reporting is required, *i.e.*, for CO, VOC, $NO_X$, $SO_2$, $PM_{2.5}$, $PM_{10}$, lead and $NH_3$ but without regard to emissions of HAPs. Currently, the requirement for point source reporting is based on thresholds of actual emissions during the inventory year. While it has always been an option for states to include all such sources, and we know that some states already do, expanding the point source definition may require more sources to be reported as point sources every third year. In addition, some sources now reported as ''Type B'' point sources every third year may be reported as ''Type A'' point sources each year. Affected states will continue to report their actual emissions, but the new approach will make it possible to better track changes in source emissions, shutdowns, and start-ups over time. Because states have an existing list of sources based on 40 CFR part 70 requirements, this approach will result in a more stable universe of reporting point sources, which in turn will facilitate elimination of overlaps and gaps in estimating point source emissions, as compared to nonpoint source emissions. Under this requirement, states will know well in advance of the start of the inventory year which sources will need to be reported. These new requirements will be in effect for all reports for emissions starting with the 2009 inventory year.

### *C. Report Due Dates*

New due dates under the AERR will begin with the 2009 inventory year. For the 2008 inventory year, data submittals under the CERR will continue to be due within 17 months of the end of the inventory year (May 31, 2010). The $NO_X$ SIP Call data submittal for the 2008 inventory year will be due within 12 months of the end of the inventory year (December 31, 2009).

The EPA is harmonizing reporting dates for the $NO_X$ SIP Call and the AERR beginning with the 2009 inventory year. The data submittals for both will be due by December 31, 2010. All subsequent data submittals under the AERR and $NO_X$ SIP Call will be due within 12 months of the end of the inventory year.

### *D. Reporting Biogenic Emissions*

The requirement for reporting annual and typical ozone season day biogenic emissions has been removed.

### *E. Reporting Emission Model Inputs*

States will have the option of providing emissions model inputs to EPA in lieu of emissions estimates developed from those inputs. This option is available only for source categories where EPA develops or adopts suitable emission inventory estimation models and through guidance, defines their necessary inputs prior to the reporting due date. It is further restricted to emission models capable of estimating emissions from source types on a national scale. Under this option, EPA will run the emissions model(s) to calculate emissions and will enter the emissions data into the appropriate database. The EPA is making this option available for the 2007 inventory year (due date May 31, 2009).

### *F. Reporting Summer Day Emissions*

States will report summer day emissions of VOC and $NO_X$ from point, nonpoint and nonroad mobile, and onroad mobile sources at 3-year intervals for ozone nonattainment areas and for sources in attainment counties that are covered by the nonattainment area modeling domain used to demonstrate RFP. States covered by the $NO_X$ SIP Call will report on an annual basis summer day emissions of $NO_X$

from any point source for which the state specified control measures in its SIP, and on a triennial basis summer day emissions for all point, nonpoint and nonroad mobile and onroad mobile sources.

*G. Reporting Winter Work Weekday Emissions*

The requirement for states to report winter work weekday emissions of CO is limited to areas with CO maintenance plans and CO nonattainment areas.

*H. New Data Elements*

New data elements for contact name, contact phone number, emission type, emission release point type, and MAD codes are now required for reporting point source emissions. New data elements for contact name and contact phone number are now required for reporting nonpoint, nonroad mobile and onroad mobile source emissions.

*I. Identification of New Emissions Related Data Requirements*

There are no new emissions related data requirements other than those discussed in Section IV.H. above that will be required for reporting point, nonpoint, or nonroad and onroad mobile sources.

*J. Revisions to Specific Data Elements*

States will no longer be required to report the following data elements listed under the $NO_X$ SIP Call (40 CFR 51.122): Area Designation, Federal ID Code (plant), Federal ID Code (point), Federal ID Code (process), Federal ID Code (stack number), Maximum design rate, Work weekday emissions, Secondary control efficiency, Source of fuel heat content data, Source of activity/throughput data, Source of emissions factor and Source of emissions data. States will report their ID codes for facility, unit, process and stack. The EPA will assign EIS Identifier codes to state data once the data are added to the NEI.

For point source emissions, states will no longer be required to report start time in the day and will have the option of reporting one of the following combinations: (1) Stack height, exit gas velocity and exit gas flow rate; (2) Stack height and exit gas velocity; or (3) Stack height and exit gas flow rate.

*K. EPA Initiated Changes*

1. Implementation of Data Reporting Under the AERR

In the preamble to the proposed rule we said ''The EPA intends to issue final amendments during 2006.'' We intended to have the final rule in place with sufficient lead time for state agencies to modify their data collection rules and data systems as necessary to meet the new reporting requirements. Promulgation of this action is expected to occur during 2008 which was the initial year of data reporting proposed under the AERR. The EPA recognizes that the reduced lead time may present difficulties for some states to fully comply with the requirements of this rule and is delaying full implementation of the AERR until the 2009 inventory year. A provision to allow states to submit emission model inputs in lieu of emission estimates will be effective starting with the 2007 inventory year because it provides additional flexibility to the states. EPA notes that the 17-month timeline for submittal of data under the CERR is unchanged in this rule for the 2008 inventory year, which should aid in transitioning to the new reporting requirements.

2. Early Data Submittal Program

The EPA proposed a 12-month timeline for reporting 2008 point source emission inventory data and 17 months for nonpoint and mobile source emission inventory data. The EPA further proposed that this schedule would be shortened to 6 months for point sources and 12 months for nonpoint and mobile source sectors starting with the 2011 inventory year. Commenters believed these proposed timelines were too ambitious, and this action delays implementation of the new reporting timeline until the 2009 inventory year. The existing 17-month timeline from the CERR for reporting of all emission inventory sectors will be in effect through the 2008 inventory year. The reporting timeline for the 2009 inventory year and subsequent inventory years will be shortened to 12 months for all emission inventory sectors.

The EPA believes it may be possible for some states to achieve data submittal timelines that are shorter than 17 months for the 2008 inventory year and is interested in providing a mechanism for early data submittal from such states. The EPA is considering development of a voluntary program that will provide several alternatives for states. The details of this program will be communicated by EPA to states through discussions with the National Association of Clean Air Agencies (NACAA), messages to the CHIEF and NEI listservs, and postings on the CHIEF Web site.

3. Data Element for Inventory Type

The data element for Inventory Type describes the type of data submitted and its application. The EPA believes this data element is not necessary and has deleted it from Tables 2A, 2B and 2C for reporting emissions from point sources; nonpoint sources and nonroad mobile sources; and onroad mobile sources. The EPA is taking this action for the following reasons: (1) Several of the emission inventory applications described by the codes are not expected to be submitted to EPA under this rule, (2) data submittals described by this data element such as ''HAP inventory'' are no longer appropriate given the integrated nature of emission inventory development, and (3) data submitters can better describe data being submitted using a comment field which is provided in the Transmittal Record under the NIF and XML schemas for data formatting.

4. Data Element for ''SCC or PCC''

The EPA is modifying data element #14 in Table 2A to subpart A of part 51 by eliminating the reference to PCC. The PCC (Process Classification Code) reference was included in the proposed rule to provide data reporting flexibility in the event that PCCs were developed as replacement codes for SCCs. The reference has been removed from this final rule because EPA has no plans for further development of PCCs at this time.

5. Source Reporting Formats

Section 51.20 (What are the emission thresholds that separate point and nonpoint sources?) requires that state inventories include all anthropogenic stationary sources as either point or nonpoint sources.[7] As proposed, this section would have specifically required states under § 51.20(d) to submit emission data on wildfires and prescribed fires using the nonpoint source format. Section 51.20(d) also required all sources not subject to the point source reporting thresholds be submitted using the nonpoint source reporting format. However, in consideration of the time and effort already expended to develop mechanisms for reporting such emissions as point sources, we have revised the language under § 51.20(d) to remove the requirement for reporting of wildfires and prescribed fires using the nonpoint reporting format and further revised the language to allow states the flexibility of reporting such emissions as either point or nonpoint sources, by providing a mechanism for states to use the point source reporting format for

[7] Examples of anthropogenic sources include, but are not limited to, (1) agricultural fires such as burning of orchard and field crops and (2) some emissions from livestock operations and fertilizer application.

sources that are below the point source reporting thresholds referenced in Sections 51.20(c) and (d).[8]

## V. 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.

In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in ''Supporting Statement, Air Emissions Reporting Requirements (AERR), EPA ICR #2170.02.'' A copy of the analysis is available in the docket for this action and the analysis is briefly summarized here.

This final rule will add new reporting requirements and will combine these new requirements with existing requirements from the CERR, $NO_X$ SIP Call, and the Acid Rain Program. Each of these three existing rules has an approved ICR. The current ICRs are: ICR No. 0916.10 for the CERR; ICR No. 1857 for the $NO_X$ SIP Call; and ICR No. 1633.13 for the Acid Rain Program.

The EPA estimates that this final rule will reduce the information collection burden for each of the 104 respondents (state and local agencies) by about 13 labor hours per year from current levels. The annual average reporting burden for this collection (averaged over the first 3 years of this ICR) is estimated to decrease by a total of 1,373 labor hours per year with a decrease in costs of $47,450. From the perspective of the sources reporting to the states, EPA does not believe that there will be any change in reporting burden resulting from AERR because the same universe of sources will be required to report to the states.

### *B. Paperwork Reduction Act*

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The information collection requirements are not enforceable until OMB approves them.

The information collection requirements in this rule are based on the existing Emission Inventory Reporting Requirements in 40 CFR part 51, subparts A and G. In general, these provisions require each state to compile a statewide inventory of emissions of certain criteria pollutants at least every 3 years for all point, nonpoint, and mobile sources. The information collection requirements for the existing inventory reporting requirements have been approved by OMB under control number 2060–0088.

The information collection requirements in this final rule are mandatory for all states and territories (excluding Tribal governments without TAS status to implement and enforce the AERR rule). These requirements are authorized by section 110(a) of the CAA. The reported emissions data are used by EPA to develop and evaluate state, regional, and national control strategies; to assess and analyze trends in criteria pollutant emissions; to identify emission and control technology research priorities; and to assess the impact of new or modified sources within a geographic area. The emission inventory data are also used by states to develop, evaluate, and revise their SIP.

This final rule will add new reporting requirements and will combine these new requirements with existing requirements from the CERR, $NO_X$ SIP Call, and the Acid Rain Program. Each of these three existing rules has an approved ICR. The current ICRs are approved under OMB Control Numbers 2060–0088 (CERR), 2060–0445 ($NO_X$ SIP Call), and 2060–0258 (Acid Rain Program).

The EPA estimates that this final rule will reduce the information collection burden for each of the 104 respondents by about 13 labor hours per year from current levels. The annual average reporting burden for this collection (averaged over the first 3 years of this ICR) is estimated to decrease by a total of 1,373 labor hours per year with a decrease in costs of $47,450. From the perspective of the sources reporting to the states, EPA does not believe that there will be any change in reporting burden resulting from AERR because the same universe of sources will be required to report to the states. No capital/startup costs or operation and maintenance costs for monitoring equipment are attributable to the proposed amendments. The only costs associated with this final rule are labor hours associated with collection, management, and reporting of data. The EPA does not consider the data submitted under this rule to be confidential, but some states limit release of this type of data. Any data submitted under this rule will be considered in the public domain and cannot be treated as confidential. Burden is defined at 5 CFR 1320.3(b).

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 part 51 are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the **Federal Register** to display the OMB control number for the approved information collection requirements contained in this final rule.

### *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 this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration regulations at 13 CFR 121.201; (2) a small government 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 that is not dominant in its field.

After considering the economic impacts of this 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. This action primarily impacts state and local agencies, and will provide these agencies with additional flexibility in how they collect and report emissions data.

### *D. Unfunded Mandates Reform Act*

This rule does not contain a Federal mandate that may result in expenditures

[8] EPA is developing a Fire Policy with the Department of Agriculture that will clarify terminology used in this notice regarding wildland and agricultural fires. Once that policy is finalized, EPA intends to update reporting codes to facilitate State reporting of emissions in accordance with the final policy.

of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. EPA has determined that this 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. No significant costs are attributable to this final rule; in fact, this rule is estimated to decrease costs associated with emissions inventory reporting. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The rule does not significantly or uniquely affect small governments because it contains no requirements that apply to such governments or impose obligations upon them.

*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. This rule will provide states with additional flexibility in how they collect and report emissions data. Thus, Executive Order 13132 does not apply to this rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on Tribal governments, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes, as specified in Executive Order 13175. The Tribal Authority Rule means that tribes cannot be required to report their emissions to us, unless they have attained TAS status under the Tribal Authority Rule and, on that basis, are authorized to implement and enforce this rule. Thus, Executive Order 13175 does not apply to this action.

*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 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 that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rule will consolidate, reduce, and simplify existing emissions data reporting requirements; add limited new requirements; provide additional flexibility to States in the ways they collect and report emissions data; and accelerate the reporting of emissions data to EPA. Data reporting will be conducted electronically and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy impacts.

*I. National Technology Transfer Advancement Act*

As noted in the proposed rule, Section 12(d) of the National Technology Transfer 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. 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 (E.O.) 12898 (59 FR 7629 (Feb. 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. This rule establishes information reporting procedures for emissions of criteria air pollutants from stationary and mobile source but does not affect the quantities of the pollutants emitted.

*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 the

Congress and to the Comptroller General of the United States. The 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). This rule will be effective December 17, 2008.

### List of Subjects in 40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Regional haze, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: December 4, 2008.

**Stephen L. Johnson,**

*Administrator.*

■ For the reasons stated in the preamble, title 40, chapter I, part 51 of the Code of Federal Regulations is amended as follows:

## PART 51—[AMENDED]

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

**Authority:** 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

## Subpart A—[Amended]

■ 2. Subpart A is revised to read as follows:

## Subpart A—Air Emissions Reporting Requirements

Sec.

**General Information For Inventory Preparers**

51.1 Who is responsible for actions described in this subpart?
51.5 What tools are available to help prepare and report emissions data?
51.10 How does my state report emissions that are required by the $NO_X$ SIP Call?

**Specific Reporting Requirements**

51.15 What data does my state need to report to EPA?
51.20 What are the emission thresholds that separate point and nonpoint sources?
51.25 What geographic area must my state's inventory cover?
51.30 When does my state report which emissions data to EPA?
51.35 How can my state equalize the emission inventory effort from year to year?
51.40 In what form and format should my state report the data to EPA?
51.45 Where should my state report the data?
51.50 What definitions apply to this subpart?

**Appendix A to Subpart A of Part 51—Tables**

**Appendix B to Subpart A of Part 51—[Reserved]**

### Subpart A—Air Emissions Reporting Requirements

### General Information for Inventory Preparers

#### § 51.1 Who is responsible for actions described in this subpart?

States must inventory emission sources located on nontribal lands and report this information to EPA.

#### § 51.5 What tools are available to help prepare and report emissions data?

(a) We urge your state to use estimation procedures described in documents from the Emission Inventory Improvement Program (EIIP), available at the following Internet address: *http://www.epa.gov/ttn/chief/eiip.* These procedures are standardized and ranked according to relative uncertainty for each emission estimating technique. Using this guidance will enable others to use your state's data and evaluate its quality and consistency with other data.

(b) Where current EIIP guidance materials have been supplanted by state-of-the-art emission estimation approaches or are not applicable to sources or source categories, states are urged to use applicable, state-of-the-art techniques for estimating emissions.

#### § 51.10 How does my state report emissions that are required by the $NO_X$ SIP Call?

The District of Columbia and states that are subject to the $NO_X$ SIP Call § 51.121) are subject to the emissions reporting provisions of § 51.122. This subpart A incorporates the pollutants, source, time periods, and required data elements for these reporting requirements.

### Specific Reporting Requirements

#### § 51.15 What data does my state need to report to EPA?

(a) *Pollutants.* Report actual emissions of the following (see § 51.50 for precise definitions as required):

(1) Required pollutants for triennial reports of annual (12-month) emissions for all sources and every-year reports of annual emissions from Type A sources:

(i) Sulfur dioxide ($SO_2$).

(ii) Volatile organic compounds (VOC).

(iii) Nitrogen oxides ($NO_X$).

(iv) Carbon monoxide (CO).

(v) Lead and lead compounds.

(vi) Primary $PM_{2.5}$. As applicable, also report filterable and condensable components.

(vii) Primary $PM_{10}$. As applicable, also report filterable and condensable components.

(viii) Ammonia ($NH_3$).

(2) Required pollutants for all reports of ozone season (5 months) emissions: $NO_X$.

(3) Required pollutants for triennial reports of summer day emissions:

(i) $NO_X$.

(ii) VOC.

(4) Required pollutants for every-year reports of summer day emissions: $NO_X$.

(5) A state may, at its option, include estimates of emissions for additional pollutants (such as other pollutants listed in paragraph (a)(1) of this section or hazardous air pollutants) in its emission inventory reports.

(b) *Sources.* Emissions should be reported from the following sources in all parts of the state, excluding sources located on tribal lands:

(1) Point.

(2) Nonpoint.

(3) Onroad mobile.

(4) Nonroad mobile.

(c) *Supporting Information.* You must report the data elements in Tables 2a through 2c in Appendix A of this subpart. We may ask you for other data on a voluntary basis to meet special purposes.

(d) *Confidential Data.* We do not consider the data in Tables 2a through 2c in Appendix A of this subpart confidential, but some states limit release of this type of data. Any data that you submit to EPA under this subpart will be considered in the public domain and cannot be treated as confidential. If Federal and state requirements are inconsistent, consult your EPA Regional Office for a final reconciliation.

(e) *Option to Submit Inputs to Emission Inventory Estimation Models in Lieu of Emission Estimates.* For a given inventory year, EPA may allow states to submit comprehensive input values for models capable of estimating emissions from a certain source type on a national scale, in lieu of submitting the emission estimates otherwise required by this subpart.

#### § 51.20 What are the emission thresholds that separate point and nonpoint sources?

(a) All anthropogenic stationary sources must be included in your inventory as either point or nonpoint sources.

(b) Sources that meet the definition of point source in this subpart must be reported as point sources. All pollutants specified in § 51.15(a) must be reported

for point sources, not just the pollutant(s) that qualify the source as a point source. The reporting of wildland and agricultural fires is encouraged but not required.

(c) If your state has lower emission reporting thresholds for point sources than paragraph (b) of this section, then you may use these in reporting your emissions to EPA.

(d) All stationary sources that are not reported as point sources must be reported as nonpoint sources. Episodic wind-generated particulate matter (PM) emissions from sources that are not major sources may be excluded, for example dust lifted by high winds from natural or tilled soil. In addition, if not reported as point sources, wildland and agricultural fires must be reported as nonpoint sources. Emissions of nonpoint sources may be aggregated to the county level, but must be separated and identified by source classification code (SCC). Nonpoint source categories or emission events reasonably estimated by the state to represent a de minimis percentage of total county and state emissions of a given pollutant may be omitted.

**§ 51.25 What geographic area must my state's inventory cover?**

Because of the regional nature of these pollutants, your state's inventory must be statewide, regardless of any area's attainment status.

**§ 51.30 When does my state report which emissions data to EPA?**

All states are required to report two basic types of emission inventories to EPA: Every-year Cycle Inventory; and Three-year Cycle Inventory. The sources and pollutants to be reported vary among states.

(a) Every-year cycle. See Tables 2a, 2b, and 2c of Appendix A of this subpart for the specific data elements to report every year.

(1) All states are required to report every year the annual (12-month) emissions of all pollutants listed in § 51.15(a)(1) from Type A (large) point sources, as defined in Table 1 of Appendix A of this subpart. The first every-year cycle inventory will be for the 2009 inventory year and must be submitted to EPA within 12 months, *i.e.*, by December 31, 2010.

(2) States subject to the emission reporting requirements of § 51.122 (the $NO_X$ SIP Call) are required to report every year the ozone season emissions of $NO_X$ and summer day emissions of $NO_X$ from any point, nonpoint, onroad mobile, or nonroad mobile source for which the state specified control measures in its SIP submission under § 51.121(g). This requirement begins with the inventory year prior to the year in which compliance with the $NO_X$ SIP Call requirements is first required.

(3) In inventory years that fall under the 3-year cycle requirements, the reporting required by the 3-year cycle satisfies the every-year reporting requirements of paragraph (a).

(b) Three-year cycle. See Tables 2a, 2b and 2c to Appendix A of subpart A for the specific data elements that must be reported triennially.

(1) All states are required to report for every third inventory year the annual (12-month) emissions of all pollutants listed in § 51.15(a)(1) from all point sources, nonpoint sources, onroad mobile sources, and nonroad mobile sources. The first 3-year cycle inventory will be for the 2011 inventory and must be submitted to us within 12 months, *i.e.*, by December 31, 2012. Subsequent 3-year cycle (2011, 2014, etc.) inventories will be due 12 months after the end of the inventory year, *i.e.*, by December 31 of the following year.

(2) States subject to § 51.122 must report ozone season emissions and summer day emissions of $NO_X$ from all point sources, nonpoint sources, onroad mobile sources, and nonroad mobile sources. The first 3-year cycle inventory will be for the 2008 inventory year and must be submitted to EPA within 12 months, *i.e.*, by December 31, 2009. Subsequent 3-year cycle inventories will be due as specified under paragraph (b)(1) of this section.

(3) Any state with an area for which EPA has made an 8-hour ozone nonattainment designation finding (regardless of whether that finding has reached its effective date) must report summer day emissions of VOC and $NO_X$ from all point sources, nonpoint sources, onroad mobile sources, and nonroad mobile sources. Summer day emissions of $NO_X$ and VOC for sources in attainment counties that are covered by the nonattainment area modeling domain used to demonstrate reasonable further progress (RFP) must be included. The first 3-year cycle inventory will be for the 2011 inventory year and must be submitted to EPA within 12 months, *i.e.*, by December 31, 2012. Subsequent three-year cycle inventories will be due as specified under paragraph (b)(1) of this section.

(4) States with CO nonattainment areas and states with CO attainment areas subject to maintenance plans must report winter work weekday emissions of CO with their 3-year cycle inventories.

**§ 51.35 How can my state equalize the emission inventory effort from year to year?**

(a) Compiling a 3-year cycle inventory means more effort every 3 years. As an option, your state may ease this workload spike by using the following approach:

(1) Each year, collect and report data for all Type A (large) point sources (this is required for all Type A point sources).

(2) Each year, collect data for one-third of your sources that are not Type A point sources. Collect data for a different third of these sources each year so that data has been collected for all of the sources that are not Type A point sources by the end of each 3-year cycle. You must save 3 years of data and then report all emissions from the sources that are not Type A point sources on the 3-year cycle due date.

(3) Each year, collect data for one-third of the nonpoint, nonroad mobile, and onroad mobile sources. You must save 3 years of data for each such source and then report all of these data on the 3-year cycle due date.

(b) For the sources described in paragraph (a) of this section, your state will have data from 3 successive years at any given time, rather than from the single year in which it is compiled.

(c) If your state chooses the method of inventorying one-third of your sources that are not Type A point sources and 3-year cycle nonpoint, nonroad mobile, and onroad mobile sources each year, your state must compile each year of the 3-year period identically. For example, if a process has not changed for a source category or individual plant, your state must use the same emission factors to calculate emissions for each year of the 3-year period. If your state has revised emission factors during the 3 years for a process that has not changed, you must resubmit previous years' data using the revised factor. If your state uses models to estimate emissions, you must make sure that the model is the same for all 3 years.

(d) If your state needs a new reference year emission inventory for a selected pollutant, your state cannot use these optional reporting frequencies for the new reference year.

(e) If your state is a $NO_X$ SIP Call state, you cannot use these optional reporting frequencies for $NO_X$ SIP Call reporting.

**§ 51.40 In what form and format should my state report the data to EPA?**

(a) You must report your emission inventory data to us in electronic form.

(b) We support specific electronic data reporting formats, and you are required to report your data in a format consistent with these. The term format

encompasses the definition of one or more specific data fields for each of the data elements listed in Tables 2a, 2b, and 2c in Appendix A of this subpart; allowed code values for categorical data fields; transmittal information; and data table relational structure. Because electronic reporting technology changes continually, contact the EPA Emission Inventory and Analysis Group (EIAG) for the latest specific formats. You can find information on the current formats at the following Internet address: *http://www.epa.gov/ttn/chief/nif/index.html.* You may also call the air emissions contact in your EPA Regional Office or our Info CHIEF help desk at (919) 541–1000 or send e-mail to *info.chief@epa.gov.*

**§ 51.45 Where should my state report the data?**

(a) Your state submits or reports data by providing it directly to EPA.

(b) The latest information on data reporting procedures is available at the following Internet address: *http://www.epa.gov/ttn/chief.* You may also call our Info CHIEF help desk at (919) 541–1000 or e-mail to *info.chief@epa.gov.*

**§ 51.50 What definitions apply to this subpart?**

*Activity throughput* means a measurable factor or parameter that relates directly or indirectly to the emissions of an air pollution source during the period for which emissions are reported. Depending on the type of source category, activity information may refer to the amount of fuel combusted, raw material processed, product manufactured, or material handled or processed. It may also refer to population, employment, or number of units. Activity throughput is typically the value that is multiplied against an emission factor to generate an emissions estimate.

*Annual emissions* means actual emissions for a plant, point, or process that are measured or calculated to represent a calendar year.

*Ash content* means inert residual portion of a fuel.

*Contact name* means the complete name of the lead contact person for the organization transmitting the data set, including first name, middle name or initial, and surname.

*Contact phone number* means the phone number for the contact name.

*Control device type* means the name of the type of control device (*e.g.*, wet scrubber, flaring, or process change).

*Day/wk in operations* means days per week that the emitting process operates, averaged over the inventory period.

*Design capacity* means a measure of the size of a point source, based on the reported maximum continuous throughput or output capacity of the unit. For a boiler, design capacity is based on the reported maximum continuous steam flow, usually in units of million BTU per hour.

*Emission factor* means the ratio relating emissions of a specific pollutant to an activity or material throughput level.

*Emission release point type* means the code for physical configuration of the release point.

*Emission type* means the code describing temporal designation of emissions reported, *i.e.*, Entire Period, Average Weekday, etc.

*Exit gas flow rate* means the numeric value of the flow rate of a stack gas.

*Exit gas temperature* means the numeric value of the temperature of an exit gas stream.

*Exit gas velocity* means the numeric value of the velocity of an exit gas stream.

*Facility ID codes* means the unique codes for a plant or facility treated as a point source, containing one or more pollutant-emitting units. The EPA's reporting format for a given inventory year may require several facility ID codes to ensure proper matching between databases, *e.g.*, the state's own current and most recent facility ID codes, the EPA-assigned facility ID codes, and the ORIS (Department of Energy) ID code if applicable.

*Fall throughput (percent)* means the part of the throughput or activity attributable to the three fall months (September, October, November). This expresses part of the annual activity information based on four seasons—typically spring, summer, fall, and winter. It is a percentage of the annual activity (*e.g.*, out of 600 units produced each year, 150 units are produced in the fall which is 25 percent of the annual activity).

*FIPS Code.* Federal Information Placement System (FIPS) means the system of unique numeric codes the government developed to identify states, counties and parishes for the entire United States, Puerto Rico, and Guam.

*Heat content* means the amount of thermal heat energy in a solid, liquid, or gaseous fuel, averaged over the period for which emissions are reported. Fuel heat content is typically expressed in units of Btu/lb of fuel, Btu/gal of fuel, joules/kg of fuel, etc.

*Hr/day in operations* means the hours per day that the emitting process operates averaged over the inventory period.

*Inventory end date* means the last day of the inventory period.

*Inventory start date* means the first day of the inventory period.

*Inventory year* means the year for which emissions estimates are calculated.

*Lead (Pb)* means lead as defined in 40 CFR 50.12. Lead should be reported as elemental lead and its compounds.

*NAICS* means North American Industry Classification System code. The NAICS codes are U.S. Department of Commerce's codes for businesses by products or services and have replaced Standard Industrial Classification codes.

*Maximum nameplate capacity* means a measure of the size of a generator which is put on the unit's nameplate by the manufacturer. The data element is reported in megawatts or kilowatts.

*Method accuracy description (MAD) codes* means a set of six codes used to define the accuracy of latitude/longitude data for point sources. The six codes and their definitions are:

(1) *Coordinate Data Source Code:* The code that represents the party responsible for providing the latitude/longitude.

(2) *Horizontal Collection Method Code:* Method used to determine the latitude/longitude coordinates for a point on the earth.

(3) *Horizontal Accuracy Measure:* The measure of accuracy (in meters) of the latitude/longitude coordinates.

(4) *Horizontal Reference Datum Code:* Code that represents the reference datum used to determine the latitude/longitude coordinates.

(5) *Reference Point Code:* The code that represents the place for which geographic coordinates were established. Code value should be 106 (*e.g.*, point where substance is released).

(6) *Source Map Scale Number:* The number that represents the proportional distance on the ground for one unit of measure on the map or photo.

*Mobile source* means a motor vehicle, nonroad engine or nonroad vehicle, where:

(1) A *motor vehicle* is any self-propelled vehicle used to carry people or property on a street or highway;

(2) A *nonroad engine* is an internal combustion engine (including fuel system) that is not used in a motor vehicle or a vehicle used solely for competition, or that is not affected by sections 111 or 202 of the CAA; and

(3) A *nonroad vehicle* is a vehicle that is run by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition.

*Nitrogen oxides ($NO_X$)* means nitrogen oxides ($NO_X$) as defined in 40 CFR 60.2 as all oxides of nitrogen except $N_2O$.

Nitrogen oxides should be reported on an equivalent molecular weight basis as nitrogen dioxide ($NO_2$).

*Nonpoint sources.* Nonpoint sources collectively represent individual sources that have not been inventoried as specific point or mobile sources. These individual sources treated collectively as nonpoint sources are typically too small, numerous, or difficult to inventory using the methods for the other classes of sources.

*Ozone season* means the period from May 1 through September 30 of a year.

*Particulate Matter (PM).* Particulate matter is a criteria air pollutant. For the purpose of this subpart, the following definitions apply:

(1) *Filterable $PM_{2.5}$* or *Filterable $PM_{10}$*: Particles that are directly emitted by a source as a solid or liquid at stack or release conditions and captured on the filter of a stack test train. Filterable $PM_{2.5}$ is particulate matter with an aerodynamic diameter equal to or less than 2.5 micrometers. Filterable $PM_{10}$ is particulate matter with an aerodynamic diameter equal to or less than 10 micrometers.

(2) *Condensable PM:* Material that is vapor phase at stack conditions, but which condenses and/or reacts upon cooling and dilution in the ambient air to form solid or liquid PM immediately after discharge from the stack. Note that all condensable PM, if present from a source, is typically in the $PM_{2.5}$ size fraction, and therefore all of it is a component of both primary $PM_{2.5}$ and primary $PM_{10}$.

(3) *Primary $PM_{2.5}$*: The sum of filterable $PM_{2.5}$ and condensable PM.

(4) *Primary $PM_{10}$*: The sum of filterable $PM_{10}$ and condensable PM.

(5) *Secondary PM:* Particles that form or grow in mass through chemical reactions in the ambient air well after dilution and condensation have occurred. Secondary PM is usually formed at some distance downwind from the source. Secondary PM should not be reported in the emission inventory and is not covered by this subpart.

*Physical address* means the street address of a facility. This is the address of the location where the emissions occur; not, for example, the corporate headquarters.

*Point source* means large, stationary (nonmobile), identifiable sources of emissions that release pollutants into the atmosphere. A point source is a facility that is a major source under 40 CFR part 70 for the pollutants for which reporting is required, except for the emissions of hazardous air pollutants, which are not considered in determining whether a source is a point source under this subpart. The minimum point source reporting thresholds in tons per year of pollutant are as follows, as measured in potential to emit:

| Pollutant | Annual cycle (Type A sources) | Three-year cycle | |
|---|---|---|---|
| | | Type B sources [1] | NAA sources [2] |
| (1) $SO_X$ | ≥2500 | ≥100 | ≥100. |
| (2) VOC | ≥250 | ≥100 | $O_3$ (moderate) ≥ 100. |
| (3) VOC | | | $O_3$ (serious) ≥ 50. |
| (4) VOC | | | $O_3$ (severe) ≥ 25. |
| (5) VOC | | | $O_3$ (extreme) ≥ 10. |
| (6) $NO_X$ | ≥ 2500 | ≥ 100 | ≥ 100. |
| (7) CO | ≥ 2500 | ≥1000 | $O_3$ (all areas) ≥ 100. |
| (8) CO | | | CO (all areas) ≥ 100. |
| (9) Pb | | ≥ 5 | ≥ 5. |
| (10) $PM_{10}$ | ≥ 250 | ≥ 100 | $PM_{10}$ (moderate) ≥ 100. |
| (11) $PM_{10}$ | | | $PM_{10}$ (serious) ≥ 70. |
| (12) $PM_{2.5}$ | ≥ 250 | ≥ 100 | ≥ 100. |
| (13) $NH_3$ | ≥ 250 | ≥ 100 | ≥ 100. |

[1] Type A sources are a subset of the Type B sources and are the larger emitting sources by pollutant.

[2] NAA = Nonattainment Area. Special point source reporting thresholds apply for certain pollutants by type of nonattainment area. The pollutants by nonattainment area are: Ozone: VOC, $NO_X$, CO; CO: CO; $PM_{10}$: $PM_{10}$.

*Pollutant code* means a unique code for each reported pollutant assigned by the reporting format specified by EPA for each inventory year.

*Primary capture and control efficiencies* means two values indicating the emissions capture efficiency and the emission reduction efficiency of a primary control device. Capture and control efficiencies are usually expressed as a percentage.

*Process ID code* means a unique code for the process generating the emissions, typically a description of a process.

*Roadway class* means a classification system developed by the Federal Highway Administration that defines all public roadways as to type based on land use and physical characteristics of the roadway.

*Rule effectiveness (RE)* means a rating of how well a regulatory program achieves all possible emissions reductions. This rating reflects the assumption that controls typically are not 100 percent effective because of equipment downtime, upsets, decreases in control efficiencies, and other deficiencies in emission estimates. Rule effectiveness adjusts the control efficiency from what could be realized under ideal conditions to what is actually emitted in practice due to less than ideal conditions.

*Rule penetration* means the percentage of a nonpoint source category covered by an applicable regulation.

*SCC* means source classification code, a process-level code that describes the equipment and/or operation which is emitting pollutants.

*Site name* means the name of the facility.

*Spring throughput (percent)* means part of the throughput or activity attributable to the three Spring months (March, April, May). See also the definition of Fall throughput.

*Stack diameter* means the inner physical diameter of a stack.

*Stack height* means physical height of a stack above the surrounding terrain.

*Stack ID code* means a unique code for the point where emissions from one or more processes release into the atmosphere.

*Sulfur content* means the sulfur content of a fuel, usually expressed as percent by weight.

*Summer day emissions* means an average day's emissions for a typical summer work weekday. The state will select the particular month(s) in summer and the day(s) in the work week to be represented. The selection of conditions should be coordinated with the conditions assumed in the development of reasonable further

progress (RFP) plans, rate of progress plans and demonstrations, and/or emissions budgets for transportation conformity, to allow comparability of daily emission estimates.

*Summer throughput (percent)* means the part of throughput or activity attributable to the three Summer months (June, July, August). See also the definition of Fall throughput.

*Total capture and control efficiency (percent)* means the net emission reduction efficiency of all emissions collection devices.

*Type A source* means large point sources with actual annual emissions greater than or equal to any of the emission thresholds listed in Table 1 of Appendix A of this subpart for Type A sources. If a source is a Type A source for any pollutant listed in Table 1, then the emissions for all Table 1 pollutants must be reported for that source.

*Unit ID code* means a unique code for the unit of generation of emissions, typically a physical piece of or a closely related set of equipment. The EPA's reporting format for a given inventory year may require multiple unit ID codes to ensure proper matching between databases, *e.g.*, the state's own current and most recent unit ID codes, the EPA-assigned unit ID codes if any, and the ORIS (Department of Energy) ID code if applicable.

*VMT by SCC* means vehicle miles traveled disaggregated to the SCC level, *i.e.*, reflecting combinations of vehicle type and roadway class. Vehicle miles traveled expresses vehicle activity and is used with emission factors. The emission factors are usually expressed in terms of grams per mile of travel. Because VMT does not correlate directly to emissions that occur while the vehicle is not moving, nonmoving emissions are incorporated into the emission factors in EPA's MOBILE Model.

*VOC* means volatile organic compounds. The EPA's regulatory definition of VOC is in 40 CFR 51.100.

*Winter throughput (percent)* means the part of throughput or activity attributable to the three winter months (January, February, December of the same year, *e.g.*, winter 2005 is composed of January 2005, February 2005, and December 2005). See also the definition of Fall throughput.

*Wk/yr in operation* means weeks per year that the emitting process operates.

*Work weekday* means any day of the week except Saturday or Sunday.

*X stack coordinate (longitude)* means an object's east-west geographical coordinate.

*Y stack coordinate (latitude)* means an object's north-south geographical coordinate.

**Appendix A to Subpart A of Part 51—Tables**

TABLE 1 TO APPENDIX A OF SUBPART A—EMISSION THRESHOLDS BY POLLUTANT (TPY[1]) FOR TREATMENT OF POINT SOURCES AS TYPE A UNDER 40 CFR 51.30.

| Pollutant | Emissions threshold for Type A treatment |
|---|---|
| (1) $SO_2$ | ≥2500. |
| (2) VOC | ≥250. |
| (3) $NO_X$ | ≥2500. |
| (4) CO | ≥2500. |
| (5) Pb | Does not determine Type A status. |
| (6) $PM_{10}$ | ≥250. |
| (7) $PM_{2.5}$ | ≥250. |
| (8) $NH_3$[2] | ≥250. |

[1] tpy = Tons per year of actual emissions.
[2] Ammonia threshold applies only in areas where ammonia emissions are a factor in determining whether a source is a major source, *i.e.*, where ammonia is considered a significant precursor of $PM_{2.5}$.

TABLE 2a TO APPENDIX A OF SUBPART A—DATA ELEMENTS FOR REPORTING ON EMISSIONS FROM POINT SOURCES, WHERE REQUIRED BY 40 CFR 51.30

| Data elements | Every-year reporting | Three-year reporting |
|---|---|---|
| (1) Inventory year | ✓ | ✓ |
| (2) Inventory start date | ✓ | ✓ |
| (3) Inventory end date | ✓ | ✓ |
| (4) Contact name | ✓ | ✓ |
| (5) Contact phone number | ✓ | ✓ |
| (6) FIPS code | ✓ | ✓ |
| (7) Facility ID codes | ✓ | ✓ |
| (8) Unit ID code | ✓ | ✓ |
| (9) Process ID code | ✓ | ✓ |
| (10) Stack ID code | ✓ | ✓ |
| (11) Site name | ✓ | ✓ |
| (12) Physical address | ✓ | ✓ |
| (13) SCC | ✓ | ✓ |
| (14) Heat content (fuel) (annual average) | ✓ | ✓ |
| (15) Heat content (fuel) (ozone season, if applicable) | ✓ | ✓ |
| (16) Ash content (fuel) (annual average) | ✓ | ✓ |
| (17) Sulfur content (fuel) (annual average) | ✓ | ✓ |
| (18) Pollutant code | ✓ | ✓ |
| (19) Activity/throughput (for each period reported) | ✓ | ✓ |
| (20) Summer day emissions (if applicable) | ✓ | ✓ |
| (21) Ozone season emissions (if applicable) | ✓ | ✓ |
| (22) Annual emissions | ✓ | ✓ |
| (23) Emission factor | ✓ | ✓ |

TABLE 2a TO APPENDIX A OF SUBPART A—DATA ELEMENTS FOR REPORTING ON EMISSIONS FROM POINT SOURCES, WHERE REQUIRED BY 40 CFR 51.30—Continued

| Data elements | Every-year reporting | Three-year reporting |
|---|---|---|
| (24) Winter throughput (percent) | ✓ | ✓ |
| (25) Spring throughput (percent) | ✓ | ✓ |
| (26) Summer throughput (percent) | ✓ | ✓ |
| (27) Fall throughput (percent) | ✓ | ✓ |
| (28) Hr/day in operation | ✓ | ✓ |
| (29) Day/wk in operation | ✓ | ✓ |
| (30) Wk/yr in operation | ✓ | ✓ |
| (31) X stack coordinate (longitude) | | ✓ |
| (32) Y stack coordinate (latitude) | | ✓ |
| (33) Method accuracy description (MAD) codes | | ✓ |
| (34) Stack height | | ✓ |
| (35) Stack diameter | | ✓ |
| (36) Exit gas temperature | | ✓ |
| (37) Exit gas velocity | | ✓ |
| (38) Exit gas flow rate | | ✓ |
| (39) NAICS at the Facility level | | ✓ |
| (40) Design capacity (including boiler capacity if applicable) | | ✓ |
| (41) Maximum generator nameplate Capacity | | ✓ |
| (42) Primary capture and control efficiencies (percent) | | ✓ |
| (43) Total capture and control efficiency (percent) | | ✓ |
| (44) Control device type | | ✓ |
| (45) Emission type | | ✓ |
| (46) Emission release point type | | ✓ |
| (47) Rule effectiveness (percent) | | ✓ |
| (48) Winter work weekday emissions of CO (if applicable) | | ✓ |

TABLE 2b TO APPENDIX A OF SUBPART A—DATA ELEMENTS FOR REPORTING ON EMISSIONS FROM NONPOINT SOURCES AND NONROAD MOBILE SOURCES, WHERE REQUIRED BY 40 CFR 51.30

| Data elements | Every-year reporting | Three-year reporting |
|---|---|---|
| (1) Inventory year | ✓ | ✓ |
| (2) Inventory start date | ✓ | ✓ |
| (3) Inventory end date | ✓ | ✓ |
| (4) Contact name | ✓ | ✓ |
| (5) Contact phone number | ✓ | ✓ |
| (6) FIPS code | ✓ | ✓ |
| (7) SCC | ✓ | ✓ |
| (8) Emission factor | ✓ | ✓ |
| (9) Activity/throughput level (for each period reported) | ✓ | ✓ |
| (10) Total capture/control efficiency (percent) | ✓ | ✓ |
| (11) Rule effectiveness (percent) | ✓ | ✓ |
| (12) Rule penetration (percent) | ✓ | ✓ |
| (13) Pollutant code | ✓ | ✓ |
| (14) Ozone season emissions (if applicable) | ✓ | ✓ |
| (15) Summer day emissions (if applicable) | ✓ | ✓ |
| (16) Annual emissions | ✓ | ✓ |
| (17) Winter throughput (percent) | ✓ | ✓ |
| (18) Spring throughput (percent) | ✓ | ✓ |
| (19) Summer throughput (percent) | ✓ | ✓ |
| (20) Fall throughput (percent) | ✓ | ✓ |
| (21) Hrs/day in operation | ✓ | ✓ |
| (22) Days/wk in operation | ✓ | ✓ |
| (23) Wks/yr in operation | ✓ | ✓ |
| (24) Winter work weekday emissions of CO (if applicable) | | ✓ |

TABLE 2c TO APPENDIX A OF SUBPART A—DATA ELEMENTS FOR REPORTING ON EMISSIONS FROM ONROAD MOBILE SOURCES, WHERE REQUIRED BY 40 CFR 51.30

| Data elements | Every-year reporting | Three-year reporting |
|---|---|---|
| 1. Inventory year | ✓ | ✓ |
| 2. Inventory start date | ✓ | ✓ |
| 3. Inventory end date | ✓ | ✓ |
| 4. Contact name | ✓ | ✓ |
| 5. Contact phone number | ✓ | ✓ |

TABLE 2c TO APPENDIX A OF SUBPART A—DATA ELEMENTS FOR REPORTING ON EMISSIONS FROM ONROAD MOBILE SOURCES, WHERE REQUIRED BY 40 CFR 51.30—Continued

| Data elements | Every-year reporting | Three-year reporting |
|---|---|---|
| 6. FIPS code | ✓ | ✓ |
| 7. SCC | ✓ | ✓ |
| 8. Emission factor | ✓ | ✓ |
| 9. Activity (VMT by SCC) | ✓ | ✓ |
| 10. Pollutant code | ✓ | ✓ |
| 11. Ozone season emissions (if applicable) | ✓ | ✓ |
| 12. Summer day emissions (if applicable) | ✓ | ✓ |
| 13. Annual emissions | ✓ | ✓ |
| 14. Winter throughput (percent) | ✓ | ✓ |
| 15. Spring throughput (percent) | ✓ | ✓ |
| 16. Summer throughput (percent) | ✓ | ✓ |
| 17. Fall throughput (percent) | ✓ | ✓ |
| 18. Winter work weekday emissions of CO (if applicable) | | ✓ |

## Subpart G—[Amended]

■ 3. Section 51.122 is revised to read as follows:

**§ 51.122 Emissions reporting requirements for SIP revisions relating to budgets for $NO_x$ emissions.**

(a) As used in this section, words and terms shall have the meanings set forth in § 51.50.

(b) For its transport SIP revision under § 51.121, each state must submit to EPA $NO_X$ emissions data as described in this section.

(c) Each revision must provide for periodic reporting by the state of $NO_X$ emissions data to demonstrate whether the state's emissions are consistent with the projections contained in its approved SIP submission.

(1) For the every-year reporting cycle, each revision must provide for reporting of $NO_X$ emissions data every year as follows:

(i) The state must report to EPA emissions data from all $NO_X$ sources within the state for which the state specified control measures in its SIP submission under § 51.121(g), including all sources for which the state has adopted measures that differ from the measures incorporated into the baseline inventory for the year 2007 that the state developed in accordance with § 51.121(g).

(ii) If sources report $NO_X$ emissions data to EPA for a given year pursuant to a trading program approved under § 51.121(p) or pursuant to the monitoring and reporting requirements of 40 CFR part 75, then the state need not provide an every-year cycle report to EPA for such sources.

(2) For the three-year cycle reporting, each plan must provide for triennial (*i.e.*, every third year) reporting of $NO_X$ emissions data from all sources within the state.

(3) The data availability requirements in § 51.116 must be followed for all data submitted to meet the requirements of paragraphs (b)(1) and (2) of this section.

(d) The data reported in paragraph (b) of this section must meet the requirements of subpart A of this part.

(e) Approval of ozone season calculation by EPA. Each state must submit for EPA approval an example of the calculation procedure used to calculate ozone season emissions along with sufficient information to verify the calculated value of ozone season emissions.

(f) Reporting schedules.

(1) Data collection is to begin during the ozone season 1 year prior to the state's $NO_X$ SIP Call compliance date.

(2) Reports are to be submitted according to paragraph (b) of this section.

(3) Through 2011, reports are to be submitted according to the schedule in Table 1 of this paragraph. After 2011, triennial reports are to be submitted every third year and annual reports are to be submitted each year that a triennial report is not required.

TABLE 1—SCHEDULE FOR SUBMITTING REPORTS

| Data collection year | Type of report required |
|---|---|
| 2005 | Triennial. |
| 2006 | Annual. |
| 2007 | Annual. |
| 2008 | Triennial. |
| 2009 | Annual. |
| 2010 | Annual. |
| 2011 | Triennial. |

(4) States must submit data for a required year within the time specified after the end of the inventory year for which the data are collected. The first inventory (the 2009 inventory year) and all subsequent years will be due 12 months following the end of the inventory year, *i.e.*, the 2009 inventory must be reported to EPA by December 31, 2010.

(g) Data reporting procedures are given in subpart A. When submitting a formal $NO_X$ Budget Emissions Report and associated data, states shall notify the appropriate EPA Regional Office.

[FR Doc. E8–29737 Filed 12–16–08; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R05–OAR–2006–0609; FRL–8749–1]**

## Approval and Promulgation of Air Quality Implementation Plans; Wisconsin; New Source Review Reform "Linkage" Rule, Rule AM–32–04b

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is approving as a revision to the Wisconsin State Implementation Plan (SIP) changes to the minor New Source Review (NSR) construction permit program and permits fees schedule, through rule AM–32–04b. The purpose of rule AM–32–04b is to update Wisconsin's minor NSR construction permit program to include changes to implement some of the new elements of the Federal NSR Reform Rule for sources that meet certain provisions within the new major NSR permitting requirements. Rule AM–32–04b has been created to accompany Wisconsin's NSR Reform rules and is necessary to effectively implement them. Elsewhere in this **Federal Register**, EPA is approving Wisconsin's NSR Reform rules. The

Wisconsin Department of Natural Resources (WDNR) has also established a new fee schedule that will apply to facilities that meet the criteria in rule AM–32–04b.

**DATES:** This final rule is effective on January 16, 2009.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2006–0609. 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 Danny Marcus, Environmental Engineer, at (312) 353–8781 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Danny Marcus, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8781, *marcus.danny@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:

I. What Is Being Addressed in This Action?
II. What Are the Changes That EPA Is Approving?
III. What Action Is EPA Taking Today?
IV. Statutory and Executive Order Reviews

## I. What Is Being Addressed in This Action?

We are approving changes to the minor NSR construction permit program and permits fees schedule for the State of Wisconsin, enacted through rule AM–32–04b. EPA granted full approval to WDNR's non-attainment new source review (NANSR) program on January 18, 1995 (60 FR 3538) and the approval became effective on February 17, 1995. The January 18, 1995, approval also included WDNR's minor NSR program, which was incorporated by reference into Wisconsin's SIP.

The rule revision being approved in this action has been created to update Wisconsin's minor NSR construction permit program to include changes to implement some of the new elements of the Federal NSR Reform Rule for sources that meet certain requirements within the new major NSR permitting requirements. EPA published the NSR Reform Rule, which includes revisions to the Federal Prevention of Significant Deterioration (PSD) and NANSR regulations, in the **Federal Register** on December 31, 2002, effective March 3, 2003. Elsewhere in today's **Federal Register**, EPA is approving Wisconsin's revisions to its NSR rules. The action approving them contains a compilation of responses to comments that we received.

This rule revision will affect those facilities meeting certain criteria within the major NSR program as a result of the actual-to-projected-actual applicability test, and facilities complying with plant-wide applicability limitations (PALs). This rule revision also establishes a new fee schedule for facilities utilizing PALs and for facilities utilizing the actual-to-projected-actual test to avoid major NSR.

This rule revision contains a provision that will be applicable to sources that meet criteria within the major NSR rules when applying the actual-to-projected-actual applicability test in circumstances where the calculated difference between projected actual emissions and baseline actual emissions does not exceed significant thresholds. Facilities that meet this criterion will also have to meet the criteria in this rule, AM–32–04b, in order to be eligible for utilizing the provision.

EPA created PALs so that a facility could make rapid, iterative changes optimizing process performance, without the administrative time delays and uncertainty associated with permitting. EPA believes that the PAL provides for environmental improvement since its cap-based framework encourages emission reductions and pollution prevention. EPA has not provided provisions for sources operating under a PAL in certain circumstances where a state's minor NSR rules could affect permitting. In rule AM–32–04b, WDNR provides additional requirements for facilities that choose to operate under a PAL.

In Wisconsin, any source that chooses to establish a PAL, or will distribute allowable emissions following expiration of a PAL, must comply with section NR 406.035 and will need a minor NSR construction permit. Any source that chooses to modify its plant under a PAL will not need a minor NSR permit, consistent with the NSR Reform Rule, so long as the criteria of NR 406.04(1f) are met.

WDNR has also established in its rules a new fee schedule that will apply to facilities using PALs and to facilities applying to utilize certain new provisions in this rule. A source will be responsible for paying a fee when establishing a PAL limit, receiving permission to increase an existing PAL limit, and when distributing limits upon expiration of a PAL. Also, there are fees applicable to sources that utilize the actual-to-projected-actual determination to avoid major NSR under the new provisions of this rule.

## II. What Are the Changes That EPA Is Approving?

We are approving amendments to Wisconsin's minor NSR construction permit program to incorporate some of the new elements of the Federal NSR Reform Rule. Please refer to the proposed approval of this rule, 72 FR 19834 (April 20, 2007), which includes a detailed explanation of the provisions that we are approving. This final action incorporates into the Wisconsin SIP amendments to the following provisions NR 406 and NR 410: NR 406.035, NR 406.04(1f), NR 406.04(1k), NR 406.07(3), NR 406.11(1m), NR 410.03(intro.), NR 410.03(1)(a)8. to 10., NR 410.03(1)(b)1, NR 410.03(1)(b)(intro.) and 2. to 4.

## III. What Action Is EPA Taking Today?

EPA is approving into the Wisconsin SIP, rule AM–32–04b, changes to the minor NSR construction permit program and permits fees schedule. Rule AM–32–04b will update Wisconsin's minor NSR construction permit program to include changes to implement the new elements of the Federal NSR Reform Rule for sources that meet certain criteria within the major NSR program as a result of the actual-to-projected-actual applicability test, and for those facilities complying with the new PAL provisions. This new rule is necessary for AM–06–04, the adopted version of the NSR Reform Rule, to be implemented appropriately.

## IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act.

Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- 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);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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 action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 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 February 17, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

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

Dated: December 8, 2008.

**Lynn Buhl,**

*Regional Administrator, Region 5.*

■ 40 CFR part 52 is amended as follows:

## PART 52—[AMENDED]

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

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

## Subpart YY—Wisconsin

■ 2. Section 52.2570 is amended by adding paragraph (c)(120) to read as follows:

**§ 52.2570 Identification of plan.**

* * * * *

(c)* * *

(120) On May 25, 2006, Wisconsin submitted for EPA approval into the Wisconsin SIP a revision to renumber and amend NR 410.03(1)(b); to amend 410.03(intro.) and to create NR 406.035, 406.04(1f) and (1k), 406.07(3), 406.11(1m), 410.03(1)(a)8. to 10. and (b)(intro.) and 2. to 4. relating to changes to chs. NR 406 and 410, the state air permitting programs, with Federal changes to air permitting program and affecting small business. The rule revision being approved in this action has been created to update Wisconsin's minor NSR construction permit program to include changes to implement some of the new elements of the Federal NSR Reform rules for sources that meet certain requirements within the new major NSR permitting requirements. EPA has determined that this revision is approvable under the Act.

(i) Incorporation by reference. The following sections of the Wisconsin Administrative Code are incorporated by reference:

(A) NR 406.035 Establishment or distribution of plant-wide applicability limitations, as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(B) NR 406.04 Direct sources exempt from construction permit requirements. NR 406.04(1f) and NR 406.04(1k), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(C) NR 406.07 Scope of permit exemption. NR 406.07(3), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(D) NR 406.11 Construction permit revision, suspension and revocation. NR 406.11(1m), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(E) NR 410.03 Application fee. NR 410.03(intro.), NR 410.03(1)(a) 8 to 10, NR 410.03(1)(b), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

* * * * *

[FR Doc. E8–29817 Filed 12–16–08; 8:45 am]

BILLING CODE 6560–50–P

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## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R05–OAR–2006–0609; FRL–8748–9]**

## Approval and Promulgation of Air Quality Implementation Plans; Wisconsin; NSR Reform Regulations, Rule AM–06–04

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is approving certain revisions to Wisconsin's prevention of significant deterioration (PSD) and non-attainment new source review (NANSR) construction permit programs, which Wisconsin submitted on May 25, 2006. The Wisconsin Department of Natural Resources (WDNR) is seeking approval of rule AM–06–04 to implement the

NSR Reform provisions that were not vacated by the United States Court of Appeals for the District of Columbia (D.C. Circuit) in *New York* v. *EPA.* EPA proposed approval of these rules on April 20, 2007 and received adverse comments. In this action, EPA responds to these comments and announces EPA's final rulemaking action. This action affects major stationary sources in Wisconsin that are subject to or potentially subject to the PSD and NANSR construction permit programs.

**DATES:** This final rule is effective on January 16, 2009.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2006–0609. 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 Danny Marcus, Environmental Engineer, at (312) 353–8781 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Danny Marcus, Environmental Engineer, Air Permits Section, Air Programs Branch (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8781, *marcus.danny@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

I. What is being addressed by this document?
II. What sections of Wisconsin's rules are we approving in this action?
III. How has this rulemaking been affected by the December 21, 2007 rulemaking which clarifies the ''reasonable possibility'' provision?
IV. What are EPA's responses to adverse comments?
V. What action is EPA taking?
VI. Statutory and Executive Order Reviews

## I. What is being addressed by this document?

We are approving rule AM–06–04 as a revision to the PSD and NANSR construction permit programs for the State of Wisconsin. EPA granted final approval to Wisconsin's NANSR program on January 18, 1995 (60 FR 3538) and the approval became effective on February 17, 1995. EPA granted final approval to Wisconsin's PSD program on May 27, 1999 (64 FR 28745), which became effective on June 28, 1999.

On December 31, 2002, EPA published revisions to the Federal PSD and NANSR regulations in 40 CFR Parts 51 and 52 (67 FR 80186). These revisions are commonly referred to as the New Source Review (NSR) Reform Rule and became effective on March 3, 2003. These regulatory revisions included provisions for establishing Plant-wide Applicability Limits (PALs), Clean Units and Pollution Control Projects (PCPs), for determining baseline actual emissions, and for promulgating the actual-to-future-actual methodology. As stated in the December 31, 2002, EPA rulemaking, state and local permitting agencies were required to adopt and submit revisions to their part 51 permitting programs implementing the minimum program elements of that rulemaking no later than January 2, 2006 (67 FR 80240). With this action, we are approving WDNR's program revisions that satisfy this requirement.

WDNR originally prepared rule changes to adopt a version of the Federal rule revisions, which were subsequently authorized by the Wisconsin Natural Resources Board for public hearing in December 2003. On June 24, 2005, the DC Circuit issued its ruling on challenges to the December 2002 NSR Reform Rule. *New York* v. *EPA*, 413 F.3d 3 (DC. Cir 2005). Although the court upheld most of EPA's rules, it vacated both the Clean Unit and the PCP provisions. In addition, the court remanded to EPA the ''reasonable possibility'' provision for reporting and recordkeeping. In response, on December 21, 2007, EPA published a rule that clarifies the recordkeeping and reporting standards of the 2002 rule.

After the DC Circuit ruled on the challenges to the Federal NSR Reform Rule, WDNR adopted those portions of the Reform Rule that the court upheld, and modified the portion that the court remanded to EPA in accordance with the court's instructions. WDNR submitted the revisions to EPA on May 25, 2006. These revisions are consistent with the current provisions of the NSR Reform Rule following the ruling of the DC Circuit.

## II. What sections of Wisconsin's rules are we approving in this action?

We are approving amendments to provisions of the PSD and NANSR construction permit programs in the Wisconsin State Implementation Plan (SIP). Please refer to the proposed rule of this action which includes a detailed explanation of the provisions that are being approved. This final action amends the following provisions within NR 405, NR 408, and NR 484: NR 405.01(1) and (2), NR 405.02(1), NR 405.02(1)(d), NR 405.02(2m), NR 405.02(8) and (11), NR 405.02(11c), (11e) and (11j), NR 405.02(12), NR 405.02(20m), NR 405.02(21) and (24), NR 405.02(24j), NR 405.02(24m), NR 405.02(25b), (25d), (25e), (25f) and (25i), NR 405.02(27)(a)8., 17., and 18., NR 405.02(27m), NR 405.025, NR 405.16(3) and (4), NR 405.18(1) to (15), NR 408.02(1), NR 408.02(2m), NR 408.02(4), (5), and (11), NR 408.02(11e), (11m) and (11s), NR 408.02(13), NR 408.02(13m), NR 408.02(20), NR 408.02(21)(a)1.(intro), NR 408.02(23), NR 408.02(24m) and (25s), NR 408.02(27), NR 408.02(28e), (28j), (28m), (28s), (29m), and (32m), NR 408.025, NR 408.06(10), NR 408.10(5) and (6), NR 408.11(1) to (15), NR 484.04(21), and NR 484.04(27m).

## III. How has this rulemaking been affected by the December 21, 2007 rulemaking which clarifies the ''reasonable possibility'' provision?

As part of its ruling on challenges to the December 2002 NSR Reform Rule, the DC Circuit remanded to EPA the ''reasonable possibility'' provision regarding reporting and recordkeeping. *New York* v. *EPA*, 413 F.3d at 35–36. In response, on December 21, 2007, EPA published a rule (72 FR 72607) that clarifies the recordkeeping and reporting standards of the 2002 rule. The rule adds further clarification to the criteria determining whether a source experiencing a physical change or change in the method of operation that does not trigger major NSR permitting requirements must keep records. The standard also specifies the recordkeeping requirements for such sources.

WDNR requires any facility that chooses to use the ''past-actual-to-future-actual'' provision to satisfy the recordkeeping and reporting standards. NR 405.16(3) and NR 408.10(5) are more stringent than the criteria established by EPA to determine whether a facility is subject to the recordkeeping and reporting requirements. *See* 40 CFR 51.165(a)(6) and 40 CFR 51.166(r)(6).

The preamble to the December 21, 2007, rule states that state and local authorities have the option of making their regulations more stringent than these rules. The preamble also states that state and local authorities that have regulations within their SIP, which they

believe fulfills the minimum criteria of the December 21, 2007, rulemaking, must submit notice acknowledging that their rules are at least as stringent as the Federal rules within three years of December 21, 2007. We have concluded that the revisions that we are approving today into Wisconsin's SIP are consistent with the December 21, 2007 rulemaking.

**IV. What are EPA's responses to adverse comments?**

EPA received comments both in support of and in opposition to Wisconsin's rules. The Sierra Club provided adverse comments on EPA's April 20, 2007, proposed rule approval. EPA responded to these adverse comments in a document that can be found in the official docket for this action. The document is titled, ''Response to Comments by the Sierra Club on NSR Reform Regulations.'' Below are EPA's responses to each of the Sierra Club's comments, which are set forth in full in the aforementioned document:

*Comment I:* The Proposed Modifications to Wisconsin's SIP are an Impermissible Backslide.

*Response:* The Federal NSR Reform Rule was upheld by the DC Circuit in *New York* v. *EPA*, 413 F.3d 3 (DC Cir. 2005), with the exception of the Pollution Control Project, Clean Unit, and ''reasonable possibility'' provisions. Therefore, with the exceptions noted, the revisions to Wisconsin's NSR rules, which are based on the Federal NSR Reform Rule, have already withstood judicial scrutiny and are lawful. EPA addresses the commenter's specific points as follows:

a. As addressed in the national Rulemaking, the proposed NSR Reform Rule of 1996, 61 FR 38250 (July 23, 1996) addressed the provision for the actual-to-future-actual method of determining whether or not a source is subject to major NSR. Thus, the appropriate time to have commented on this provision was prior to October 21, 1996, the close of the public comment period. EPA has found that while the actual-to-projected-actual test would reduce the number of sources that would need to take permit limits, the environmental benefit of these permit limits is preserved, because any source projecting no significant net emissions increase must stay within that projection or comply with NSR. Furthermore, in Wisconsin, a minor increase in emissions, even if small enough not to trigger major NSR, is still required to meet the criteria of NR 406.04(1k) of WDNR's SIP. Facilities that are able to net out of permit review under the actual-to-actual provision are still required to ensure that the modifications do not cause or exacerbate an air quality increment or air quality standard.

b. The test developed in *Wisconsin Electric Power Company* v. *Reilly,* 893 F.2d 901, 904 (7th Cir. 1990), as a result of the NSR Reform Rule, applies to all facilities and not just power plants. EPA found that the ten-year look back period promotes economic growth and administrative efficiency by affording sources the flexibility to respond rapidly to market changes, focusing limited regulatory resources on changes most likely to harm the environment. The DC Circuit upheld the ten-year look back period, stating, ''* * * we conclude that petitioner's challenges to the ten-year look back period fail to overcome the presumption of validity afforded to EPA regulations under the [Clean Air Act (CAA or Act)].'' *New York* v. *EPA,* 413 F.3d at 22. The court found that EPA's decision regarding this provision was supported with ''detailed and reasoned'' analysis based on EPA's own experience and expertise. *New York* v. *EPA,* 413 F.3d at 24.

c. Other than the change that applies the ten-year look back period to all sources, EPA's policy of determining ''actual'' emissions from two years of operating data has not changed. EPA's policy is to have all of the appropriate operating data that can prove what a facility's emissions were during that particular time period to identify the ''actual'' emissions.

d. A source's ability to use the full ten-year look back period will depend upon the availability of relevant data for the consecutive 24-month period that a source chooses. The data must adequately describe the operation and associated pollution levels for the emissions units being changed. In the event that a source does not have the data necessary to determine the unit's actual emission factors, utilization rate, and other relevant information needed to accurately calculate its average annual emissions rate during that period of time, the source must chose another consecutive 24-month period within the ten-year look back period for which it has adequate data. ''Non-compliant emissions'' are not allowed to be considered as part of the baseline actual emissions. This is to be determined by the permitting authority after reviewing adequate files and working with the source to determine the true baseline actual emissions based on the available data and considering all applicable regulations and emission limitations.

e. EPA received comments both in favor of and in opposition to making the demand growth exclusion available to all source categories. EPA decided to extend the demand growth exclusion because it captures periods of time where increased operations respond to independent factors, such as system-wide demand growth, which would have occurred and affected the unit's operations even in the absence of a physical or operational change. The ten-year look back period allows a facility to identify a consecutive 24-month time frame when the facility was operating at its true capacity, and calculate the emissions that resulted during that period. Instead of duplication, the provisions serve distinct purposes. In cases where the source experiences full capacity utilization, the source will not have a basis for attributing part of its post-change emissions increase to market demand. However, if the source still has the ability to increase production to meet projected market demand without making a physical or operational change, the source may consider product demand growth.

f. EPA has taken the position that replacement units may be considered to be modified units, since the replacement unit is replacing a similar emissions unit with a record of historical operational data. Since the replacement unit is very similar to the unit that is being replaced, a source replacing a unit should be able to adequately project and track emissions for the replacement unit based on the operating history of the replaced unit. Therefore, the projection of future actual emissions can be sufficiently reliable and an up-front emissions cap based on Potential to Emit (PTE) is unnecessary. *See* revised definition of ''emissions unit,'' 68 FR 63021 (November 7, 2003), clarifying that a replacement unit is considered an existing emissions unit and, therefore, is eligible for the actual-to-projected-actual test for major NSR applicability determinations.

g. *In New York* v. *EPA*, 413 F.3d at 36–38, the DC Circuit held that the environmental petitioners had failed to demonstrate that PALs are based on an impermissible statutory interpretation or are otherwise arbitrary and capricious. As part of an Environmental Impact Analysis, EPA examined six pilot projects that implemented flexible permits similar to PALs. The participants in these pilot projects reduced their emissions by 27% to 83% below their PAL levels, and, based on these results, EPA concluded that PALs encourage sources to reduce their emissions voluntarily in order to ''create enough headroom for future expansions'' during the PAL term. *See New York* v. *EPA,* 413 F.3d at 37.

h. In *New York* v. *EPA,* the DC Circuit addressed the environmental petitioners' comment that a ten-year look back period allows facilities to set their PALs high enough to accommodate future increases without any initial decreases. It examined EPA's conclusion that the ten-year look back period affects only a small percentage of sources, and that most sources would set their PALs equal to recent baseline actual emissions, thereby reducing emissions by 10% to 33% below their PAL levels. The court found that state intervenors' experience confirmed EPA's conclusions. *See New York* v. *EPA,* 413 F.3d at 38.

i. PALs are designed to cap a facility's emissions for a criteria pollutant, and thus allow facilities to operate within a cap without triggering NSR. Additional necessary recordkeeping, monitoring, and reporting are required for facilities to obtain a PAL, and compliance must be demonstrated through the additional monitoring activities required. The commenter asserts that PALs replace operational limitations that are never restored after a PAL limit expires. We disagree. Once a PAL expires, the facility loses the ability to operate particular emission units unrestricted within the facility-wide cap. Sources that have existing permits with limitations that are subject to state or Federal requirements such as Best Available Control Technology (BACT), Reasonably Available Control Technology (RACT), and New Source Performance Standards (NSPS), and they must still comply with those particular requirements throughout the use of the PAL, as well as after the expiration of a PAL. The reviewing authority maintains the discretion to determine how to distribute any remaining allowable emissions after a PAL's expiration. This may require a source to take emission limits even more stringent than the original emission/operating limits that originally applied to an emission unit, or require that unit to undergo a PSD/NANSR analysis.

The commenter points to a 2003 WDNR prepared analysis, which they describe as concluding that specific emissions increases would result if the elements of NSR Reform were approved into Wisconsin's SIP. Unfortunately, the commenter did not include the 2003 analysis with the comments. The analysis that the commenter attached to the comments is a presentation file that does not contain an explanation describing how WDNR arrived at the increases that the commenter references in the comments.

EPA has made several attempts to obtain any existing supporting documentation for the analysis the commenter describes. WDNR has not been able to provide us with any documentation in support of the 2003 conclusions to which the commenter refers. However, as a result of our efforts to obtain this documentation, we did obtain from WDNR a document entitled ''Report to Legislature,'' (hand-dated March 10, 2006, and received by EPA on October 7, 2008). This 2006 report contains, among other things, a description of WDNR's 2003 position regarding the analysis. In the report, WDNR states that its 2003 conclusion was that the NSR reform rules would lead to emissions increases because fewer projects would be required to undergo major source NSR, but that this conclusion was flawed because WDNR did not examine other changes at a facility that would reduce allowable emissions. Further, the 2006 report acknowledges that the State of Michigan has been implementing the elements of the Federal NSR Reform Rule since March 3, 2003, and that Michigan has not seen a decrease in PSD permit applications. According to the 2006 report, Michigan and Wisconsin have issued a similar number of PSD permits annually and have a comparable number of sources subject to the major source NSR program. Because WDNR has, itself, disavowed its own former predictions, and EPA never received supporting documentation for the predictions, EPA does not find the comments based on WDNR's 2003 analysis to be persuasive.

Finally, any analysis done in 2003 would have been done prior to *New York* v. *EPA,* the 2005 DC Circuit decision that vacated the Clean Unit and Pollution Control Projects provisions of the rule. Such analysis would be based on the NSR Reform Rule prior to the changes made as a result of the decision, and so the analysis could not have considered the rules that are in effect today.

The commenter also points to a report entitled, ''Reform or Rollback? How EPA's Changes to New Source Review Affect Air Pollution in 12 States.'' The report was prepared by the Environmental Integrity Project (EIP) and the Council of State Governments/ Eastern Regional Conference. The draft report claims that the change to a ''two-in-ten'' baseline could allow emissions from 1,273 major sources to increase emissions in 12 states. However, EPA disagrees that the EIP report supports this conclusion. EPA has found the analysis to be overly simplistic and erroneous in its interpretation of NSR. These failures undermine the plausibility of the report's conclusions, including its emissions estimates. EPA notes, in particular, the following problems with the report:

- The approach EIP used looks at plant-wide emissions inventories at facilities where emissions have been lower in the recent two years than in the past. The plant-wide inventory approach completely avoids consideration of why these emissions went down.
- The report incorrectly used plant-wide emissions inventory changes as a crude estimate of emissions increases allowed under the rule.
- The EIP analysis did not consider the fact that major source NSR is only triggered when a physical change or change in the method of operation of a source results in a significant net emissions increase.
- The EIP analysis ignored netting. Even if a project results in a significant increase, it does not trigger major source NSR if there are decreases during the contemporaneous period that offset the increases during that period (including the project increase).
- The EIP analysis purported to measure the ''potential'' for increases under the rule revisions. Notwithstanding all the other flaws of the analysis, EIP made no assessment of whether this ''potential'' will actually be realized.

Industry has complained that it is often expected to surrender capacity under the current approach, because it is not being utilized in the two-year period immediately preceding the change. The purpose of the new baseline provision is to enable sources with an existing unit undergoing modification to select as a baseline a level of operation that more accurately represents that unit's actual operating history. EPA has determined that it is reasonable for a source to determine its baseline emissions in this manner, so long as it is done in compliance with the applicable regulations. First, a source must have adequate information to calculate an average annual emissions rate, in tons per year, for the specific 24-month period selected to represent the unit's representative operation. Second, a source will be required to make downward adjustments in the baseline emissions calculations to account for any enforceable emissions factors and operating restrictions that have been imposed since the representative baseline period and are more stringent than the original limits. This adjustment ensures that the source cannot take credit for an emissions level that is no longer allowed for the unit if it were

operating at its representative level today. Third, the new rule for determining baseline emissions does not affect new sources and new units at existing sources, nor does it affect electric utility steam generating units, for which the five-year look back period is still required. There will be no change in baseline for sources with recent high levels of emissions or consistent emissions levels over ten-year periods. Finally, under the existing regulations, states have always had the flexibility to define a different contemporaneous period under SIP-approved NSR programs. The new rules will help simplify the process of determining the appropriate baseline period, and eliminate the delays associated with the previous approach.

*Section 110(l)*

The commenter contends that the requested rule revisions would relax the existing safeguards in the current NSR rules, and thereby violate section 110(l) of the CAA. Section 110(l) states that ''[t]he Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * * or any other applicable requirement of this chapter.'' 42 U.S.C. 7410(l).

In ''Approval and Promulgation of Implementation Plans; New Source Review; State of Nevada, Clark County Department of Air Quality and Environmental Management,'' 69 FR 54006 (Sept. 7, 2004), the EPA stated that section 110(l) does not preclude SIP relaxations. The Agency stated that section 110(l) only requires that the ''relaxations not interfere with specified requirements of the Act including requirements for attainment and reasonable further progress,'' and that, therefore, a state can relax its SIP provisions if it is able to show that it can ''attain or maintain the [National Ambient Air Quality Standards (NAAQS)] and meet any applicable reasonable further progress goals or other specific requirements.'' 69 FR 54011–54012.

The Wisconsin-requested NSR revisions track the Federal NSR Reform Rule, and EPA has already determined that the implementation of the Federal NSR Reform Rule will be environmentally beneficial. See 68 FR 44620 (July 30, 2003) and 68 FR 63021. EPA's Supplemental Analysis for the Federal NSR Reform Rule estimated that there are likely to be reductions in emissions of volatile organic compounds (VOC) due to the use of PALs. A quantitative methodology was applied in the Supplemental Analysis to three industrial categories, concluding that 3,400 to 17,000 tons of VOC emission reduction per year was likely nationwide in just these categories. The three industrial categories selected were Automobile Manufacturing (SIC 3711), Pharmaceutical Manufacturing (SIC 2834), and Semiconductor Manufacturing (SIC 3674). These were chosen based on the Flexible Permit Pilot Evaluation Report.[1] The report concluded that facilities in these source categories were likely to adopt a PAL because of frequent operational, time-sensitive changes, and because of opportunities for economical air pollution control measures. The Supplemental Analysis determined that 50% to 75% of the facilities under these categories would seek a PAL and each facility would reduce its emissions by 10% to 33%.

We have found seven facilities that fall under these categories within Wisconsin. Six are automobile manufacturing facilities and one is a pharmaceutical manufacturing facility. These facilities may take advantage of the PAL option under the Federal NSR Reform Rule. The following tables evaluate the potential effects of PALs in Wisconsin from these sources.[2]

| Facility name | VOC (tons per year (TPY))[2] |
|---|---|
| Oshkosh Truck Corp—West Plant | 123.8 |
| Oshkosh Truck Corp—Main Plant | 78.97 |
| FWD Corporation | 16.28 |
| Western Products | 2.33 |
| Scientific Protein Labs | 75.74 |
| GM—NAO Janesville—Truck Platform | 1103.56 |
| Oshkosh Truck Corp—South Plant | 0.50 |

| If 75% of the facilities above take a PAL | |
|---|---|
| 10% VOC Reduction | 105.1 TPY of VOC. |
| 33% VOC Reduction | 346.8 TPY of VOC. |
| **If 50% of sources take a PAL** | |
| 10% VOC Reduction | 70.1 TPY of VOC. |
| 33% VOC Reduction | 231.2 TPY of VOC. |
| 10% VOC reduction at largest single source. | 110.3 TPY of VOC. |
| 33% VOC reduction at largest single source. | 364.2 TPY of VOC. |

Using the same methodology used in the Supplemental Analysis to assess the emissions benefits of Wisconsin's NSR reform revisions in Wisconsin as EPA used to assess the benefits nationally, we conclude that the PAL option would result in a net reduction of between 70.1 and 364.2 tons of VOC per year.

EPA's Supplemental Analysis for the Federal NSR Reform Rule mentions that, since PALs are voluntary, it is extremely difficult to model how many and which particular sources will take PALs. It is assumed that the source categories more likely to apply for a PAL are those sources that are making frequent operational changes.

In Wisconsin, facilities, like the paper mills, frequently apply for PSD permits in order to modify their mills, which result in relatively large increases in emissions. An analysis of the National Emissions Inventory found that Wisconsin has about 73 major sources that belong to SIC group 26, paper and allied products. These sources emit about 8,358 tons of VOC per year. Even if a conservative 10% of these sources were to take a PAL for a conservative decrease in emissions between 10% and 33%, that would result in a total decrease in emissions between about 83.5 tons to 275.8 tons of VOC per year.

It is more difficult to assess the environmental impacts of the actual-to-projected-actual test and the ''two-in-ten'' baseline provisions. The Supplemental Analysis determined that there is a slight national environmental benefit brought about by these NSR reform provisions. Additionally, in Wisconsin, sources undergoing construction, which are not subject to the best available control technology or

[1] The full reports, ''Evaluation of Implementation Experiences with Innovative Air Permits,'' is included in the Supplemental Analysis as Appendix A.

[2] Emissions based on 2002 National Emission Inventory Database.

lowest achievable emission reduction NSR requirements, will need to assure WDNR that any increases will not cause or exacerbate an air quality increment or air quality standard.

Overall, we expect changes in air quality as a result of implementing PALs, the actual-to-projected-actual test and the ''two-in-ten'' baseline provisions in Wisconsin to provide somewhere between a neutral and modest contribution to reasonable further progress. Accordingly, EPA determines that these changes will not interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the CAA.

*Section 193*

The commenter contends that WDNR's NSR Reform revision does not ''demonstrate[] that the NAAQS/PSD Increment/RFP [reasonable further progress] demonstration/visibility will be protected if the revision is approved and implemented,'' and that WDNR did not ''quantify the changes in SIP-allowable emissions and estimate or quantify the changes in actual emissions from affected sources.'' This failure to demonstrate protection of the NAAQS, the commenter argues, constitutes backsliding, in violation of section 193 of the CAA.

As the commenter points out, section 193 of the CAA provides in part that ''No control requirement in effect * * * before November 15, 1990, in any area which is a non-attainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.'' 42 U.S.C. 7515.

Assuming that section 193 applies to NSR, section 193 does not require additional emission reductions before this SIP revision is approved. Wisconsin did not have a major source NANSR program consistent with the requirements of the CAA. Although the program that was in effect as of November 15, 1990, included a preconstruction permitting program, that program did not require any offsets for any sources. In the proposed rules, major sources are subject to permitting requirements consistent with CAA requirements.

Thus, assuming that section 193 applies in some fashion to the permitting program in the SIP, as of November 15, 1990, as it applied to major sources, that program did not require any ''emission reductions'' from major sources because it did not require offsets for any sources. Absent offsets, a source subject to the permitting program would not be required to reduce emissions. It follows that if there were no emission reductions generated by the 1990 permitting program, then the section 193 requirement to provide ''equivalent or greater emission reductions'' of any air pollutant as part of this SIP revision would be satisfied with no additional reductions. Furthermore, for the reasons discussed above with respect to section 110(l), EPA has found that the net effect of these changes will be neutral to environmentally beneficial.

*Comment II:* The Proposed Modifications Violate the Anti-Backsliding Provisions of Section 172(e).

*Response:* As discussed above, EPA has concluded that the NSR Reform Rule is not a ''relaxation'' or weakening of the existing NSR rules. EPA has assessed the impact of NSR Reform on the State of Wisconsin and has concluded that approving these revisions into the Wisconsin SIP will result in somewhere between a neutral effect on the environment and a modest environmental benefit. Thus, approving the NSR Reform Rule into the Wisconsin SIP will not result in controls that are ''less stringent'' than the previous controls. In addition, the changes to the existing NSR rules are not being undertaken in the context of a NAAQS relaxation. Thus, section 172(e) does not apply on its face. Nor are these changes undertaken in the context of strengthening a NAAQS. Therefore, the decision of the DC Circuit in *South Coast Air Quality Management District* v. *Environmental Protection Agency,* 472 F.3d 882 (D.C. Cir. 2006), does not apply in this context.

*Comment III:* The Proposed Modifications Cannot Be Adopted Unless and Until EPA Consults with the Fish and Wildlife Service Pursuant to the Endangered Species Act (ESA).

*Response:* Under relevant CAA provisions, states are entitled to administer their own approved NSR programs, and EPA is required to approve a state's program or revisions to its program that satisfy applicable requirements of the CAA. The CAA SIP approval authority does not provide the Agency with the discretion to refrain from approving Wisconsin's SIP revisions if the revisions to its NSR program meet all applicable CAA requirements. Accordingly, and as confirmed by recent Supreme Court precedent, the ESA requirements cited in the comments do not apply to EPA's decision to approve revisions to Wisconsin's NSR program into the SIP. *See* 50 CFR 402.03; *National Ass'n of Home Builders* v. *Defenders of Wildlife,* 127 S. Ct. 2518 (2007) (*Defenders of Wildlife*).

Section 7(a)(2) of the ESA generally requires Federal agencies to consult with the relevant Federal wildlife agencies to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of Federally-listed endangered or threatened species, or result in the destruction or adverse modification of designated critical habitat of such species. 16 U.S.C. 1536(a)(2). In accordance with relevant ESA implementing regulations, this requirement applies only to actions ''in which there is discretionary Federal involvement or control.'' 50 CFR 402.03. In the *Defenders of Wildlife* case, the Supreme Court examined these provisions in the context of EPA's decision to approve a state permitting program under the Clean Water Act (CWA). In that case, the Court held that when a Federal agency is required by statute to undertake a particular action once certain specified triggering events have occurred, there is no relevant agency discretion, and thus the requirements of ESA section 7(a)(2) do not apply. *Defenders of Wildlife,* 127 S.Ct. at 2536.

With regard to EPA's transfer of CWA permitting authority to a state, the Court found that the relevant CWA provision mandated that EPA ''shall approve'' a state permitting program if a list of CWA statutory criteria is met. Therefore, EPA lacked the discretion to deny a transfer application that satisfied those criteria. Id. at 2531–32. The Court also found that the relevant CWA program approval criteria did not include consideration of endangered or threatened species, and stated that ''[n]othing in the text of [the relevant CWA provision] authorizes EPA to consider the protection of threatened or endangered species as an end in itself when evaluating [an] application'' to transfer a permitting program to a state. Id. at 2537. Accordingly, the Court held that the CWA required EPA to approve the state's permitting program if the statutory criteria were met; those criteria did not include the consideration of ESA-protected species; and thus, consistent with 50 CFR 402.03, the non-discretionary action to transfer CWA permitting authority to the state did not trigger relevant ESA section 7 requirements.

Similar to the CWA program approval provision at issue in *Defenders of Wildlife,* section 110(k)(3) of the CAA mandates that EPA ''shall approve'' a SIP submittal that meets applicable CAA requirements. 42 U.S.C. 7410(k)(3).

The CAA provides a list of SIP submittal criteria in section 110. See 42 U.S.C. 7410(a)(2).

Section 110(l), governing SIP revisions, states that each revision ''shall be adopted'' after reasonable public notice and public hearing, as long as the revision does not interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the CAA.

As was the case with the CWA requirements in *Defenders of Wildlife,* the SIP requirements contained in section 110 of the CAA do not include protection of listed species. Further, Title I, Parts C and D, of the CAA do not explicitly state that consideration of the impacts on listed species is a required factor in SIP approval decisions. EPA has interpreted sections 169(3) and 165(e)(3)(B) of the CAA as providing EPA with the relevant discretion to carry out ESA section 7(a)(2) obligations during its review of individual applications for Federally issued PSD permits under section 165. *See In re Indeck-Elwood, LLC,* PSD appeal No. 03–04 (EAB Sept. 27, 2006), slip op. at 108 (holding EPA has discretion to consider impacts on listed species in BACT and soils and vegetation analyses). However, this discretion in PSD permitting decisions does not provide EPA similar discretion in its SIP approval decisions under section 110.

In issuing individual PSD permits, EPA is required to complete an environmental impacts analysis in the BACT determination of CAA section 169(3) and an additional impacts analysis, including impacts on soils and vegetation, under section 165(e)(3)(B) of the CAA. In carrying out these analyses, EPA has interpreted these provisions as affording the Agency discretion to determine whether listed species are impacted by individual Federal PSD permitting decisions. In contrast, EPA's action on state SIP submittals is governed by section 110 of the CAA, which unequivocally directs EPA to approve state plans meeting applicable CAA requirements.

Section 110 does not provide for similar impact analyses in reviewing SIP submittals. An ESA obligation triggered by one provision of the statute-consideration of ESA in individual Federal PSD permitting decisions cannot be bootstrapped to raise that obligation in another provision-approval of the revision to a SIP that does not provide EPA with similar discretion. *See,* generally, *Defenders of Wildlife* (finding that while EPA undertakes ESA consultation when issuing individual Federal National Pollutant Discharge Environmental System (NPDES) permits, it was not required to do so in approving state NPDES permitting programs).

Applying the reasoning of *Defenders of Wildlife,* the SIP approval criteria contained in the CAA do not provide EPA with the discretionary authority to consider whether approval of SIP revisions may affect any listed species. EPA has determined that WDNR has submitted a SIP revision to incorporate the NSR Reform Rule that satisfies all of the applicable SIP requirements contained in section 110 of the CAA. Thus, given the Supreme Court precedent and applicable regulations (*see* 50 CFR 402.03), EPA is without discretion to disapprove or conditionally approve Wisconsin's SIP revision request based on concerns for listed species, and the ESA requirements cited by the commenter are thus inapplicable to this approval action.

*Comment IV:* The Proposed Rules do not Reference 40 CFR 52.21 in Order to Encompass Permits Issued by EPA and/or WDNR Under a Delegated Program.

*Response:* EPA has considered the comment regarding the differences in citations used with respect to the fuel use prohibition that is part of the definition of a major modification. This provision was part of Wisconsin's SIP prior to the requested change and is unaffected by Wisconsin's requested revisions. It is, therefore, not before EPA for approval. Moreover, this issue was never brought to WDNR's attention during the public comment period during which WDNR sought approval by the Wisconsin Natural Resources Board. Nevertheless, EPA has considered this comment and agrees with the commenter that certain permits that have been issued to sources within Wisconsin, to the extent that they exist, may not be covered by the language in NR 405.02(21)(b)(5) and NR 408.02(20)(e)(5), which refers to permits that have established fuel prohibiting conditions. Wisconsin's PSD program was approved into its SIP on May 27, 1999. The rules cited above failed to incorporate language that would include sources with construction permits issued prior to that approval, either directly by EPA or by WDNR under a delegated agreement in accordance with 40 CFR 52.21.

We have been in contact with WDNR on this matter, and plan to work with WDNR to revise the language as appropriate. However, this amendment is not required for EPA's approval of Wisconsin's requested revisions, which did not include the omission of language referencing 40 CFR 52.21 and 40 CFR 51.166.

With respect to the commenter's contention that ''WDNR has sometimes taken the position that the Mandatory Operating Permits (MOPs) are not federally enforceable,'' it is EPA's understanding that WDNR does not consider its MOP program to be federally enforceable. Although WDNR submitted the MOP program to EPA as a SIP revision on April 22, 1985, by letter dated June 20, 1990, WDNR withdrew that request for approval, prior to EPA approving the program.

## V. What action is EPA taking?

EPA is approving revisions to the PSD and NANSR construction permit programs for the State of Wisconsin which Wisconsin submitted to EPA on May 25, 2006. These revisions meet the minimum program requirements of the December 31, 2002, EPA NSR Reform rulemaking, consistent with subsequent changes to that rule, as set forth in *New York* v. *EPA,* and the resulting December 21, 2007 rule concerning recordkeeping and reporting standards.

## VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- 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);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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 action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 17, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

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

Dated: December 8, 2008.

**Lynn Buhl,**

*Regional Administrator, Region 5.*

■ 40 CFR part 52 is amended as follows:

## PART 52—[AMENDED]

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

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

## Subpart YY—Wisconsin

■ 2. Section 52.2570 is amended by adding paragraph (c)(119) to read as follows:

### § 52.2570 Identification of plan.

* * * * *

(c) * * *

(119) On May 25, 2006, Wisconsin submitted for EPA approval into the Wisconsin SIP a revision relating to changes to chs. NR 405 and 408 for incorporation of Federal changes to the air permitting program. The rule revision being approved in this action has been created to approve rule AM–06–04, the NSR Reform provisions that were not vacated by the DC Circuit Court in *New York* v. *EPA*, 413 F.3d 3 (DC Cir. 2005). The rule revision also repeals NR 405.02(1)(d), (24m), (27)(a)8., 17 and 18 and 408.02(27). EPA has determined that this revision is approvable under the Clean Air Act.

(i) Incorporation by reference. The following sections of the Wisconsin Administrative Code are incorporated by reference:

(A) NR 405.01 Applicability; purpose. NR 405.01(1) and (2), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(B) NR 405.02 Definitions. NR 405.02(1), (2m), (8), (11), (11c), (11e), (11j), (12), (20m), (21), (24), (24j), (25b), (25d), (25e), (25f), (25i), and (27m) as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(C) NR 405.025 Methods for calculation of increases in actual emissions, as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(D) NR 405.16 Source obligation. NR 405.16(3) and (4) as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(E) NR 405.18 Plant-wide applicability limitations (PALs), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(F) NR 408.02 Definitions. NR 408.02(1), (2m), (4), (5), (11), (11e), (11m), (11s), (13), (13m), (20), (21)(a)1.(intro), (23), (24m), (25s), (28e), (28j), (28m), (28s), (29m), and (32m) as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(G) NR 408.025 Methods for calculation of increases in actual emissions, as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(H) NR 408.06 Emissions offsets. NR 408.06(10), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(I) NR 408.10 Source obligation. NR 408.10(5) and (6), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(J) NR 408.11 Plant-wide applicability limitations (PALs), as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

(ii) Additional material.

(A) NR 484.04 Code of federal regulations appendices. NR 484.04(21), and (27m) as published in the Wisconsin Administrative Register, June 30, 2007, No. 618, effective July 1, 2007.

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[FR Doc. E8–29820 Filed 12–16–08; 8:45 am]

BILLING CODE 6560–50–P

# Proposed Rules

Federal Register

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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

### Commodity Credit Corporation

### 7 CFR Part 1493

**RIN 0551–AA79**

### Export Credit Guarantee Program

**AGENCY:** Foreign Agricultural Service and Commodity Credit Corporation, USDA.

**ACTION:** Advanced notice of proposed rulemaking.

**SUMMARY:** This advanced notice of proposed rulemaking (ANPR) solicits comments on options to reform the USDA, Commodity Credit Corporation (CCC), Export Credit Guarantee Program (GSM–102). The purpose of the ANPR is to invite suggestions on improvements and changes to be made in the implementation and operation of the GSM–102 program, with the intent of improving the GSM–102 program's effectiveness, efficiency, and lower costs.

**DATES:** Comments on this notice must be received by February 2, 2009 to be assured consideration.

**ADDRESSES:** You may submit comments by any of the following methods:

- E-Mail: *GSM102.ANPR@fas.usda.gov*.
- Fax: (202) 720–2495, Attention: ''GSM102/ANPR Comments''.
- Mail to: P. Mark Rowse, Director, Office of Trade Programs, Credit Programs Division, Foreign Agricultural Service, U.S. Department of Agriculture, Stop 1025, Washington, DC 20250–1025.
- Hand Delivery or Courier: 1250 Maryland Avenue, SW., Washington, DC 20024.

All comments received will be available for public inspection at the above address during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** P. Mark Rowse, Director, Credit Programs Division, at the address stated above or telephone: (202) 720–0624.

**SUPPLEMENTARY INFORMATION:**

## Background

The GSM–102 program is currently authorized under the Agricultural Trade Act of 1978, as amended. The GSM–102 program helps to ensure that credit is available to finance commercial exports of U.S. agricultural products on competitive credit terms. The CCC currently has authorized availability of guarantees for transactions in at least 176 countries and regions, with 2,900 exporters eligible to participate. Since 1981, CCC has issued approximately $86.5 billion in credit guarantees under the GSM–102 program.

By allowing assignment of the guarantee by the U.S exporter to an approved U.S. financial institution, the program guarantees credit extended by the approved U.S. financial institution (or, less commonly, by the U.S. exporter if not assigned) to approved foreign banks. The credit facility mechanism is a dollar-denominated, irrevocable letter of credit.

Under the terms of the guarantee, typically, 98 percent of principal and a portion of interest are covered on credit terms of up to three years. By financing less than 100 percent of the exported value, CCC encourages risk-sharing by the exporter or the exporter's assignee.

By law, the program may not be used for foreign aid, foreign policy or debt rescheduling purposes, or in countries that the Secretary of Agriculture (the Secretary) has determined cannot service the debt.

## Defaults/Claims

If the foreign bank fails to make any payment as agreed under the GSM–102 program guaranteed transaction, the exporter or assignee must submit a notice of default to the CCC. A claim for loss also may be filed, and the CCC will promptly pay claims found to be in good order. For CCC audit purposes, the U.S. exporter must obtain documentation to show that the commodity arrived in the eligible country, and must maintain all transaction documents for five years from the date of completion of all payments.

## Participation Criteria

The CCC must qualify exporters for participation before accepting guarantee applications. An exporter must have a business office in the United States and must not be debarred or suspended from any U.S. government program. Financial institutions must meet established criteria and be approved by the CCC.

The CCC evaluates the ability of each country and each approved foreign bank to service CCC-guaranteed debt. For programming purposes, a credit limit is established for each obligor country. Banks within that approved obligor country are reviewed and individual bank credit lines are established. New banks may be added or existing approved bank levels may be increased or decreased as appropriate, based on available information.

## Eligible Commodities

The CCC selects agricultural commodities and products according to market potential and eligibility based on applicable legislative and regulatory requirements. These include bulk, intermediate and consumer ready agricultural products encompassing food, feed, fiber, aquaculture and forest products. The agricultural commodities must be 100 percent U.S. origin unless they have been determined by the Secretary to be high-value agricultural products. If a high-value product determination is made, 90 percent or more of the agricultural components by weight, excluding packaging and added water, must be entirely produced in the United States.

## Fees

The issuance of the guarantee is subject to a fee paid by the applicant. In July 2005, USDA initiated a risk-based fee structure. A fee is charged based on the terms of the guarantee in tenure (length of credit period) and terms for principal payment installments, whether 6 months or annually, and the risk grade of the obligor country. The CCC assigns a numeric risk category (0–6, lowest to highest risk). The risk category, along with the other factors cited, determines the fee charged.

## Statutory Revisions and Budgetary Limits

Prior to the June 18, 2008, enactment into law of the Food, Conservation, and Energy Act of 2008, provisions of the Agricultural Trade Act of 1978, as amended, required the Export Credit Guarantee programs operated by CCC to make available not less that $5.5 billion in credit guarantees under its combined authority to issue short-term credit

guarantees (GSM–102 and Supplier Credit Guarantee (SCGP) programs) up to three years, and medium-term credit guarantees (GSM–103 program) from three to 10 years. Origination fees for the short-term credit guarantees were also previously capped at 1 percent. Section 1542 of the Food, Agriculture, Conservation and Trade Act of 1990 required that CCC make available not less than $1 billion in direct credit or credit guarantees to emerging markets, of which a portion should be made available for facilities and services.

The authority for the SCGP, the GSM–103 program, and the 1 percent origination fee cap were all repealed by the Food, Conservation, and Energy Act of 2008. The Food, Conservation, and Energy Act of 2008 also amended the statutory funding levels for short-term credit guarantees by requiring that CCC make credit guarantees available for each fiscal year (FY) through FY 2012 in an amount equal to, but not more than, (a) the lesser of $5.5 billion in credit guarantees, (b) or the sum of the amount of credit guarantees that could be made available using budget authority of $40 million, plus any unobligated budget authority for credit guarantees from prior fiscal years and required that, to the maximum extent practicable, ensure that the risk-based fees associated with the guarantees cover, but do not exceed, the operating costs and losses for the program over the long term.

**Recent History**

Beginning in FY 2005, increased global liquidity and the advent of risk-based fees resulted in a decline in program usage from an average annual value of sales registered of approximately $3 billion for the preceding 10-year period, to $1.36 billion in FY 2006. However, from July through September of FY 2007, CCC experienced a significant increase in participation and dollar value levels under the GSM–102 program. Part of this increase was the result of increased commodity prices. However, tightening of global credit markets also is believed to have contributed significantly to the increase in participation and program demand. These driving factors propelled GSM–102 transactions from $1.4 billion in FY 2007, to over $3 billon in FY 2008. Demand and usage is expected to further increase in FY 2009.

**Comments**

As a result of anticipated increase in demand, we are soliciting the responses of interested parties to the following specific questions concerning options under consideration for the GSM–102 program. Interested parties may choose to address any or all of the questions listed or provide other comments. CCC's aim is to improve upon the GSM–102's effectiveness and efficiency, and lower costs.

Additional program information inclusive of our fee structure is available on our Web site at *http://www.fas.usda.gov/excredits/ecgp.asp*.

*1. Fees*

—Does the current risk-based fee schedule correctly distinguish levels of risk specific to loan tenor, country of obligor and amount of coverage?
—Does the current risk-based fee structure capture sufficient variables that are responsive to the changing credit markets?
—Should CCC consider charging fees for amendments to guarantees or applications?
—How should the fee structure take into account levels of risk particular to individual obligors?

*2. Alternative Registration Processes*

—Should CCC consider moving from the current first-come, first-serve and pro-rata methodologies for issuance of guarantees?
—Should the GSM–102 program be run on an awards basis? CCC would award GSM–102 guarantees on a competitive basis based upon exporter bids which would propose varying levels of coverage and different fee structures.
—Should CCC consider permitting exporters to submit letters of intent in which they propose how much they would like to export under a specified announcement? CCC would review all letters of intent and award shares of the announcement based on the letters of intent.
—Should CCC require copies of sales contracts and proof of financing to be submitted with the application for guarantee?
—Should CCC require that a ''firm sale'' include approved financing?

*3. Additional Questions*

—Should CCC consider permitting global banking whereby any CCC approved bank could finance sales of U.S. agricultural products for shipment to any CCC approved country?
—Should CCC consider no longer permitting sales in which the exporter, intervening purchaser, or importers are affiliated organizations?
—Should CCC consider no longer permitting sales in which there is an intervening purchaser?
—Should CCC consider no longer permitting foreign bank amendments to the application/guarantee except under extraordinary circumstances which would require documentation from the original foreign bank?
—Should CCC consider more rigid qualification criteria for exporters?
—Should CCC bring the time frame for claims payment into conformity with that contemplated under the Prompt Payment Act?

*Consideration of Comments:* Additional comments on other program modifications to the GSM–102 program that are responsive to the principles outlined herein are encouraged. CCC will carefully consider all comments submitted by interested parties. After consideration of the comments received, CCC will consider what changes should be made to the GSM–102 program. Some of the changes described above would require solicitation and consideration of comments received from interested parties via the rulemaking process. Other changes might be adopted by changing internal policies and procedures. Comments received will help CCC to determine the extent and scope of any future rulemaking.

Signed at Washington, DC, on November 26, 2008.

**W. Kirk Miller,**

*Executive Vice President, Commodity Credit Corporation, and Administrator, Foreign Agricultural Service.*

[FR Doc. E8–29831 Filed 12–16–08; 8:45 am]

BILLING CODE 3410–10–P

## DEPARTMENT OF ENERGY

### 10 CFR Part 431

**[Docket No. EERE–2008–BT–TP–0017]**

**RIN 1904–AB87**

## Energy Conservation Program for Certain Commercial and Industrial Equipment: Test Procedures for Metal Halide Lamp Ballasts

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of public meeting.

**SUMMARY:** The U.S. Department of Energy (DOE) will hold a public meeting to discuss and receive comment concerning its proposal to establish metal halide lamp ballast test procedures that manufacturers would use to demonstrate compliance with the metal halide ballast energy conservation standards mandated by the statute.

**DATES:** DOE will hold a public meeting in Washington, DC, on Friday, December 19, 2008, beginning at 9 a.m.

**ADDRESSES:** The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue, SW., Washington, DC 20585. To attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945. (Please note that foreign nationals visiting DOE headquarters are subject to advance security screening procedures. Any foreign national wishing to participate in the meeting should advise DOE immediately by contacting Ms. Edwards to initiate the necessary procedures.)

- *Postal Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please submit one signed paper original.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024. Telephone: (202) 586–2945. Please submit one signed paper original.

*Docket:* For access to the docket to read background documents or comments received, visit the U.S. Department of Energy, Resource Room of the Building Technologies Program, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please contact Ms. Brenda Edwards at the above phone number for additional information regarding visiting the Resource Room.

**FOR FURTHER INFORMATION CONTACT:** Ms. Linda Graves, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–1851. E-mail: *Linda.Graves@ee.doe.gov.* Or you may contact Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–9507. E-mail: *Eric.Stas@hq.doe.gov.*

For additional information on how to participate in the public meeting, contact Ms. Brenda Edwards, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. E-mail: *Brenda.Edwards@ee.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Background

In accordance with the Energy Policy and Conservation Act, as amended (EPCA), the proposed metal halide test procedures are based on American National Standards Institute (ANSI) Standard C82.6–2005, ''Ballasts for High-Intensity Discharge Lamps—Method of Measurement.'' Also in accordance with EPCA, DOE proposes a test method for measuring standby mode power consumption and discusses the fact that off mode power consumption does not apply to metal halide lamp ballasts. The proposed test procedures are contained in a Notice of Proposed Rulemaking that was issued by DOE on December 4, 2008, and may be viewed and downloaded from the DOE Web page at: *http://www1.eere.energy.gov/buildings/appliance_standards/commercial/metal_halide_lamp_ballasts_tp_nopr.html.* The Notice of proposed rulemaking will be published in the **Federal Register** in the near future, and at that time the 75-day public comment period will begin.

## II. Public Participation

### *A. Attendance at Public Meeting*

The time/date and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections, respectively at the beginning of this notice. To attend the public meeting, please notify Ms. Brenda Edwards at (202) 586–2945. As explained in the **ADDRESSES** section, foreign nationals visiting DOE Headquarters are subject to advance security screening procedures.

### *B. Procedure for Submitting Requests to Speak*

Any person who has an interest in the topics addressed in this notice or who represents a group or class of persons with an interest in these issues may request an opportunity to make an oral presentation at the public meeting. Such persons may hand-deliver requests to speak to the address shown in the **ADDRESSES** section at the beginning of this notice between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Send requests by mail or e-mail to Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, or *Brenda.Edwards@ee.doe.gov.* Persons who wish to speak should include a computer diskette or CD in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format that briefly describes the nature of their interest in this rulemaking and the topics that they wish to discuss, and provide a telephone number for contact. DOE requests that those persons scheduled to speak submit an advance copy of their statements before the public meeting. DOE may permit any person who cannot supply an advance copy to participate if that person has made alternative arrangements with the Building Technologies Program in advance. The request to make an oral presentation should ask for such alternative arrangements.

### *C. Conduct of Public Meeting*

DOE will designate a DOE official to preside at the public meeting and also may use a professional facilitator to aid discussion. The meeting will be conducted in an informal, conference style. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with 5 U.S.C. 553 and section 336 of EPCA (42 U.S.C. 6306). DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. A court reporter will record the proceedings and prepare a transcript.

At the public meeting, DOE will present summaries of comments received before the public meeting, allow time for presentations by participants, and encourage all interested parties to share their views on issues affecting the proposed test procedures. Each participant may present a prepared general statement (within time limits determined by DOE) before the discussion of specific topics. Other participants may comment briefly on any general statements. At the end of all prepared statements, participants may clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions from DOE and other participants. Department representatives may also ask questions about other matters relevant to the proposed test procedures. The official conducting the public meeting will accept additional comment or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of procedures needed for the proper conduct of the public meeting.

DOE will make the transcript from the public meeting available for inspection at the U.S. Department of Energy, Resource Room of the Building Technologies Program, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The official transcript will also be posted on the DOE Web site at: *http://*

*www.eere.energy.gov/buildings/appliance_standards*. Anyone may purchase a copy of the transcript from the transcribing reporter.

Issued in Washington, DC, on December 11, 2008.

**John F. Mizroch,**

*Acting Assistant Secretary, Energy Efficiency and Renewable Energy.*

[FR Doc. E8–29944 Filed 12–16–08; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### 15 CFR Part 301

**[Docket No. 080102004–8005–01]**

**RIN 0625–AA75**

## Changes in Procedures for Florence Agreement Program

**AGENCY:** Import Administration, International Trade Administration (''ITA''), Department of Commerce.

**ACTION:** Proposed rule.

**SUMMARY:** This action invites public comment on a proposal to amend the regulations that govern the duty-free entry of scientific instruments and apparatus into the United States by educational and nonprofit institutions. The amendments are being proposed for the purpose of making technical changes required by the passage of the Miscellaneous Trade and Technical Corrections Act of 2004, updating the regulations to comport with current Customs and Border Protection (''CBP'') practices and changes made in the Harmonized Tariff Schedule of the United States (''HTSUS'') and adding a Web site address for Statutory Import Programs Staff (''SIPS''). We also propose amending the regulations to reflect the new nomenclature changes made necessary by the transfer of the legacy Customs Service of the Department of the Treasury to the Department of Homeland Security (''DHS'').

**DATES:** Written comments must be received on or before January 16, 2009.

**ADDRESSES:** Address written comments to Jesse Cortes, Import Policy Analyst, Subsidies Enforcement Office, Room 3713, U.S. Department of Commerce, 14th and Constitution Ave., NW., Washington, DC 20230, or electronically via the Federal Government e.rulemaking portal, *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Jesse Cortes, (202) 482–3986, same address as above.

**SUPPLEMENTARY INFORMATION:** The Departments of Commerce and Treasury (''the Departments'') and Customs and Border Protection are proposing to amend Part 301, Chapter III, Subtitle B of Title 15 of the Code of Federal Regulations relating to their responsibilities under the Educational, Scientific, and Cultural Materials Importation Act of 1966 (the ''Act''; Public Law 89–651, as amended by Public Law 106–36; 80 Stat. 897). The Act implements U.S. treaty obligations under Annex D of the Florence Agreement, relating to the import of scientific instruments and apparatus. Treaty signatories agreed to waive duties on such imports if there is no scientifically equivalent instrument being manufactured in the country of importation and the instrument is to be used by a nonprofit institution established for scientific research or educational purposes.

### Proposed Amendments

ITA proposes to amend language in 15 CFR 301.8(a)(4) because references to liquidation being suspended for a period of 180 days from the date of entry are not accurate and the reference to ''suspension'' is misleading. Under 15 CFR part 301, an applicant desiring duty-free entry of an instrument may make a claim with CBP at the time of entry of an instrument that the instrument is entitled to duty-free classification under subheading 9810.00.60, HTSUS. Currently, 15 CFR 301.8(a)(4)) states that liquidation of the entry shall be suspended for a period of 180 days from the date of entry and that the applicant must file a properly stamped application form on or before the end of this suspension period or the entry will be liquidated without regard to 9810.00.60, HTSUS. We are proposing to amend 15 CFR 301.8(a)(4)) to delete any reference to the 180 day time period in its entirety. The current provision was promulgated in 1982 and does not reflect the subsequent amendments to 19 U.S.C. 1504. Under current law, CBP has up to one year to liquidate an entry before it is deemed liquidated by operation of law. *See* 19 U.S.C. 1504. After the enactment of 19 U.S.C. 1504 in 1978, CBP generally liquidated entries within 90 days of entry. The 180-day period referenced in the regulations was an exception. Moreover, the use of the term ''suspension'' is misleading since the governing statute (subchapter III, chapter 98, HTSUS (19 U.S.C. 1202)) does not authorize a ''suspension'' of liquidation. While there is no statutory authority preventing CBP from liquidating the entry at any time during the one-year period after entry of the merchandise, *see Peer Chain Co.* vs. *United States,* 316 F. Supp. 2d 1357 (CIT 2004) CBP normally liquidates an entry 315-days after entry is filed. Importers should file a copy of the stamped application as soon as possible because CBP may liquidate the entry at any time.

We also propose amending 15 CFR 301.8(c) to delete references to the protest period for entries as the referenced period is out-of-date due to the statutory amendments made by the Miscellaneous Trade and Technical Corrections Act of 2004, Public Law 108–429, § 2103(2)(B)(ii), (iii) (codified as amended at 19 U.S.C. 1514(c)(3)).

We further propose amending 15 CFR 301.3(b) to include the SIPS Web site address to let interested parties know that the application for duty-free entry of scientific instruments (Form ITA–338P) may be obtained from that Web site.

The proposed rule would also amend 15 CFR 301.2(j) and (o) by removing the references to spectrometers. This change is proposed because Presidential Proclamation 7011 of June 30, 1997, made spectrometers free of duty. This proposed rule would also add language to 15 CFR 301.2(j) that describes an appropriate example of ancillary equipment.

Finally, pursuant to section 403 of the Homeland Security Act of 2002 (Pub. L. 107–296) (2002), the U.S. Customs Service was transferred from the Department of the Treasury to the Department of Homeland Security (''DHS''). Under the Reorganization Plan (Nov. 25, 2002), this transfer became effective as of March 1, 2003. The former Customs Service had been redesignated as the Bureau of Customs and Border Protection and pursuant to section 872(a)(2) of the Homeland Security Act (see 6 U.S.C. 452(a)(2)), DHS notified Congress on January 18, 2007, that it was changing the name of the Bureau of Customs and Border Protection to ''U.S. Customs and Border Protection (CBP)'' effective March 31, 2007 (see 72 FR 20131, April 23, 2007). As a result of this reorganization, we propose amending 15 CFR 301 by replacing ''U.S. Customs Service'' and similar references throughout the regulations with its new designation, ''Customs and Border Protection'' or CBP. We note that we are retaining the ''Department of the Treasury'' wherever it occurs in the regulations for purposes of the Florence Agreement Program

because the Treasury Department did not delegate this function to the Secretary of Homeland Security (See Treasury Department Order No. 100–16, set forth in the appendix to Part 0 of title 19 of the Code of Federal Regulations).

As reflected in § 10.114 of the CBP regulations (19 CFR 10.114), the consolidated regulations of the Commerce and Treasury Departments relating to the entry of instruments and apparatus for educational and scientific institutions are contained in 15 CFR part 301. With respect to the responsibility of the Department of the Treasury in issuing these joint regulations, this document is being issued under the authority of § 0.1(a)(1) of the CBP Regulations (19 CFR 0.1(a)(1)). Accordingly, regulations for which the Secretary of the Treasury retains the sole authority to approve pursuant to 19 CFR 0.1(a)(1) are signed by the Secretary of the Treasury (or his or her Treasury delegate), and by the Commissioner of CBP, who is signing this document as the delegate of the Secretary of the Department of Homeland Security.

**Administrative Law Requirements**

*Regulatory Flexibility Act.* In accordance with the Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.*, the Chief Counsel for Regulation at the Department of Commerce has certified to the Chief Counsel for Advocacy, Small Business Administration, that the proposed rule, if promulgated as final, will not have a significant economic impact on a substantial number of small entities. The applicants for the duty-free entry of scientific instruments and apparatus are educational and non-profit institutions. The proposed rulemaking would make the necessary changes required by the passage of the Miscellaneous Trade and Technical Corrections Act of 2004, update the regulations to comport with current CBP practices and changes in the HTSUS, add a Web site address for SIPS and make necessary changes to reflect the new designations that were created when Customs became CBP. Adoption of this rule would implement the following changes: Extend the liquidation period and, therefore, the amount of time the applicant has to submit a properly stamped copy of the form ITA–338P to CBP before liquidation occurs; remove the outdated reference to a 90-day protest period; remove outdated references to spectrometers; add the SIPS Web site address to let interested parties know that the application for duty-free entry of scientific instruments (Form ITA–338P) can be obtained from the SIPS Web site; and make the necessary changes to reflect the new nomenclature changes made necessary by the transfer of the legacy Customs Service of the Department of the Treasury to DHS and the subsequent enfolding of the U.S. Customs Service into the Bureau of Customs and Border Protection and then its subsequent name change by DHS to ''U.S. Customs and Border Protection'' on March 31, 2007. There would be no adverse economic impact from these proposed changes.

This proposed rule also would not change reporting or recordkeeping requirements. The changes in the regulations will also not duplicate, overlap or conflict with other laws or regulations. Consequently, the changes are not expected to meet the RFA criteria of having a ''significant'' economic effect on a ''substantial number'' of small entities, as stated in 5 U.S.C. 603 *et seq.* Therefore, a regulatory flexibility analysis was not prepared.

*Paperwork Reduction Act.* This proposed rulemaking does not contain revised collection of information requirements subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. Collection activities are currently approved by the Office of Management and Budget under control number 0625–0037.

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

*Executive Order 12866.* It has been determined that the proposed rulemaking is not significant for purposes of Executive Order 12866.

**List of Subjects in 15 CFR Part 301**

Administrative practice and procedure, Customs duties and inspection, Educational facilities, Imports, Nonprofit organizations, Scientific equipment.

For the reasons set forth in the preamble, 15 CFR part 301 is proposed to be amended as follows:

## PART 301—[AMENDED]

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

**Authority:** Sec. 6(c), Pub. L. 89–651, 80 Stat. 897, 899; Sec. 2402, Pub. L. 106–36, 113 Stat. 127, 168.

**§ 301.1 [Amended]**

2. Section 301.1 is amended by removing ''Secretary of the Treasury (U.S. Customs Service)'' in paragraph (c)(2) and adding ''Customs and Border Protection'' in its place.

**§ 301.2 [Amended]**

3. Section 301.2 is amended as follows:

a. Paragraph (b) is amended by removing ''*Customs* means the U.S. Customs Service and 'The Commissioner' means Commissioner of the U.S. Customs Service'' and adding ''*The Commissioner* means Commissioner of Customs and Border Protection'' in its place;

b. Paragraph (c) is amended by removing ''*Customs Port*'' and adding ''*CBP Port*'' in its place;

c. The third sentence of paragraph (j) is amended by removing ''automatic sampling equipment sold for use with a variety of mass spectrometers'' and adding ''a vacuum evaporator sold for use with an electron microscope'' in its place;

d. Paragraph (o) is amended by removing the words ''mass spectrometer'' and ''x-ray spectrometer.''.

**§ 301.3 [Amended]**

4. Section 301.3 is amended as follows:

a. The first sentence of paragraph (b) is amended by removing ''20230, or'' and adding ''20230, the Web site at *http://ia.ita.doc.gov/sips/index.html*, or'' in its place;

b. Paragraph (c) is amended by removing the words ''U.S. Customs Service, Department of the Treasury,'' and adding ''U.S. Customs and Border Protection'' in its place.

5. Section 301.8 is amended as follows:

a. Paragraph (a)(4) is revised to read as set forth below;

b. The second sentence of paragraph (c) is amended by removing '', within 90 days after notice of liquidation''.

**§ 301.8 Instructions for entering instruments through U.S. Customs and Border Protection under subheading 9810.00.60, HTSUS.**

* * * * *

(a) * * *

(4) If a claim for duty-free entry under subheading 9810.00.60, HTSUS is made but is not accompanied by a copy of the properly stamped form, a deposit of the estimated duty is required. Before the entry is liquidated, the applicant must file with the CBP Port a properly stamped copy of the application form. In the event that the CBP Port does not receive a copy of the properly stamped application form before liquidation, the instrument shall be classified and liquidated in the ordinary course,

without regard for subheading 9810.00.60, HTSUS.

* * * * *

**§§ 301.1, 301.2, 301.4, 301.5, 301.8, 301.9, 301.10 [Amended]**

6. In addition to the amendments set forth above, 15 CFR part 301 is amended by removing ''U.S. Customs Service'', ''U.S. Customs'', or ''Customs'' and adding ''Customs and Border Protection'' in its place in the following places:

a. Second sentence in § 301.1(d);

b. Fourth sentence in § 301.2(k);

c. Section 301.4 heading, and first sentence of § 301.4(a) introductory text;

d. Second sentence in § 301.5(d)(ii);

e. Section 301.8 heading, § 301.8(a)(3), (b) heading and first and second sentences, and (d) first and second sentences;

f. Section 301.9(b) and § 301.9(c); and

g. Second sentence in § 301.10(a).

**§§ 301.7, 301.8, 301.9 [Amended]**

7. In addition to the amendments set forth above, 15 CFR part 301 is amended by removing ''Customs Port'' and adding ''CBP Port'' in its place in the following places:

a. First sentence in § 301.7(b);

b. Third and fourth sentences of § 301.8(a)(4); and

c. Third sentence of § 301.9(a).

**David Spooner,**

*Assistant Secretary for Import Administration, Department of Commerce.*

**W. Ralph Basham,**

*Commissioner, Customs and Border Protection.*

**Timothy Skud,**

*Deputy Assistant Secretary of the Treasury.*

[FR Doc. E8–29128 Filed 12–16–08; 8:45 am]

BILLING CODE 3510–DS–P; 9111–14–P

## SOCIAL SECURITY ADMINISTRATION

## 20 CFR Part 404

**[Docket No. SSA–2007–0058]**

**RIN 0960–AG58**

## Use of Date of Written Statement as Filing Date

**AGENCY:** Social Security Administration.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** We propose to revise our rules for protective filing after we receive a written statement of intent to claim Social Security benefits under title II of the Social Security Act (the Act). Specifically, we propose to revise from 6 months to 60 days the time period during which you must file an application for benefits after the date of a notice we send explaining the need to file an application. We are proposing this revision to make the time period used in the title II program consistent with the time period used in other programs we administer under the Act. We believe that eliminating the difference between the time periods in the programs we administer would make it easier for the public to understand and follow our rules.

**DATES:** To be sure that your comments are considered, we must receive them by February 17, 2009.

**ADDRESSES:** You may submit comments by any one of four methods-Internet, facsimile, regular mail, or hand-delivery. Commenters should not submit the same comments multiple times or by more than one method. Regardless of which of the following methods you choose, please state that your comments refer to Docket No. SSA–2007–0058 to ensure that we can associate your comments with the correct regulation:

1. Federal eRulemaking portal at *http://www.regulations.gov.* (This is the most expedient method for submitting your comments, and we strongly urge you to use it.) In the *Comment or Submission* section of the Web page, type ''SSA–2007–0058'', select ''Go,'' and then click ''Send a Comment or Submission.'' The Federal eRulemaking portal issues you a tracking number when you submit a comment.

2. Telefax to (410) 966–2830.

3. Letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235–7703.

4. Deliver your comments to the Office of Regulations, Social Security Administration, 922 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days.

All comments are posted on the Federal eRulemaking portal, although they may not appear for several days after receipt of the comment. You may also inspect the comments on regular business days by making arrangements with the contact person shown in this preamble.

*Caution:* All comments we receive from members of the public are available for public viewing in their entirety on the Federal eRulemaking portal at *http://www.regulations.gov.* Therefore, you should be careful to include in your comments only information that you wish to make publicly available on the Internet. We strongly urge you not to include any personal information, such as your Social Security number or medical information, in your comments.

**FOR FURTHER INFORMATION CONTACT:** Martin Sussman, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401. Call (410) 965–1767 for further information about these proposed rules. For information on eligibility or filing for benefits, call our national toll-free number 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet Web site, Social Security Online, at *http://www.socialsecurity.gov.*

**SUPPLEMENTARY INFORMATION:**

### Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html.*

### What rules are we proposing to revise?

*Time Period To File an Application after Submitting a Written Statement of Intent To Claim Benefits*

We propose to revise our regulations at § 404.630(c), which explain when we will use the date of a written statement as your filing date for Social Security benefits under title II of the Act. We will use the date a written statement indicating your intent to claim benefits is filed with us as the date of your application for benefits if certain requirements are met. Under our current regulations, you must file the application for benefits within 6 months after the date of a notice we send advising you of the need to file an application. We propose to revise the time period to 60 days after the date of such notice.

### Why are we proposing to change our rules?

As stated above, our current protective filing rules under title II allow us to protect your intent to file for a 6-month period Our current rules also allow for protective filing in the supplemental security income program under title XVI of the Act and the special veterans benefits program under title VIII of the Act. However, the time period in which an application must be filed in those programs is 60 days after the date of the notice we send advising you of the need to file an application.

Our program experience has shown that the public may be confused by the difference in time periods for protective filing in the programs we administer, and this confusion may cause them to lose benefits. This is especially true when claimants indicate they intend to file concurrent applications for more than one program, usually under titles II and XVI of the Act. The proposed

change to the time period in which to file an application for benefits under title II would simplify program policies by making the time period consistent across the programs we administer under the Act.

The change we are proposing would also help streamline procedures for our field office employees who currently use separate protective filing procedures for claims under title II and title XVI. For instance, the proposed revision could reduce the need for separate notices for each program, providing instead for a single, combined notice. The time savings for field office employees would allow them to process additional claims, and thereby allow us to provide better public service. Ultimately, this change would benefit all applicants for Social Security benefits.

By making the filing period 60 days for title II, we encourage applicants to pursue claims promptly, which can reduce overall case processing time and ultimately provide benefits in a shorter period of time.

Moreover, expanded and updated methods of filing, including Internet applications, provide an opportunity to apply promptly, which we believe lessens the need for a 6-month protective filing period.

**What programs would these proposed rules affect?**

These proposed rules would affect claims for Social Security benefits under title II of the Act. In addition, to the extent that Medicare entitlement is based on whether you qualify for benefits under title II, these proposed rules would also affect the Medicare program.

**What is our authority to make rules and set procedures for determining whether a person qualifies for benefits under title II of the Act?**

Section 205(a) of the Act provides that:

> The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

**When will we start to use these rules?**

We will not use these rules until we evaluate the public comments we receive on them, determine whether they should be issued as final rules, and issue final rules in the **Federal Register**. If we publish final rules, we will explain in the preamble how we will apply them. We will also summarize and respond to any public comments. Until the effective date of any final rules, we will continue to use our current rules.

**Clarity of These Proposed Rules**

Executive Order 12866, as amended, requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your comments on how to make them easier to understand.

For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rules clearly stated?
- Do the rules contain technical language or jargon that is not clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rules easier to understand?

**Regulatory Procedures**

*Executive Order 12866, as Amended*

We have consulted with the Office of Management and Budget (OMB) and determined that these proposed rules meet the requirements for a significant regulatory action under Executive Order 12866, as amended. Thus, they were subject to OMB review.

*Regulatory Flexibility Act*

We certify that these proposed rules would not have a significant economic impact on a substantial number of small entities because they would affect only individuals. Thus, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

*Paperwork Reduction Act*

These proposed rules contain reporting requirements in section § 404.630. These rules changes the protective filing period from 6 months to 60 days for title II claims. We previously accounted for this public reporting burden in the Information Collection Requests for an existing form the public uses to submit the information to SSA. Consequently, we are inserting a 1-hour placeholder burden in this section.

| Regulation section | Description of public reporting requirement | Number of respondents (annually) | Frequency of response | Average burden per response (minutes) | Estimated annual burden |
|---|---|---|---|---|---|
| § 404.630 ..... | When members of the public state their intent to claim title II Social Security benefits, SSA sends them a notice telling them they must file an application for these benefits. This regulation section changes the time period in which they are required to file the application from six months to 60 days.. | ..... | ..... | ..... | 1 hour (placeholder burden). |
| Total ..... | N/A ..... | ..... | N/A | N/A | 1 |

SSA is submitting an Information Collection Request for clearance of this regulation section to OMB. We are soliciting comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize the burden on respondents, including the use of automated techniques or other forms of information technology. If you would like to submit comments, please send them to the following locations:

Office of Management and Budget, Attn: Desk Officer for SSA, Fax Number: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov*;

Social Security Administration, Attn: Reports Clearance Officer, 1333 Annex, 6401 Security Blvd., Baltimore, MD 21235–0001, Fax Number: 410–965–6400, E-mail: *OPLM.RCO@ssa.gov.*

You can submit comments for up to 60 days after the publication of this notice; however, your comments will be most useful if you send them to SSA within 30 days of publication. To receive a copy of the OMB clearance package, contact the SSA Reports Clearance Officer using any of the above contact methods. We prefer to receive comments by e-mail or fax.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance.)

### List of Subjects in 20 CFR Part 404

Administrative practice and procedure; Blind, Disability benefits; Old-Age, Survivors, and Disability Insurance; Reporting and recordkeeping requirements; Social Security.

Dated: September 18, 2008.

**Michael J. Astrue,**

*Commissioner of Social Security.*

For the reasons set out in the preamble, we propose to amend subpart G of part 404 of chapter III of title 20 of the Code of Federal Regulations as set forth below:

## PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950– )

## Subpart G—[Amended]

1. The authority citation for subpart G continues to read as follows:

**Authority:** Secs. 202 (i), (j), (o), (p), and (r), 205(a), 216(i)(2), 223(b), 228(a), and 702(a)(5) of the Social Security Act (42 U.S.C. 402 (i), (j), (o), (p), and (r), 405(a), 416(i)(2), 423(b), 428(a), and 902(a)(5)).

2. Amend § 404.630(c) by revising the first sentence to read as follows:

**§ 404.630 Use of date of written statement as filing date.**

* * * * *

(c) The claimant files an application with us on an application form as described in § 404.611, or one is filed for the claimant by a person described in § 404.612, within 60 days after the date of a notice we will send advising of the need to file an application. * * *

* * * * *

[FR Doc. E8–29951 Filed 12–16–08; 8:45 am]

BILLING CODE 4191–02–P

## DEPARTMENT OF STATE

## 22 CFR Part 62

**[Public Notice: 6455]**

## Exchange Visitor Program

**AGENCY:** Department of State.

**ACTION:** Proposed rule with request for comment; withdrawal.

**SUMMARY:** On December 10, 2008, the State Department published in the **Federal Register** a proposed rule titled Exchange Visitor Program. The Department amended the General Provisions of the existing Exchange Visitor Program regulations set forth at 22 CFR Part 62. This proposed rule is being withdrawn because it was submitted prior to a formal significance designation being made by OMB. The proposed rule is withdrawn in its entirety.

**DATES:** The proposed rule published at 73 FR 75015, December 10, 2008, is withdrawn effective December 16, 2008.

**FOR FURTHER INFORMATION CONTACT:** Michael Cheman, U.S. Department of State, Washington, DC 20547, (202) 312–9605.

**SUPPLEMENTARY INFORMATION:**

### Background

On December 10, 2008, the State Department published a proposed rule at 73 FR 75015. The rule was intended to amend the General Provisions (Subpart A) of the existing Exchange Visitor Program regulations set forth at 22 CFR part 62 in order to provide greater specificity regarding program administration, sponsor obligations and participant eligibility in the Exchange Visitor Program.

### Reason for Withdrawal

This rule was published prior to submission to OMB for formal significance designation. The proposed rule is withdrawn for OMB review. Accordingly, the Department withdraws the proposed rule ''Exchange Visitor Program'', Public Notice: 6448, RIN 1400–AC36.

Withdrawal of the proposed rule does not preclude the Department from issuing another rule on the subject matter in the future or committing the agency to any future course of action.

Dated: December 10, 2008.

**Michael G. Cheman,**

*Deputy Director, Office of Directives Management, Department of State.*

[FR Doc. E8–29784 Filed 12–16–08; 8:45 am]

BILLING CODE 4710–24–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Office of Inspector General

## 42 CFR Part 1001

## Solicitation of New Safe Harbors and Special Fraud Alerts

**AGENCY:** Office of Inspector General (OIG), HHS.

**ACTION:** Notice of intent to develop regulations.

**SUMMARY:** In accordance with section 205 of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, this annual notice solicits proposals and recommendations for developing new and modifying existing safe harbor provisions under the Federal anti-kickback statute (section 1128B(b) of the Social Security Act), as well as developing new OIG Special Fraud Alerts.

**DATES:** To assure consideration, public comments must be delivered to the address provided below by no later than 5 p.m. on February 17, 2009.

**ADDRESSES:** In commenting, please refer to file code OIG–113–N. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of three ways (no duplicates, please):

1. *Electronically.* You may submit electronic comments on specific recommendations and proposals through the Federal eRulemaking Portal at *http://www.regulations.gov.* (Attachments should be in Microsoft Word, if possible.)

2. *By regular, express, or overnight mail.* You may send written comments to the following address: Office of Inspector General, Department of Health and Human Services, Attention: OIG–113–N, Room 5541, Cohen Building, 330 Independence Avenue, SW., Washington, DC 20201. Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By hand or courier.* If you prefer, you may deliver, by hand or courier, your written comments before the close of the comment period to Office of Inspector General, Department of Health and Human Services, Cohen Building, 330 Independence Avenue, SW., Washington, DC 20201. Because access to the interior of the Cohen Building is not readily available to persons without Federal Government identification, commenters are encouraged to schedule their delivery with one of our staff members at (202) 619–1343.

For information on viewing public comments, please see the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** Marco Villagrana, Department of Health & Human Services, Office of Inspector General, Office of External Affairs, (202) 401–2206.

**SUPPLEMENTARY INFORMATION:**

*Submitting Comments:* We welcome comments from the public on recommendations for developing new or revised safe harbors and Special Fraud Alerts. Please assist us by referencing the file code OIG–113–N.

*Inspection of Public Comments:* All comments received before the end of the comment period are available for viewing by the public. All comments will be posted on *http://www.regulations.gov* as soon as possible after they have been received. Comments received timely will also be available for public inspection as they are received at Office of Inspector General, Department of Health and Human Services, Cohen Building, 330 Independence Avenue, SW., Washington, DC 20201, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (202) 401–2206.

## I. Background

### *A. OIG Safe Harbor Provisions*

Section 1128B(b) of the Social Security Act (the Act) (42 U.S.C. 1320a–7b(b)) provides criminal penalties for individuals or entities that knowingly and willfully offer, pay, solicit, or receive remuneration in order to induce or reward business reimbursable under the Federal health care programs. The offense is classified as a felony and is punishable by fines of up to $25,000 and imprisonment for up to 5 years. OIG may also impose civil money penalties, in accordance with section 1128A(a)(7) of the Act (42 U.S.C. 1320a–7a(a)(7)), or exclusion from the Federal health care programs, in accordance with section 1128(b)(7) of the Act (42 U.S.C. 1320a–7(b)(7)).

Since the statute on its face is so broad, concern has been expressed for many years that some relatively innocuous commercial arrangements may be subject to criminal prosecution or administrative sanction. In response to the above concern, the Medicare and Medicaid Patient and Program Protection Act of 1987, section 14 of Public Law 100–93, specifically required the development and promulgation of regulations, the so-called ''safe harbor'' provisions, specifying various payment and business practices which, although potentially capable of inducing referrals of business reimbursable under the Federal health care programs, would not be treated as criminal offenses under the anti-kickback statute and would not serve as a basis for administrative sanctions. OIG safe harbor provisions have been developed ''to limit the reach of the statute somewhat by permitting certain non-abusive arrangements, while encouraging beneficial and innocuous arrangements'' (56 FR 35952, July 29, 1991). Health care providers and others may voluntarily seek to comply with these provisions so that they have the assurance that their business practices will not be subject to liability under the anti-kickback statute or related administrative authorities.

Existing OIG safe harbors describing those practices that are sheltered from liability are codified in 42 CFR 1001.

### *B. OIG Special Fraud Alerts*

OIG has also periodically issued Special Fraud Alerts to give continuing guidance to health care providers with respect to practices OIG finds potentially fraudulent or abusive. The Special Fraud Alerts encourage industry compliance by giving providers guidance that can be applied to their own practices. OIG Special Fraud Alerts are intended for extensive distribution directly to the health care provider community, as well as to those charged with administering the Federal health care programs.

In developing these Special Fraud Alerts, OIG has relied on a number of sources and has consulted directly with experts in the subject field, including those within OIG, other agencies of the Department, other Federal and State agencies, and those in the health care industry.

### *C. Section 205 of Public Law 104–191*

Section 205 of Public Law 104–191 requires the Department to develop and publish an annual notice in the **Federal Register** formally soliciting proposals for modifying existing safe harbors to the anti-kickback statute and for developing new safe harbors and Special Fraud Alerts.

In developing safe harbors for a criminal statute, OIG is required to engage in a thorough review of the range of factual circumstances that may fall within the proposed safe harbor subject area so as to uncover potential opportunities for fraud and abuse. Only then can OIG determine, in consultation with the Department of Justice, whether it can effectively develop regulatory limitations and controls that will permit beneficial and innocuous arrangements within a subject area while, at the same time, protecting the Federal health care programs and their beneficiaries from abusive practices.

## II. Solicitation of Additional New Recommendations and Proposals

In accordance with the requirements of section 205 of Public Law 104–191, OIG last published a **Federal Register** solicitation notice for developing new safe harbors and Special Fraud Alerts on December 19, 2007 (72 FR 71868). As required under section 205, a status report of the public comments received in response to that notice is set forth in Appendix D to the OIG's Semiannual Report covering the period April 1, 2008, through September 30, 2008.[1] OIG is not seeking additional public comment on the proposals listed in Appendix D at this time. Rather, this notice seeks additional recommendations regarding the development of proposed or modified safe harbor regulations and new Special Fraud Alerts beyond those summarized in Appendix D to the OIG Semiannual Report referenced above.

### *A. Criteria for Modifying and Establishing Safe Harbor Provisions*

In accordance with section 205 of HIPAA, we will consider a number of factors in reviewing proposals for new or modified safe harbor provisions, such as the extent to which the proposals would affect an increase or decrease in—

- Access to health care services,
- The quality of services,
- Patient freedom of choice among health care providers,
- Competition among health care providers,
- The cost to Federal health care programs,
- The potential overutilization of the health care services, and
- The ability of health care facilities to provide services in medically underserved areas or to medically underserved populations.

In addition, we will also take into consideration other factors, including, for example, the existence (or nonexistence) of any potential financial benefit to health care professionals or providers that may take into account their decisions whether to (1) order a health care item or service or (2) arrange for a referral of health care items or services to a particular practitioner or provider.

[1] The OIG Semiannual Report can be accessed through the OIG Web site at *http://oig.hhs.gov/publications/semiannual.asp.*

*B. Criteria for Developing Special Fraud Alerts*

In determining whether to issue additional Special Fraud Alerts, we will also consider whether, and to what extent, the practices that would be identified in a new Special Fraud Alert may result in any of the consequences set forth above, as well as the volume and frequency of the conduct that would be identified in the Special Fraud Alert.

A detailed explanation of justifications for, or empirical data supporting, a suggestion for a safe harbor or Special Fraud Alert would be helpful and should, if possible, be included in any response to this solicitation.

Dated: December 11, 2008.

**Daniel R. Levinson,**

*Inspector General.*

[FR Doc. E8–29982 Filed 12–16–08; 8:45 am]

BILLING CODE 4152–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 73

**[DA 08–2570; MB Docket No. 08–227; RM–11493]**

### Radio Broadcasting Services; Batesville, TX

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document requests comments on a petition for rulemaking filed by Katherine Pyeatt, requesting the allotment of Channel 250A at Batesville, Texas. Channel 250A can be allotted to Batesville consistent with the minimum distance separation requirements of the Commission's Rules with the imposition of a site restriction located 11.4 kilometers (7.1 miles) east of the community at reference coordinates 28–58–27 NL and 99–30–12 WL.

**DATES:** Comments must be filed on or before January 21, 2009, and reply comments on or before February 5, 2009.

**ADDRESSES:** Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner as follows: Katherine Pyeatt, 2215 Cedar Springs Rd. #1910, Dallas, Texas 75201.

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

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Notice of Proposed Rulemaking, MB Docket No. 08–227, adopted November 26, 2008, and released November 28, 2008. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 Twelfth Street, SW., Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or via e-mail *http://www.BCPIWEB.com*. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rulemaking is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

**List of Subjects in 47 CFR Part 73**

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

## PART 73—RADIO BROADCAST SERVICES

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

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

**§ 73.202 [Amended]**

2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Batesville, Channel 250A.

Federal Communications Commission.

**Robert A. Hayne,**

*Senior Attorney to Allocations, Audio Division, Media Bureau.*

[FR Doc. E8–29919 Filed 12–16–08; 8:45 am]

BILLING CODE 6712–01–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 20

**[FWS–R9–MB–2008–N0303; 91200–1231–9BPP–L2]**

### Service Regulations Committee Meeting

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** The Fish and Wildlife Service (hereinafter Service) will conduct an open meeting on January 29, 2009, to identify and discuss preliminary issues concerning the 2009–10 migratory bird hunting regulations.

**DATES:** The meeting will be held January 29, 2009.

**ADDRESSES:** The Service Regulations Committee will meet at the Embassy Suites Hotel, Denver—International Airport, 7001 Yampa Street, Denver, CO (303) 574–3000.

**FOR FURTHER INFORMATION CONTACT:** Robert Blohm, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, Department of the Interior, ms–4107–ARLSQ, 1849 C Street, NW., Washington, DC 20240, (703) 358–1714.

**SUPPLEMENTARY INFORMATION:** Under the authority of the Migratory Bird Treaty Act (16 U.S.C. 703–712), the Service regulates the hunting of migratory game birds. We update the migratory game bird hunting regulations, located at 50 CFR part 20, annually. Through these regulations, we establish the frameworks, or outside limits, for season lengths, bag limits, and areas for migratory game bird hunting. To help us in this process, we have administratively divided the nation into four Flyways (Atlantic, Mississippi, Central, and Pacific), each of which has a Flyway Council. Representatives from the Service, the Service's Migratory Bird Regulations Committee, and Flyway Council Consultants will meet on January 29, 2009, at 8:30 a.m. to identify preliminary issues concerning the 2009–10 migratory bird hunting regulations for discussion and review by the Flyway Councils at their March meetings.

In accordance with Department of the Interior (hereinafter Department) policy regarding meetings of the Service Regulations Committee attended by any person outside the Department, these meetings are open to public observation.

Dated: November 26, 2008.

**Paul R. Schmidt,**

*Assistant Director, Migratory Birds, U.S. Fish and Wildlife Service.*

[FR Doc. E8–29942 Filed 12–16–08; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 218

**RIN 0648–AW79**

## Taking and Importing Marine Mammals; U.S. Navy Training in the Jacksonville Range Complex

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS has received a request from the U.S. Navy (Navy) for authorization to take marine mammals incidental to training activities conducted within the Jacksonville (JAX) Range Complex for the period of April 2009 through April 2014. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that take and requesting information, suggestions, and comments on these proposed regulations.

**DATES:** Comments and information must be received no later than January 16, 2009.

**ADDRESSES:** You may submit comments, identified by 0648–AW79, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*
- Hand delivery or mailing of paper, disk, or CD-ROM comments should be addressed 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.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonyous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Shane Guan, Office of Protected Resources, NMFS, (301) 713–2289, ext. 137.

**SUPPLEMENTARY INFORMATION:**

### Availability

A copy of the Navy's application may be obtained by writing to the address specified above (See **ADDRESSES**), telephoning the contact listed above (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.g gov/pr/permits/incidental.h htm*. The Navy's Draft Environmental Impact Statement (DEIS) for the JAX Range Complex was published on June 27, 2008, and may be viewed at *http://www.JacksonvilleRange C ComplexEIS.com*. NMFS participated in the development of the Navy's DEIS as a cooperating agency under the National Environmental Policy Act (NEPA).

### Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals in specified geographic region by U.S. citizens who engage in a specified activity (other than commercial fishing) during periods of not more than five consecutive years each if certain findings are made and regulations are issued or, if the taking is limited to harassment, 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 if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking 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.

The National Defense Authorization Act of 2004 (NDAA) (Public Law 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations and amended the definition of ''harassment'' as it applies to a ''military readiness activity'' to read as follows (Section 3(18)(B) of the MMPA):

(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

### Summary of Request

On March 17, 2008, NMFS received an application from the Navy requesting authorization for the take of six species of cetaceans incidental to the proposed training activities in the JAX Range Complex over the course of 5 years. On November 7, 2008, the Navy submitted an Addendum with some modifications to its original requests. These training activities are classified as military readiness activities. The Navy states that these training activities may cause various impacts to marine mammal species in the proposed JAX Range Complex area. The Navy requests an authorization to take individuals of these cetacean species by Level B Harassment. Further, the Navy requests authorization to take 2 individual Atlantic spotted dolphins per year by injury as a result of the proposed training activities at JAX Range Complex. Please refer to Table 9 of the document for detailed information of the potential exposures from explosive ordnance (per year) for marine mammals in the JAX Range Complex. However, due to the proposed mitigation and monitoring measures, NMFS believes that the actual take would be less that estimated.

### Background of Navy Request

The Navy's mission is to maintain, train, and equip combat-ready naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas. Section 5062 of Title 10 of the U.S. Code directs the Chief of Naval Operations to train all naval forces for combat. The Chief of Naval Operations meets that direction, in part, by conducting at-sea training exercises and ensuring naval forces have

access to ranges, operating areas (OPAREAs) and airspace where they can develop and maintain skills for wartime missions and conduct research, development, test, and evaluation (RDT&E) of naval weapons systems.

The JAX Range Complex represents an essential three-dimensional space that provides a realistic and safe training area for Navy personnel. For nearly a century the area has supported Navy training activities, and is now host to a wide range of training every year to ensure the U.S. military members are ready for combat.

The JAX Study Area geographically encompasses offshore, near-shore, and onshore OPAREAs, instrumented ranges, and special use airspace (SUA) located along the southern east coast of the U.S. The two principal OPAREAs within the JAX Study Area are the Jacksonville OPAREA and the Charleston OPAREA (sometimes referred to collectively as the JAX/CHASN OPAREA, or simply the OPAREA). The boundary that separates the two OPAREAs from one another is located between 31° and 32° N latitude. The JAX/CHASN OPAREA encompasses much of the South Atlantic Bight (SAB) (i.e., the marine waters located between Cape Hatteras and Cape Canaveral).

The JAX/CHASN OPAREA encompasses 50,219 nm$^2$ (172,246 km$^2$) of ocean area within the SAB. The western boundary of the JAX/CHASN OPAREA is located approximately 3 nm (5.56 km) off the southeast U.S. coast. This shoreward boundary ranges from waters southwest of the New River, North Carolina to waters just north of the Indian and Banana River Complex, Florida.

The northernmost point of the JAX/CHASN OPAREA is located just north of Wilmington, North Carolina (34°37' N) in waters less than 20 m (65.6 ft) deep, while the easternmost boundary lies 281 nm (518.6 km) offshore of Jacksonville, Florida (77°00' W) in waters with a bottom depth of nearly 2,000 m (6,562 ft). The JAX/CHASN OPAREA is a set of operating and maneuver areas with defined air, ocean surface, and subsurface areas described in detail in Table 1 of the Navy's LOA application.

A Warning Area is airspace of defined dimensions, extending from 3 nm (5.56 km) outward from the coast of the U.S., which contains activity that may be hazardous to nonparticipating aircraft. The purpose of such warning areas is to warn nonparticipating pilots of the potential danger. A warning area may be located over domestic or international waters or both.

**Description of the Specified Activities**

In the application submitted to NMFS, the Navy requests an authorization to take marine mammals incidental to conducting training operations within the JAX Range Complex. These training activities consist of surface warfare, mine warfare, amphibious warfare, vessel movement, and small arms training. The locations of these activities are described in Figure 1 of the application. A description of each of these training activities within the JAX Range Complex is provided below:

*Surface Warfare*

Surface Warfare (SUW) supports defense of a geographical area (e.g., a zone or barrier) or friendly ships underway in cooperation with surface, subsurface, and air forces. SUW operations detect, localize, and track surface targets, primarily ships. Hostile small craft and ships are detected and monitored visually and with electronic sensors. Operations include identifying surface contacts, engaging with weapons, disengaging, evasion and avoiding attack, including implementation of radio silence and deceptive measures.

For the proposed JAX Range Complex training operations, SUW involving the use of explosive ordnance includes air-to-surface Missile Exercises that occur at sea.

Missile Exercise (Air-to-Surface) (MISSILEX (A-S)): This exercise would involve fixed winged aircraft and helicopter launching missiles at targets on the ocean's surface with the goal of destroying or disabling the target. MISSILEX (A-S) training in JAX Range Complex can occur during the day or at night in locations described in Figure 1 of the LOA application. Table 1 below summarizes the levels of MISSILEX planned in the JAX Range Complex for the proposed action.

TABLE 1. LEVELS OF MISSILEX PLANNED IN THE JAX RANGE COMPLEX PER YEAR

| Operation | Platform | System/Ordnance | Number of Events |
|---|---|---|---|
| Missile Exercise (MISSILEX) (Air to Surface) | MH-60R/S, SH-60B, HH-60H | AGM-114 (Hellfire missile) | 70 sorties (70 missiles) |
| | P-3C, and P-8A | AGM-65 (Maverick missile) | 3 sorties (3 missiles) |

*Mine Warfare/Mine Exercises*

Mine Warfare (MIW) includes the strategic, operational, and tactical use of mines and mine countermine measures (MCM). MIW training events are also collectively referred to as Mine Exercises (MINEX). MIW training/MINEX utilizes shapes to simulate mines. These shapes are either concrete-filled shapes or metal shapes. No actual explosive mines are used during MIW training in the JAX Range Complex study area. MIW training or MINEX is divided into the following.

(1) Mine laying: Crews practice the laying of mine shapes in simulated enemy areas;

(2) Mine countermeasures: Crews practice ''countering'' simulated enemy mines to permit the maneuver of friendly vessels and troops. ''Countering'' refers to both the detection and identification of enemy mines, the marking and maneuver of vessels and troops around identified enemy mines and mine fields, and the disabling of enemy mines. A subset of mine countermeasures is mine neutralization. Mine neutralization refers to the disabling of enemy mines by causing them to self-detonate either by setting a small explosive charge in the vicinity of the enemy mine, or by using various types of equipment that emit a sound, pressure, or a magnetic field that causes the mine to trip and self-detonate. In all cases, actual explosive (live) mines would not be used during training events. Rather, mine shapes are used to simulate real enemy mines. In the JAX Study Area, MIW training/MINEX events include the use of explosive charges for one type of mine countermeasures and neutralization training: underwater detonations of mine shapes by Explosive Ordnance Disposal (EOD) divers. Table 2 below summarizes the levels of mine warfare/mine exercises planned in the JAX Range Complex for the proposed action.

TABLE 2. LEVELS OF MINE WARFARE/MINE EXERCISES PLANNED IN THE JAX RANGE COMPLEX PER YEAR

| Operation | Platform | System/Ordnance | Number of Events (each event include 1 charge) |
|---|---|---|---|
| Mine Neutralization | EOD | 20 lb charges | 12 events |

EOD personnel detect, identify, evaluate, and neutralize mines. The EOD mission during training is to locate and neutralize mine shapes after they are initially located by another source, such as an MCM or MHC class ship or an MH–53 or MH–60 helicopter. For underwater detonations, EOD divers are deployed from a ship or small boat to practice neutralizing a mine shape underwater. The neutralization exercise in the water is normally done with an explosive charge of 5-, 10- or 20–lbs NEW. The initiation of the charge is controlled remotely by EOD personnel. If the mine shape were an actual mine, it would explode due to the pressure and energy exerted in the water from the smaller EOD explosive charge. This training is conducted only during day light hours in the JAX Study Area.

*Amphibious Warfare*

Amphibious Warfare (AMW) involves the utilization of naval firepower and logistics in combination with U.S. Marine Corps landing forces to project military power ashore. AMW encompasses a broad spectrum of operations involving maneuver from the sea to objectives ashore, ranging from shore assaults, boat raids, ship-to-shore maneuver, shore bombardment and other naval fire support, and air strike and close air support training. AMW that involves the use of explosive ordnance is limited to Firing Exercises (FIREX).

During a FIREX, surface ships use their main battery guns to fire from sea at land targets in support of military forces ashore. On the east coast, the land ranges where FIREX training can take place are limited. Therefore, land masses are simulated during east coast FIREX training using the Integrated Maritime Portable Acoustic Scoring and Simulation System (IMPASS) system, a system of buoys that simulate a land mass. FIREX training using IMPASS would occur only during daylight hours in the locations described in Figure 1 of the LOA application. Table 3 below summarizes the levels of FIREX with IMPASS planned in the JAX Range Complex for the proposed action.

TABLE 3. LEVELS OF FIREX WITH IMPASS PLANNED IN THE JAX RANGE COMPLEX PER YEAR

| Operation | Platform | System/Ordnance | Number of Events (each event include 1 charge) |
|---|---|---|---|
| FIREX with IMPASS | CG, DDG | 5″ gun (IMPASS | 10 events (390 rounds) |

*Vessel Movement*

Vessel movements are associated with most activities under the training operations in the JAX Study Area. This involves transiting to and from port to the JAX Range Complex as well as vessel movements into, within, and through the range complex. Some training operations are strictly vessel movements such as Man Overboard Drills, Tow/Be Towed Exercises, Underway Replenishment, Aircraft Carrier Flight Operations, and use of the transit lanes by submarines when surfaced; these types of operations are all analyzed under the impacts from vessel movement. The Navy estimates approximately 1,050 steaming days in the JAX Range Complex. This also includes non-training related vessel movements which are unpredictable as to their occurrence in a year such as, but not limited to, storm evasion, deployment transits, and movements in the basin to rearrange for repairs/berthing/loading/off-loading from designated piers. An estimate of steaming days per year was computed by summing the number of steaming hours proposed in each range complex, dividing by 24 hours per day, and rounding to the nearest 10 days.

*Small Arms Training Explosive hand grenades (such as the MK3A2 grenades)*

Small arms training is part of quarterly reservist training for the Mobile Expeditionary Security Group (MESG). The MESG trains with MK3A2 (0.5–lb NEW) anti-swimmer concussion grenades. The MK3A2 grenades are small and contain high explosives in an inert metal or plastic shell. They detonate at about 3 m (9.8 ft) under the water's surface within 4 to 5 seconds of being deployed. The detonation depth may be shallower depending upon the speed of the boat at the time the grenade is deployed. Table 4 below summarizes the levels of small arms training planned in the JAX Range Complex for the proposed action.

TABLE 4. LEVELS OF SMALL ARMS TRAINING PLANNED IN THE JAX RANGE COMPLEX PER YEAR

| Operation | Platform | System/Ordnance | Event Duration | Number of Events (each event include 1 charge) |
|---|---|---|---|---|
| Small Arms Training (explosive hand grenades) | Maritime Expeditionary Support Group (Various Small Boats) | MK3A2 anti-swimmer grenades (HE) | 1-2 hours | 96 events (80 grenades) |

A number of different types of boats would be used depending on the unit using the boat and their mission. Boats are mostly used by Naval Special Warfare (NSW) teams and Navy Expeditionary Combat Command (NECC) units (Naval Coastal Warfare, Inshore Boat Units, Mobile Security Detachments, Explosive Ordnance

Disposal, and Riverine Forces). These units would be used to protect ships in harbors and high value units, such as aircraft carriers, nuclear submarines, liquid natural gas tankers, etc., while entering and leaving ports, as well as to conduct riverine operations, insertion and extractions, and various naval special warfare operations.

The boats used by these units include: Small Unit River Craft (SURC), Combat Rubber Raiding Craft (CRRC), Rigid Hull Inflatable Boats (RHIB), Patrol Craft, and many other versions of these types of boats. These boats would use inboard or outboard, diesel or gasoline engines with either propeller or water jet propulsion.

This exercise is usually a live-fire exercise, but at times blanks may be used so boat crews can practice their ship-handling skills for the employment of weapons without being concerned with the safety requirements involved with HE weapons.

(1) Basic Phase (Unit Level Training) Scenario:

Boat crews may use high or low speeds to approach and engage targets simulating swimmers with anti-swimmer concussion grenades.

(2) Integrated and Sustainment Phase Training Scenarios:

Typically do not differ from the Basic Phase Scenario, except for additional command and control coordination involved.

(3) Training Considerations

The purpose of this exercise is to develop marksmanship skills and small boat ship-handling tactics skills required to employ these weapons. Training usually lasts 1–2 hours.

**Description of Marine Mammals in the Area of the Specified Activities**

There are 29 marine mammal species with possible or confirmed occurrence in the JAX Range Complex. As indicated in Table 5, all of them are cetacean species (7 mysticetes and 22 odontocetes). Table 5 also includes the federal status of these marine mammal species. Six marine mammal species listed as federally endangered under the Endangered Species Act (ESA) occur in the JAX Range Complex: the humpback whale, North Atlantic right whale, sei whale, fin whale, blue whale, and sperm whale.

TABLE 5. MARINE MAMMAL SPECIES FOUND IN THE JAX RANGE COMPLEX

| Family and Scientific Name | Common Name | Federal Status |
|---|---|---|
| Order Cetacea | | |
| Suborder Mysticeti (baleen whales) | | |
| *Eubalaena glacialis* | North Atlantic right whale | Endangered |
| *Megaptera novaeangliae* | Humpback whale | Endangered |
| *Balaenoptera acutorostrata* | Minke whale | |
| *B. brydei* | Bryde's whale | |
| *B. borealis* | Sei whale | Endangered |
| *B. physalus* | Fin whale | Endangered |
| *B. musculus* | Blue whale | Endangered |
| Suborder Odontoceti (toothed whales) | | |
| *Physeter macrocephalus* | Sperm whale | Endangered |
| *Kogia breviceps* | Pygmy sperm whale | |
| *K. sima* | Dwarf sperm whale | |
| *Ziphius cavirostris* | Cuvier's beaked whale | |
| *Mesoplodon minus* | True's beaked whale | |
| *M. europaeus* | Gervais' beaked whale | |
| *M. densirostris* | Blainville's beaked whale | |
| *Steno bredanensis* | Rough-toothed dolphin | |
| *Tursiops truncatus* | Bottlenose dolphin | |
| *Stenella attenuata* | Pantropical spotted dolphin | |
| *S. frontalis* | Atlantic spotted dolphin | |
| *S. longirostris* | Spinner dolphin | |
| *S. clymene* | Clymene dolphin | |
| *S. coeruleoalba* | Striped dolphin | |
| *Delphinus delphis* | Common dolphin | |

TABLE 5. MARINE MAMMAL SPECIES FOUND IN THE JAX RANGE COMPLEX—Continued

| Family and Scientific Name | Common Name | Federal Status |
|---|---|---|
| *Lagenodephis hosei* | Fraser's dolphin | |
| *Grampus griseus* | Risso's dolphin | |
| *Peponocephala electra* | Melon-headed whale | |
| *Feresa attenuata* | Pygmy killer whale | |
| *Pseudorca crassidens* | False killer whale | |
| *Orcinus orca* | Killer whale | |
| *G. macrorhynchus* | Short-finned pilot whale | |

The information contained herein relies heavily on the data gathered in the Marine Resource Assessments (MRAs). The Navy MRA Program was implemented by the Commander, Fleet Forces Command, to initiate collection of data and information concerning the protected and commercial marine resources found in the Navy's OPAREAs. Specifically, the goal of the MRA program is to describe and document the marine resources present in each of the Navy's OPAREAs. The MRA for the JAX/CHASN OPAREA was recently updated in 2008 (DoN, 2008).

The MRA data were used to provide a regional context for each species. The MRA represents a compilation and synthesis of available scientific literature (e.g., journals, periodicals, theses, dissertations, project reports, and other technical reports published by government agencies, private businesses, or consulting firms), and NMFS reports including stock assessment reports, recovery plans, and survey reports.

The density estimates that were used in previous Navy environmental documents have been recently updated to provide a compilation of the most recent data and information on the occurrence, distribution, and density of marine mammals. The updated density estimates used for the analyses are derived from the Navy OPAREA Density Estimates (NODE) for the Southeast OPAREAS report (DON, 2007).

Density estimates for cetaceans were either modeled using available line-transect survey data or derived using available data in order of preference: (1) through spatial models using line-transect survey data provided by NMFS; (2) using abundance estimates from Mullin and Fulling (2003); (3) or based on the cetacean abundance estimates found in the most current NMFS stock assessment report (SAR) (Waring *et al.*, 2007), which can be viewed at: *http://www.nmfs.noaa.gov/pr/sars/species.htm*.

For the model-based approach, density estimates were calculated for each species within areas containing survey effort. A relationship between these density estimates and the associated

environmental parameters such as depth, slope, distance from the shelf break, sea surface temperature, and chlorophyll a concentration was formulated using generalized additive models. This relationship was then used to generate a two-dimensional density surface for the region by predicting densities in areas where no survey data exist.

The analyses for cetaceans were based on sighting data collected through shipboard surveys conducted by NMFS-Northeast Fisheries Science Center (NEFSC) and Southeast Fisheries Science Center (SEFSC) between 1998 and 2005. Species-specific density estimates derived through spatial modeling were compared with abundance estimates found in the most current NMFS SAR to ensure consistency. All spatial models and density estimates were reviewed by and coordinated with NMFS Science Center technical staff and scientists with the University of St. Andrews, Scotland, Centre for Environmental and Ecological Modeling (CREEM). For a more detailed description of the methodology involved in calculating the density estimates provided in this LOA, please refer to the NODE report for the Southeast (DON 2007).

**Potential Impacts to Marine Mammal Species**

The Navy considers that explosions associated with MISSILEX, FIREX, MINEX, and Small Arms Training (explosive hand grenades) are the activities with the potential to result in Level A or Level B harassment of marine mammals. Vessel strikes were also analyzed for potential affect to marine mammals.

*Vessel Strikes*

Ship strikes are known to affect large whales and sirenians in the JAX Study Area. The most vulnerable marine mammals are those that spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (e.g., the sperm whale). In addition, some baleen whales, such as the North Atlantic right whale seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.*, 2004). These species are primarily large, slow moving whales. Smaller marine mammals, for example, Atlantic bottlenose and Atlantic spotted dolphins-move quickly throughout the water column and are often seen riding the bow wave of large ships. Marine mammal responses to vessels may include avoidance and changes in dive pattern (NRC, 2003).

After reviewing historical records and computerized stranding databases for evidence of ship strikes involving baleen and sperm whales, Laist *et al.* (2001) found that accounts of large whale ship strikes involving boats operated by engines in the area date back to at least the late 1800s. Ship collisions remained infrequent until the 1950s, after which point they increased. Laist *et al.* (2001) report that both the number and speed of motorized vessels have increased over time for trans-Atlantic passenger services, which transit through the area. They concluded that most strikes occur over or near the continental shelf, that ship strikes likely have a negligible effect on the status of most whale populations, but that for small populations or segments of populations the impact of ship strikes may be significant.

Although ship strikes may result in the mortality of a limited number of whales within a population or stock,

Laist *et al.* (2001) also concluded that, when considered in combination with other human-related mortalities in the area (e.g., entanglement in fishing gear), these ship strikes may present a concern for whale populations.

Of 11 species known to be hit by ships, fin whales are struck most frequently; followed by right whales, humpback whales, sperm whales, and gray whales (Laist *et al.*, 2001). In some areas, one-third of all fin whale and right whale strandings appear to involve ship strikes. Sperm whales spend long periods (typically up to 10 minutes; Jacquet *et al.*, 1996) ''rafting'' at the surface between deep dives. There were also instances in which sperm whales approached vessels too closely and were cut by the propellers (NMFS, 2006).

The east coast is a principal migratory corridor for North Atlantic right whales that travel between the calving/nursery areas in the Southeastern United States and feeding grounds in the northeast U.S. and Canada. Transit to the Study Area from mid-Atlantic ports requires Navy vessels to cross the migratory route of North Atlantic right whales. Southward right whale migration generally occurs from mid- to late November, although some right whales may arrive off the Florida coast in early November and stay into late March (Kraus *et al.*, 1993). The northbound migration generally takes place between January and late March. Data indicate that during the spring and fall migration, right whales typically occur in shallow water immediately adjacent to the coast, with over half the sightings (63 percent) occurring within 18.5 km (10 NM), and 94.1 percent reported within 55 km (30 NM) of the coast. Given the low abundance of North Atlantic right whales relative to other species, the frequency of occurrence of vessel collisions to right whales suggests that the threat of ship strikes is proportionally greater to this species (Jensen and Silber, 2003). Therefore, in 2008, NMFS published a final rule concerning right whale vessel collision reduction strategy and established operational measures for the shipping industry to reduce the potential for large vessel collisions with North Atlantic right whales while transiting to and from mid-Atlantic ports during right whale migratory periods (73 FR 60173; October 10, 2008). Recent studies of right whales have shown that these whales tend to lack a response to the sounds of oncoming vessels (Nowacek *et al.*, 2004). Although Navy vessel traffic generally represents only 2 - 3 percent of overall large vessel traffic, based on this biological characteristic and the presence of critical Navy ports along the whales' mid-Atlantic migratory corridor, the Navy was the first Federal agency to proactively adopt additional mitigation measures for transits in the vicinity of mid-Atlantic ports during right whale migration. For purposes of these measures, the mid-Atlantic is defined broadly to include ports south and east of Block Island Sound southward to South Carolina.

Accordingly, the Navy has proposed mitigation measures to reduce the potential for collisions with surfaced marine mammals (for more details refer to Proposed Mitigation Measures below). Based on the implementation of Navy mitigation measures, especially during times of anticipated right whale occurrence, and the relatively low density of Navy ships in the Study Area the likelihood that a vessel collision would occur is very low.

*Assessment of Marine Mammal Response to Anthropogenic Sound*

Marine mammals respond to various types of anthropogenic sounds introduced in the ocean environment. Responses are typically subtle and can include shorter surfacings, shorter dives, fewer blows per surfacing, longer intervals between blows (breaths), ceasing or increasing vocalizations, shortening or lengthening vocalizations, and changing frequency or intensity of vocalizations (NRC, 2005). However, it is not known how these responses relate to significant effects (e.g., long-term effects or population consequences). The following is an assessment of marine mammal responses and disturbances when exposed to anthropogenic sound.

I. Physiology

Potential impacts to the auditory system are assessed by considering the characteristics of the received sound (e.g., amplitude, frequency, duration) and the sensitivity of the exposed animals. Some of these assessments can be numerically based (e.g., temporary threshold shift [TTS] of hearing sensitivity, permanent threshold shift [PTS] of hearing sensitivy, perception). Others will be necessarily qualitative, due to a lack of information, or will need to be extrapolated from other species for which information exists.

Potential physiological responses to the sound exposure are ranked in descending order, with the most severe impact (auditory trauma) occurring at the top and the least severe impact occurring at the bottom (the sound is not perceived).

Auditory trauma represents direct mechanical injury to hearing related structures, including tympanic membrane rupture, disarticulation of the middle ear ossicles, and trauma to the inner ear structures such as the organ of Corti and the associated hair cells. Auditory trauma is always injurious and could result in PTS. Auditory trauma is always assumed to result in a stress response.

Auditory fatigue refers to a loss of hearing sensitivity after sound stimulation. The loss of sensitivity persists after, sometimes long after, the cessation of the sound. The mechanisms responsible for auditory fatigue differ from auditory trauma and would primarily consist of metabolic exhaustion of the hair cells and cochlear tissues. The features of the exposure (e.g., amplitude, frequency, duration, temporal pattern) and the individual animal's susceptibility would determine the severity of fatigue and whether the effects were temporary (TTS) or permanent (PTS). Auditory fatigue (PTS or TTS) is always assumed to result in a stress response.

Sounds with sufficient amplitude and duration to be detected among the background ambient noise are considered to be perceived. This category includes sounds from the threshold of audibility through the normal dynamic range of hearing (i.e., not capable of producing fatigue).

To determine whether an animal perceives the sound, the received level, frequency, and duration of the sound are compared to what is known of the species' hearing sensitivity.

Since audible sounds may interfere with an animal's ability to detect other sounds at the same time, perceived sounds have the potential to result in auditory masking. Unlike auditory fatigue, which always results in a stress response because the sensory tissues are being stimulated beyond their normal physiological range, masking may or may not result in a stress response, depending on the degree and duration of the masking effect. Masking may also result in a unique circumstance where an animal's ability to detect other sounds is compromised without the animal's knowledge. This could conceivably result in sensory impairment and subsequent behavior change; in this case, the change in behavior is the lack of a response that would normally be made if sensory impairment did not occur. For this reason, masking also may lead directly to behavior change without first causing a stress response.

The features of perceived sound (e.g., amplitude, duration, temporal pattern) are also used to judge whether the sound exposure is capable of producing a stress response. Factors to consider in

this decision include the probability of the animal being naive or experienced with the sound (i.e., what are the known/unknown consequences of the exposure).

The received level is not of sufficient amplitude, frequency, and duration that is perceptible by the animal, by extension, this does not result in a stress response (not perceived). Potential impacts to tissues other than those related to the auditory system are assessed by considering the characteristics of the sound (e.g., amplitude, frequency, duration) and the known or estimated response characteristics of nonauditory tissues. Some of these assessments can be numerically based. Others will be necessarily qualitative, due to lack of information. Each of the potential responses may or may not result in a stress response.

Direct tissue effects – Direct tissue responses to sound stimulation may range from tissue shearing (injury) to mechanical vibration with no resulting injury. Any tissue injury would produce a stress response, whereas noninjurious stimulation may or may not.

No tissue effects – The received sound is insufficient to cause either direct (mechanical) or indirect effects to tissues. No stress response occurs.

II. The Stress Response

The acoustic source is considered a potential stressor if, by its action on the animal, via auditory or nonauditory means, it may produce a stress response in the animal. The term ''stress'' has taken on an ambiguous meaning in the scientific literature, but with respect to the later discussions of allostasis and allostatic loading, the stress response will refer to an increase in energetic expenditure that results from exposure to the stressor and which is predominantly characterized by either the stimulation of the sympathetic nervous system (SNS) or the hypothalamic-pituitary-adrenal (HPA) axis (Reeder and Kramer, 2005). The SNS response to a stressor is immediate and acute and is characterized by the release of the catecholamine neurohormones norepinephrine and epinephrine (i.e., adrenaline). These hormones produce elevations in the heart and respiration rate, increase awareness, and increase the availability of glucose and lipids for energy. The HPA response is ultimately defined by increases in the secretion of the glucocorticoid steroid hormones, predominantly cortisol in mammals. The amount of increase in circulating glucocorticoids above baseline may be an indicator of the overall severity of a stress response (Hennessy *et al.*, 1979). Each component of the stress response is variable in time; e.g., adrenalines are released nearly immediately and are used or cleared by the system quickly, whereas cortisol levels may take long periods of time to return to baseline.

The presence and magnitude of a stress response in an animal depends on a number of factors. These include the animal's life history stage (e.g., neonate, juvenile, adult), the environmental conditions, reproductive or developmental state, and experience with the stressor. Not only will these factors be subject to individual variation, but they will also vary within an individual over time. In considering potential stress responses of marine mammals to acoustic stressors, each of these should be considered. For example, is the acoustic stressor in an area where animals engage in breeding activity? Are animals in the region resident and likely to have experience with the stressor (i.e., repeated exposures)? Is the region a foraging ground or are the animals passing through as transients? What is the ratio of young (naive) to old (experienced) animals in the population? It is unlikely that all such questions can be answered from empirical data; however, they should be addressed in any qualitative assessment of a potential stress response as based on the available literature.

The stress response may or may not result in a behavioral change, depending on the characteristics of the exposed animal. However, provided a stress response occurs, we assume that some contribution is made to the animal's allostatic load. Allostasis is the ability of an animal to maintain stability through change by adjusting its physiology in response to both predictable and unpredictable events (McEwen and Wingfield, 2003). The same hormones associated with the stress response vary naturally throughout an animal's life, providing support for particular life history events (e.g., pregnancy) and predictable environmental conditions (e.g., seasonal changes). The allostatic load is the cumulative cost of allostasis incurred by an animal and is generally characterized with respect to an animal's energetic expenditure. Perturbations to an animal that may occur with the presence of a stressor, either biological (e.g., predator) or anthropogenic (e.g., construction), can contribute to the allostatic load (Wingfield, 2003). Additional costs are cumulative and additions to the allostatic load over time may contribute to reductions in the probability of achieving ultimate life history functions (e.g., survival, maturation, reproductive effort and success) by producing pathophysiological states (conditions associated with disease or injury). The contribution to the allostatic load from a stressor requires estimating the magnitude and duration of the stress response, as well as any secondary contributions that might result from a change in behavior.

If the acoustic source does not produce tissue effects, is not perceived by the animal, or does not produce a stress response by any other means, we assumes that the exposure does not contribute to the allostatic load. Additionally, without a stress response or auditory masking, it is assumed that there can be no behavioral change. Conversely, any immediate effect of exposure that produces an injury is assumed to also produce a stress response and contribute to the allostatic load.

III. Behavior

Changes in marine mammal behavior are expected to result from an acute stress response. This expectation is based on the idea that some sort of physiological trigger must exist to change any behavior that is already being performed. The exception to this rule is the case of auditory masking. The presence of a masking sound may not produce a stress response, but may interfere with the animal's ability to detect and discriminate biologically relevant signals. The inability to detect and discriminate biologically relevant signals hinders the potential for normal behavioral responses to auditory cues and is thus considered a behavioral change.

Impulsive sounds from explosions have very short durations as compared to other sounds like sonar or ship noise, which are more likely to produce auditory masking. Additionally the explosive sources analyzed in this document are used infrequently and the training events are typically of short duration. Therefore, the potential for auditory masking is unlikely and no impacts to marine mammals due to auditory masking are anticipated due to implementing the proposed action.

Numerous behavioral changes can occur as a result of stress response. For each potential behavioral change, the magnitude in the change and the severity of the response needs to be estimated. Certain conditions, such as stampeding (i.e., flight response) or a response to a predator, might have a probability of resulting in injury. For example, a flight response, if significant enough, could produce a stranding event. Each altered behavior may also have the potential to disrupt

biologically significant events (e.g., breeding or nursing) and may need to be classified as Level B harassment. All behavioral disruptions have the potential to contribute to the allostatic load. This secondary potential is signified by the feedback from the collective behaviors to allostatic loading.

IV. Life Function

*IV.1. Proximate Life Functions*

Proximate life history functions are the functions that the animal is engaged in at the time of acoustic exposure. The disruption of these functions, and the magnitude of the disruption, is something that must be considered in determining how the ultimate life history functions are affected. Consideration of the magnitude of the effect to each of the proximate life history functions is dependent upon the life stage of the animal. For example, an animal on a breeding ground which is sexually immature will suffer relatively little consequence to disruption of breeding behavior when compared to an actively displaying adult of prime reproductive age.

*IV.2. Ultimate Life Functions*

The ultimate life functions are those that enable an animal to contribute to the population (or stock, or species, etc.). The impact to ultimate life functions will depend on the nature and magnitude of the perturbation to proximate life history functions. Depending on the severity of the response to the stressor, acute perturbations may have nominal to profound impacts on ultimate life functions. For example, unit-level use of sonar by a vessel transiting through an area that is utilized for foraging, but not for breeding, may disrupt feeding by exposed animals for a brief period of time. Because of the brevity of the perturbation, the impact to ultimate life functions may be negligible. By contrast, weekly training over a period of years may have a more substantial impact because the stressor is chronic. Assessment of the magnitude of the stress response from the chronic perturbation would require an understanding of how and whether animals acclimate to a specific, repeated stressor and whether chronic elevations in the stress response (e.g., cortisol levels) produce fitness deficits.

The proximate life functions are loosely ordered in decreasing severity of impact. Mortality (survival) has an immediate effect, in that no future reproductive success is feasible and there is no further addition to the population resulting from reproduction. Severe injuries may also lead to reduced survivorship (longevity) and prolonged alterations in behavior. The latter may further affect an animal's overall reproductive success and reproductive effort. Disruptions of breeding have an immediate impact on reproductive effort and may impact reproductive success. The magnitude of the effect will depend on the duration of the disruption and the type of behavior change that was provoked. Disruptions to feeding and migration can affect all of the ultimate life functions; however, the impacts to reproductive effort and success are not likely to be as severe or immediate as those incurred by mortality and breeding disruptions.

*Explosive Ordnance Exposure Analysis*

The underwater explosion from a weapon would send a shock wave and blast noise through the water, release gaseous by-products, create an oscillating bubble, and cause a plume of water to shoot up from the water surface. The shock wave and blast noise are of most concern to marine animals. The effects of an underwater explosion on a marine mammal depends on many factors, including the size, type, and depth of both the animal and the explosive charge; the depth of the water column; and the standoff distance between the charge and the animal, as well as the sound propagation properties of the environment. Potential impacts can range from brief effects (such as behavioral disturbance), tactile perception, physical discomfort, slight injury of the internal organs and the auditory system, to death of the animal (Yelverton *et al.*, 1973; O'Keeffe and Young, 1984; DoN, 2001). Non-lethal injury includes slight injury to internal organs and the auditory system; however, delayed lethality can be a result of individual or cumulative sublethal injuries (DoN, 2001). Immediate lethal injury would be a result of massive combined trauma to internal organs as a direct result of proximity to the point of detonation (DoN, 2001). Generally, the higher the level of impulse and pressure level exposure, the more severe the impact to an individual.

Injuries resulting from a shock wave take place at boundaries between tissues of different density. Different velocities are imparted to tissues of different densities, and this can lead to their physical disruption. Blast effects are greatest at the gas-liquid interface (Landsberg, 2000). Gas-containing organs, particularly the lungs and gastrointestinal tract, are especially susceptible (Goertner, 1982; Hill, 1978; Yelverton *et al.*, 1973). In addition, gas-containing organs including the nasal sacs, larynx, pharynx, trachea, and lungs may be damaged by compression/expansion caused by the oscillations of the blast gas bubble (Reidenberg and Laitman, 2003). Intestinal walls can bruise or rupture, with subsequent hemorrhage and escape of gut contents into the body cavity. Less severe gastrointestinal tract injuries include contusions, petechiae (small red or purple spots caused by bleeding in the skin), and slight hemorrhaging (Yelverton *et al.*, 1973).

Because the ears are the most sensitive to pressure, they are the organs most sensitive to injury (Ketten, 2000). Sound-related damage associated with blast noise can be theoretically distinct from injury from the shock wave, particularly farther from the explosion. If an animal is able to hear a noise, at some level it can damage its hearing by causing decreased sensitivity (Ketten, 1995) (see *Assessment of Marine Mammal Response to Anthropogenic Sound* section below). Sound-related trauma can be lethal or sublethal. Lethal impacts are those that result in immediate death or serious debilitation in or near an intense source and are not, technically, pure acoustic trauma (Ketten, 1995). Sublethal impacts include hearing loss, which is caused by exposures to perceptible sounds. Severe damage (from the shock wave) to the ears includes tympanic membrane rupture, fracture of the ossicles, damage to the cochlea, hemorrhage, and cerebrospinal fluid leakage into the middle ear. Moderate injury implies partial hearing loss due to tympanic membrane rupture and blood in the middle ear. Permanent hearing loss also can occur when the hair cells are damaged by one very loud event, as well as by prolonged exposure to a loud noise or chronic exposure to noise. The level of impact from blasts depends on both an animal's location and, at outer zones, on its sensitivity to the residual noise (Ketten, 1995).

The exercises that use explosives in this request include: FIREX with IMPASS, MISSILEX, MINEX, and Small Arms Training (explosive hand grenades). Table 6 summarizes the number of events (per year by season) and specific areas where each occurs for each type of explosive ordnance used. For most of the operations, there is no difference in how many events take place between the different seasons. Fractional values are a result of evenly distributing the annual totals over the four seasons. For example, there are 70 Hellfire events per year that can take place in MLTR during any season, so

there are 17.5 events modeled for each season.

TABLE 6. NUMBER OF EXPLOSIVE EVENTS WITHIN THE JAX RANGE COMPLEX

| Sub-Area | Ordnance | Winter | Spring | Summer | Fall | Annual Totals |
|---|---|---|---|---|---|---|
| | MISSILEX | | | | | 73 |
| MLTR | Hellfire | 17.5 | 17.5 | 17.5 | 17.5 | |
| MLTR | Maverick | 0.75 | 0.75 | 0.75 | 0.75 | |
| | FIREX | | | | | 10 |
| BB, CC | 5″ rounds | 0** | 0** | 20 | 5 | |
| | MINEX | | | | | 12 |
| UNDET North | 20 LB | 1.25 | 1.25 | 1.25 | 1.25 | |
| UNDET South | 20 LB | 1.25 | 1.25 | 1.25 | 1.25 | |
| | Small Arms Training | | | | | 80 |
| UNDET North | MK3A2 anti-swimmer concussion grenade (0.5 lbs NEW) | 10 | 10 | 10 | 10 | |
| UNDET South | MK3A2 anti-swimmer concussion grenade (0.5 lbs NEW) | 10 | 10 | 10 | 10 | |

* See Figure 1 of the LOA application for the location of sub-areas.
** In accordance with the current biological opinion for the Southeast, no live FIREX is conducted during North atlantic right whale calving season (December 1 - March 31) and therefore no modeling was completed for the winter and spring season.

*Acoustic Environment*

Sound propagation (the spreading or attenuation of sound) in the oceans of the world is affected by several environmental factors: water depth, variations in sound speed within the water column, surface roughness, and the geo-acoustic properties of the ocean bottom. These parameters can vary widely with location.

Four types of data are used to define the acoustic environment for each analysis site:

Seasonal Sound Velocity Profiles (SVP) – Plots of propagation speed (velocity) as a function of depth, or SVPs, are a fundamental tool used for predicting how sound will travel. Seasonal SVP averages were obtained for each training area.

Seabed Geo-acoustics – The type of sea floor influences how much sound is absorbed and how much sound is reflected back into the water column.

Wind Speeds – Several environmental inputs, such as wind speed and surface roughness, are necessary to model acoustic propagation in the prospective training areas.

Bathymetry data – Bathymetry data are necessary to model acoustic propagation and were obtained for each of the training areas.

*Acoustic Effects Analysis*

The acoustic effects analysis presented in the following sections is briefly described for each major type of exercise. A more in-depth effects analysis is in Appendix A of the LOA application s and the Addendum.

1. FIREX (with IMPASS)

Modeling was completed for a 5–in. round, 8–lb NEW charge exploding at a depth of 1 ft (0.3 m). The analytical approach begins using a high-fidelity acoustic model to estimate energy in each 5–in explosive round. Impact areas are calculated by summing the energy from multiple explosions over a firing exercise (FIREX) mission, and determining the impact area based on the thresholds and criteria. Level B exposures were determined based on the 177 dB re 1 microPa$^2$–sec (energy) criteria for behavioral disturbance (without TTS) due to the use of multiple explosions.

Impact areas for a full FIREX (with IMPASS) event must account for the time and space distribution of 39 explosions, as well as the movement of animals over the several hours of the exercise. The total impact area for the 39–shot event is calculated as the sum of small impact areas for seven FIREX missions (each with four to six rounds fired) and one pre-FIREX action (with six rounds fired). Table 7 shows the Zone of Influence (ZOI) results of the model estimation.

TABLE 7. ESTIMATED ZOIS (KM$^2$) FOR A SINGLE FIREX (WITH IMPASS) EVENT (39 ROUNDS)

| Area* | Level B ZOI @ 177 dB re 1 μPa$^2$ sec (multiple detonations only) | Level B ZOI @ 23 psi | Level A ZOI @ 205 dB re 1 μPa$^2$ sec or 13 psi |
|---|---|---|---|
| BB, CC | 6.1397** | 3.7773 | 0.16464 |

*Please see Figure 1 on page 2-2 of the LOA application for the locations of these areas.

**In this area, which occurs in shallow water, the 177 dB re 1 microPa$^2$ sec behavioral disturbance criteria dominates over the 23 psi criteria and therefore was used in the analysis.

The ZOI, when multiplied by the animal densities and the total number of events (Table 6), provides the exposure estimates for that animal species for the nominal exercise case of 39 5–in explosive rounds. The potential effects would occur within a series of small effect areas associated with the pre-calibration rounds and missions spread out over a period of several hours. Additionally, target locations are changed from event to event and because of the time lag between events, it is highly unlikely, even if a marine mammal were present (not accounting for mitigation), that the marine mammal would be within the small exposure zone for more than one event.

FIREX (with IMPASS) is restricted to one location in the JAX Range Complex. In addition to other mitigation measures, dedicated lookouts would be onboard the ship monitors the target area for marine mammals before the exercise, during the deployment of the IMPASS array, and during the return to firing position. Ships will not fire on the target until the area is cleared and will suspend the exercise if any marine mammals enter the buffer area. Additionally, naval guns would only be fired in an easterly direction, away from the North Atlantic right whale critical habitat and the associated area of concern, thereby reducing potential exposures to this critically endangered species. Due to safety reasons, the buffer zone must remain clear of all types of platforms. During the actual firing of the weapon, the participants involved must be able to observe the intended ordnance impact area to ensure the area is free of range transients, however, this observation would be conducted from the firing position or other safe distance. Due to the distance between the firing position and the buffer zone, lookouts are only expected to visually detect breaching whales, whale blows, and large pods of dolphins and porpoises. Implementation of mitigation measures like these reduce the likelihood of exposure and potential effects in the ZOI.

2. MINEX

The Comprehensive Acoustic System Simulation/Gaussian Ray Bundle (OAML, 2002) model, modified to account for impulse response, shock-wave waveform, and nonlinear shock-wave effects, was run for acoustic-environmental conditions derived from the Oceanographic and Atmospheric Master Library (OAML) standard databases. The explosive source was modeled with standard similitude formulas, as in the Churchill FEIS. Because all the sites are shallow (less than 50 m), propagation model runs were made for bathymetry in the range from 10 m to 40 m.

Estimated ZOIs varied as much within a single area as from one area to another, which had been the case for the Virtual At Sea Training/IMPASS (DoN, 2003). There was, however, little seasonal dependence. As a result, the ZOIs are stated as mean values with a percentage variation. Generally, in the case of ranges determined from energy metrics, as the depth of water increases, the range shortens. The single explosion TTS-energy criterion (182 dB re 1 microPa$^2$–sec) was dominant over the pressure criteria and therefore used to determine the ZOI for the Level B exposure analysis. Table 8 shows the ZOI results of the model estimation.

The total ZOI, when multiplied by the animal densities and total number of events (Table 5), provides the exposure estimates for that animal species for each specified charge. Because of the time lag between detonations, it is highly unlikely, even if a marine mammal were present (not accounting for mitigation), that the marine mammal would be within the small exposure zone for more than one detonation. The underwater detonations are restricted to two boxes (Undet North, Undet South) designated in a Biological Opinion issued by NMFS located approximately 5 - 30 km (3.1 - 18.6 mi) offshore from Charleston, South Carolina. In addition to other mitigation measures (see Proposed Mitigation Measures section below), observers will survey the target area for marine mammals and sea turtles for 30 minutes prior through 30 minutes post detonation. Detonations will be suspended if a marine mammal enters the Zone of Influence and will only restart after the area has been clear for a full 30 minutes. Implementation of mitigation measures like these reduce the likelihood of exposure and potential effects in the ZOI.

TABLE 8. ESTIMATED ZOIS (KM$^2$) FOR MINEX

| Threshold | ZOIs | |
|---|---|---|
| | 5-lb shot | 20-lb shot |
| Level A ZOI @ 13 psi | 0.03 km$^2$ ± 10% | 0.13 km$^2$ ± 10% |
| Level B ZOI @ 182 dB re 1 microPa$^2$-sec | 0.2 km$^2$ ± 25% | 0.8 km$^2$ ± 25% |

3. MISSILEX (Hellfire and Maverick)

Modeling was completed for two of the explosive missiles involved in MISSILEX, each assumed detonation at 1–m (3.3 ft) depth. The NEW used in simulations of the Hellfire and Maverick missiles are 8 lbs and 80 lbs, respectively. The single explosion TTS-energy criterion (182 dB re 1 microPa$^2$–sec) was used to determine the ZOI for the Level B exposure analysis. Table 9 shows the ZOI results of the model estimation. The total ZOI, when multiplied by the animal densities and total number of events (Table 6), provides the exposure estimates for that animal species for each specified missile. Because of the time lag between detonations, it is highly unlikely, even if a marine mammal were present (not accounting for mitigation), that the marine mammal would be within the small exposure zone for more than one detonation. MISSILEX is only conducted in one area, the Missile Laser Training Area (MLTR) in the JAX Range Complex. Ships will not fire on the target until the area is clear of marine mammals, and will suspend the exercise if any enter the buffer area. Implementation of mitigation measures like these reduce the likelihood of exposure and potential effects in the ZOI.

TABLE 9. ESTIMATED ZOIS (KM$^2$) FOR MISSILEX

| Area | Ordnance | @ 182 dB re 1 microPa$^2$-s Level B ZOI or 23 psi | | | | @ 205 dB re 1 microPa$^2$-s Level A ZOI or 13 psi | | | | Mortality ZOI @ 30.5 psi | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Win | Spr | Sum | Fall | Win | Spr | Sum | Fall | Win | Spr | Sum | Fall |
| MLTR | Hellfire | 0.89 | 0.73 | 0.64 | 0.73 | 0.02 | 0.02 | 0.02 | 0.02 | <0.01 | <0.01 | <0.01 | <0.01 |
| MLTR | Maverick | 0.91 | 0.91 | 0.79 | 0.91 | 0.11 | 0.07 | 0.07 | 0.11 | <0.01 | <0.01 | <0.01 | <0.01 |

4. Small Arms Training – Explosive hand grenades

A quantitative analysis was conducted for MK3A2 anti-swimmer concussion grenades. A very low NEW (0.5–lb) is associated with this ordnance. In a previous Biological Opinion, the NMFS calculated the potential range within which sea turtles may be affected based on equations presented in Young (1991). The result was a ''safe range'' designed for zero injury to species within the calculated range. Equations specific to marine mammals, as presented in Young (1991), are as follows:

Adult porpoise – $R_{AP} = 434\ W_E^{0.28}$

20 ft. whale – $R_W = 327\ W_E^{0.28}$

(R = range in feet, $W_E$ = weight of explosive in pounds)

For an adult porpoise, the ''safe range'' is 114 yards (104 m); for a large whale (20 ft), the safe range is 86 yards (79 m). The ''safe range'' for an adult porpoise was used as a representative ZOI for marine mammals. The ZOI will be visually monitored during operations for all marine mammal species.

**Summary of Potential Exposures from Explosive Ordnance Use**

Explosions that occur in the OPAREA are associated with training exercises that use explosive ordnance, which include missiles (MISSILEX), 5–in. explosive naval gun shells with IMPASS (FIREX), underwater detonations associated with Mine Neutralization training (MINEX), and hand grenades associated with small arms training. Explosive ordnance use is limited to specific training areas.

(1) MISSILEX, MINEX, and FIREX

An explosive analysis was conducted to estimate the number of marine mammals that could be exposed to impacts from explosions. Table 10 provides a summary of the explosive analysis results. Exposure estimates could not be calculated for several species (blue whale, sei whale, Bryde's whale, killer whale, pygmy killer whale, false killer whale, melon-headed whale, spinner dolphin, Fraser's dolphin, Atlantic white-sided dolphin, and harbor porpoise) because density data could not be calculated due to the limited available data for these species; however, the likelihood of exposure for species not expected to occur in the JAX Range Complex should be even lower than that estimated for species with occurrence frequent enough for densities to be calculated. In addition to the low likelihood of exposure, the mitigation measures presented below in this document would be implemented thus the level of impacts would be less than expected. Since the blue whale, sei whale, Bryde's whale, killer whale, pygmy killer whale, false killer whale, melon-headed whale, spinner dolphin, Fraser's dolphin, Atlantic white-sided dolphin, and harbour porpoise are considered rare in the Jacksonville Range Complex, no exposures are expected for these species. Fin, humpback whales, and sperm whales will have high detections rates at the surface because of their large body size and pronounced blows. Because of large group sizes, it is likely that lookouts would detect Atlantic spotted dolphins, bottlenose dolphins, Clymene dolphins, common dolphins, pantropical spotted dolphins, Risso's dolphins, rough-toothed dolphins, and striped dolphins. Implementation of mitigation measures will reduce the likelihood of exposure and potential effects.

TABLE 10. SUMMARY OF POTENTIAL EXPOSURES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE JAX RANGE COMPLEX

| Species/Training Operation | Potential Exposures @ 177 dB re 1 microPa$^2$-s (multiple detonations only) | Potential Exposures @ 182 dB re 1 microPa$^2$-s or 23 psi | Potential Exposures @ 205 dB re 1 microPa$^2$-s or 13 psi | Potential Exposures @ 30.5 psi |
|---|---|---|---|---|
| Fin whale | | | | |
| MISSILEX training | NA | 0 | 0 | 0 |
| FIREX training | 0 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 0 | 0 | 0 | 0 |
| Humpback whale | | | | |
| MISSILEX training | NA | 0 | 0 | 0 |
| FIREX training | 0 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 0 | 0 | 0 | 0 |

TABLE 10. SUMMARY OF POTENTIAL EXPOSURES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE JAX RANGE COMPLEX—Continued

| Species/Training Operation | Potential Exposures @ 177 dB re 1 microPa$^2$-s (multiple detonations only) | Potential Exposures @ 182 dB re 1 microPa$^2$-s or 23 psi | Potential Exposures @ 205 dB re 1 microPa$^2$-s or 13 psi | Potential Exposures @ 30.5 psi |
|---|---|---|---|---|
| North Atlantic right whale | | | | |
| MISSILEX training | NA | 0 | 0 | 0 |
| FIREX training | 0 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 0 | 0 | 0 | 0 |
| Sperm whale | | | | |
| MISSILEX training | NA | 0 | 0 | 0 |
| FIREX training | 0 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 0 | 0 | 0 | 0 |
| Atlantic Spotted dolphin | | | | |
| MISSILEX training | NA | 31 | 1 | 0 |
| FIREX training | 23 | NA | 1 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 23 | 33 | 2 | 0 |
| Beaked whale | | | | |
| MISSILEX training | NA | 0 | 0 | 0 |
| FIREX training | 0 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 0 | 0 | 0 | 0 |
| Bottlenose dolphin | | | | |
| MISSILEX training | NA | 3 | 0 | 0 |
| FIREX training | 10 | NA | 0 | 0 |
| MINEX training | NA | 2 | 0 | 0 |
| Total Exposures | 10 | 5 | 0 | 0 |
| Clymene dolphin | | | | |
| MISSILEX training | NA | 1 | 0 | 0 |
| FIREX training | 1 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 1 | 1 | 0 | 0 |
| Common dolphin | | | | |
| MISSILEX training | NA | 0 | 0 | 0 |
| FIREX training | 0 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 0 | 0 | 0 | 0 |

TABLE 10. SUMMARY OF POTENTIAL EXPOSURES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE JAX RANGE COMPLEX—Continued

| Species/Training Operation | Potential Exposures @ 177 dB re 1 microPa$^2$-s (multiple detonations only) | Potential Exposures @ 182 dB re 1 microPa$^2$-s or 23 psi | Potential Exposures @ 205 dB re 1 microPa$^2$-s or 13 psi | Potential Exposures @ 30.5 psi |
|---|---|---|---|---|
| *Kogia spp.* | | | | |
| MISSILEX training | NA | 0 | 0 | 0 |
| FIREX training | 0 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 0 | 0 | 0 | 0 |
| Minke whale | | | | |
| MISSILEX training | NA | 0 | 0 | 0 |
| FIREX training | 0 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 0 | 0 | 0 | 0 |
| Pantropical spotted dolphin | | | | |
| MISSILEX training | NA | 1 | 0 | 0 |
| FIREX training | 1 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 1 | 1 | 0 | 0 |
| Pilot whales | | | | |
| MISSILEX training | NA | 0 | 0 | 0 |
| FIREX training | 1 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 1 | 0 | 0 | 0 |
| Risso's dolphin | | | | |
| MISSILEX training | NA | 0 | 0 | 0 |
| FIREX training | 3 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 3 | 0 | 0 | 0 |
| Rough-toothed dolphin | | | | |
| MISSILEX training | NA | 0 | 0 | 0 |
| FIREX training | 0 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |
| Total Exposures | 0 | 0 | 0 | 0 |
| Striped dolphin | | | | |
| MISSILEX training | NA | 0 | 0 | 0 |
| FIREX training | 0 | NA | 0 | 0 |
| MINEX training | NA | 0 | 0 | 0 |

TABLE 10. SUMMARY OF POTENTIAL EXPOSURES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE JAX RANGE COMPLEX—Continued

| Species/Training Operation | Potential Exposures @ 177 dB re 1 microPa$^2$-s (multiple detonations only) | Potential Exposures @ 182 dB re 1 microPa$^2$-s or 23 psi | Potential Exposures @ 205 dB re 1 microPa$^2$-s or 13 psi | Potential Exposures @ 30.5 psi |
|---|---|---|---|---|
| Total Exposures | 0 | 0 | 0 | 0 |

Note: Events were either modeled for 177 dB re 1 microPa$^2$ sec due to multiple detonations (MISSILEX and FIREX) or modeled for 182 dB re 1 microPa$^2$ sec or 23 psi due to single detonations (MISSILEX and MINEX). Therefore, for FIREX the NA refers to the criteria that were less dominant and therefore not used in the analysis. For MISSILEX and MINEX the NA refers to the fact that these events are not multiple detonations and therefore not modeled at 177 dB re 1 microPa$^2$ sec.

(2) Small Arms Training – Explosive hand grenades

A quantitative explosive analysis was conducted to estimate the exposure of marine mammals to impacts from ordnance use associated with small arms training. The explosive ordnance used in small arms training includes the MK3A2 anti-swimmer concussion grenades. A very low NEW (0.5–lbs) is associated with this ordnance. These detonations occur in the very shallow waters (< 30 m, or 98 ft) of the UNDET North and South boxes and detonate at a depth of no greater than 3 m (9.8 ft). Most of the marine mammal species that may occur in the JAX Range Complex are known to occur in waters with depths of less than 30 m (98 ft).

Using the 114 yd (104 m) ''safe range'' calculated for the MK3A2 anti-swimmer concussion grenades as a representative ZOI (0.034 km$^2$), potential exposures were calculated. No exposures for any marine mammal species were estimated.

For all marine mammal species, small arms training exercises are not expected to result in Level A or Level B harassment as defined by the MMPA and therefore will not likely affect annual rates of recruitment or survival of the species. Furthermore, the mitigation measures described in later in this document are designed to reduce exposure of marine mammals to potential impacts to achieve the least practicable adverse effect on marine mammal species or populations.

VI. Potential Effects of Exposures to Explosives

Effects from exposure to explosives vary depending on the level of exposure.

Animals exposed to levels that constitute MMPA Level B harassment may experience a behavioral disruption from the use of explosive ordnance. Behavioral responses can include shorter surfacings, shorter dives, fewer blows per surfacing, longer intervals between blows (breaths), ceasing or increasing vocalizations, shortening or lengthening vocalizations, and changing frequency or intensity of vocalizations (NRC, 2005). However, it is not known how these responses relate to significant effects (e.g., long-term effects or population consequences) (NRC, 2005). In addition, animals exposed to levels that constitute MMPA Level B harassment may experience a temporary threshold shift (TTS), which may result in a slight, recoverable loss of hearing sensitivity (DoN, 2001).

Exposures that reach Level A harassment may result in long-term injuries such as permanent threshold shift (PTS). The resulting injuries may limit an animal's ability to find food, communicate with other animals, and/or interpret the environment around them. Impairment of these abilities can decrease an individual's chance of survival or impact their ability to successfully reproduce. Level A harassment will have a long-term impact on an exposed individual.

Mortality of an animal would remove the animal entirely from the population as well as eliminate any future reproductive potential.

Based on best available science, NMFS preliminarily concludes that takes due to explosive ordnance and underwater detonations would result in only short-term effects to most individuals exposed and would likely not affect annual rates of recruitment or survival of the species. The mitigation measures presented below would further reduce the potential for exposures, and there would be no mortality of marine mammals from the proposed training activities. Table 11 provides a list of potential takes of marine mammal species as a result of the proposed JAX Range Complex training activities.

TABLE 11. SUMMARY OF POTENTIAL TAKES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE JAX RANGE COMPLEX

| Species | Level B harassment | Level A harassment | Mortality |
|---|---|---|---|
| Atlantic spotted dolphin | 56 | 2 | 0 |
| Bottlenose dolphin | 15 | 0 | 0 |
| Clymene dolphin | 2 | 0 | 0 |
| Pantropical spotted dolphin | 2 | 0 | 0 |
| Pilot whale | 1 | 0 | 0 |
| Risso's dolphin | 3 | 0 | 0 |

**Proposed Mitigation Measures**

*General Maritime Measures*

The mitigation measures presented below would be taken by Navy personnel on a regular and routine basis. These are routine measures and are considered ''Standard Operating Procedures.≥

I. Personnel Training – Lookouts

The use of shipboard lookouts is a critical component of all Navy standard operating procedures. Navy shipboard lookouts (also referred to as ''watchstanders'') are qualified and experienced observers of the marine environment. Their duties require that they report all objects sighted in the water to the Officer of the Deck (OOD) (e.g., trash, a periscope, marine mammals, sea turtles) and all disturbances (e.g., surface disturbance, discoloration) that may be indicative of a threat to the vessel and its crew. There are personnel serving as lookouts on station at all times (day and night) when a ship or surfaced submarine is moving through the water.

For the past few years, the Navy has implemented marine mammal spotter training for its bridge lookout personnel on ships and submarines. This training has been revamped and updated as the Marine Species Awareness Training (MSAT) and is provided to all applicable units. The lookout training program incorporates MSAT, which addresses the lookout's role in environmental protection, laws governing the protection of marine species, Navy stewardship commitments, and general observation information, including more detailed information for spotting marine mammals. MSAT has been reviewed by NMFS and acknowledged as suitable training. MSAT may also be viewed on-line at *https://portal.navfac.navy.mil/go/msat*

1. All bridge personnel, Commanding Officers, Executive Officers, officers standing watch on the bridge, maritime patrol aircraft aircrews, and Mine Warfare (MIW) helicopter crews will complete MSAT.

2. Navy lookouts would undertake extensive training to qualify as a watchstander in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

3. Lookout training will include on-the-job instruction under the supervision of a qualified, experienced watchstander. Following successful completion of this supervised training period, lookouts will complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects).

4. Lookouts will be trained in the most effective means to ensure quick and effective communication within the command structure to facilitate implementation of protective measures if marine species are spotted.

5. Surface lookouts would scan the water from the ship to the horizon and be responsible for all contacts in their sector. In searching the assigned sector, the lookout would always start at the forward part of the sector and search aft (toward the back). To search and scan, the lookout would hold the binoculars steady so the horizon is in the top third of the field of vision and direct the eyes just below the horizon. The lookout would scan for approximately five seconds in as many small steps as possible across the field seen through the binoculars. They would search the entire sector in approximately five-degree steps, pausing between steps for approximately five seconds to scan the field of view. At the end of the sector search, the glasses would be lowered to allow the eyes to rest for a few seconds, and then the lookout would search back across the sector with the naked eye.

6. At night, lookouts would not sweep the horizon with their eyes, because eyes do not see well when they are moving. Lookouts would scan the horizon in a series of movements that would allow their eyes to come to periodic rests as they scan the sector. When visually searching at night, they would look a little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision. Lookouts will also have night vision devices available for use.

II. Operating Procedures and Collision Avoidance

1. Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order will be issued to further disseminate the personnel training requirement and general marine species mitigation measures.

2. Commanding Officers will make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

3. While underway, surface vessels will have at least two lookouts with binoculars; surfaced submarines will have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts will watch for and report to the OOD the presence of marine mammals.

4. Personnel on lookout will employ visual search procedures employing a scanning method in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

5. After sunset and prior to sunrise, lookouts will employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

6. While in transit, naval vessels will be alert at all times, use extreme caution, and proceed at a ''safe speed'' so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

7. When whales have been sighted in the area, Navy vessels will increase vigilance and shall implement measures to avoid collisions with marine mammals and avoid activities that might result in close interaction of naval assets and marine mammals. Actions shall include changing speed and/or direction and are dictated by environmental and other conditions (e.g., safety, weather).

8. Naval vessels will maneuver to keep at least 500 yds (460 m) away from any observed whale and avoid approaching whales head-on. This requirement does not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Restricted maneuverability includes, but is not limited to, situations when vessels are engaged in dredging, submerged operations, launching and recovering aircraft or landing craft, minesweeping operations, replenishment while underway and towing operations that severely restrict a vessel's ability to deviate course. Vessels will take reasonable steps to alert other vessels in the vicinity of the whale.

9. Where feasible and consistent with mission and safety, vessels will avoid closing to within 200–yd (183 m) of marine mammals other than whales (whales addressed above).

10. Floating weeds, algal mats, Sargassum rafts, clusters of seabirds, and jellyfish are good indicators of marine mammals. Therefore, increased vigilance in watching for marine mammals will be taken where these are present.

11. Navy aircraft participating in exercises at sea will conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties. Marine mammal detections will be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

12. All vessels will maintain logs and records documenting training operations should they be required for event reconstruction purposes. Logs and records will be kept for a period of 30 days following completion of a major training exercise.

*Coordination and Reporting Requirements*

The Navy will coordinate with the local NMFS Stranding Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during or within 24 hours after completion of training activities. Additionally, the Navy will follow internal chain of command reporting procedures as promulgated through Navy instructions and orders.

*Mitigation Measures Applicable to Vessel Transits in the Mid-Atlantic during North Atlantic Right Whale Migration*

For purposes of these measures, the mid-Atlantic is defined broadly to include ports south and east of Block Island Sound southward to South Carolina. The procedure described below would be established as mitigation measures for Navy vessel transits during Atlantic right whale migratory seasons near ports located off the western North Atlantic, offshore of the eastern United States. The mitigation measures would apply to all Navy vessel transits, including those vessels that would transit to and from East Coast ports and OPAREAs. Seasonal migration of right whales is generally described by NMFS as occuring from October 15th through April 30th, when right whales migrate between feeding grounds farther north and calving grounds farther south. The Navy mitigation measures have been established in accordance with rolling dates identified by NMFS consistent with these seasonal patterns.

NMFS has identifed ports located in the western Atlantic Ocean, offshore of the southeastern United States, where vessel transit during right whale migration is of highest concern for potential ship strike. The ports include the Hampton Roads entrance to the Chesapeake Bay, which includes the concentration of Atlantic Fleet vessels in Norfolk, Virginia. Navy vessels are required to use extreme caution and operate at a slow, safe speed consistent with mission and safety during the months indicated in Table 12 below and within a 20 nm (37 km) arc (except as noted) of the specified reference points.

During the indicated months, Navy vessels would practice increased vigilance with respect to avoidance of vessel-whale interactions along the mid-Atlantic coast, including transits to and from any mid-Atlantic ports not specifically identified above.

TABLE 12. NORTH ATLANTIC RIGHT WHALE MIGRATION PORT REFERENCES

| Region | Months | Port Reference Points |
|---|---|---|
| South and East of Block Island | Sep-Oct and Mar-Apr | 37 km (20 nm) seaward of line 41°4.49 N, 71°51.15 W and 41°18.58 N, 70°50.23 W |
| New York/New Jersey | Sep-Oct and Feb-Apr | 40°30.64 N, 73°57.76 W |
| Delaware Bay (Philadelphia) | Oct-Dec and Feb-Mar | 38°52.13 N, 75°01.93 W |
| Chesapeake Bay (Hampton Roads and Baltimore) | Nov-Dec and Feb-Apr | 37°01.11 N, 75°57.56 W |
| North Carolina | Dec-Apr | 34°41.54 N, 76°40.20 W |
| South Carolina | Oct-Apr | 33°11.84 N, 79°08.99 W and 32°43.39 N, 79°48.72 W |

I. Additional Mitigation Measures in the SE Region

During North Atlantic right whale calving season, FACSFAC JAX provides an information resource through the right whale sightings clearinghouse. During calving season and within the consultation area (roughly an area to 80 nm seaward from Charleston, South Carolina, south to Sebastian Inlet, Florida) particular measures are in effect in accordance with the NMFS Biological Opinion issued in 1997 (NMFS, 1997).

The coastal waters off the Southeast United States (SEUS) support the only known calving ground for the North Atlantic right whale (NARW). In 2006, the Navy, U.S. Coast Guard (USCG), U.S. Army Corps of Engineers (USACE), and NMFS entered into a Memorandum of Agreement pursuant to the Endangered Species Act. The Early Warning System (EWS) is a result of that agreement and is a collaborative effort which involves comprehensive aerial surveys conducted daily, weather permitting, during the North Atlantic Right Whale calving season. East/west transects are flown from shoreline to approximately 30–35 nm offshore. Aerial surveys are conducted to locate NARW and provide whale detection and reporting information to mariners in the NARW calving ground in an effort to avoid collisions with these endangered species. When a NARW is sighted, information from the aerial survey aircraft is passed to a ground contact. The ground contact e-mails the sighting information to a wide network distribution which includes Fleet Area Control and Surveillance Jacksonville (FACSFAC JAX), the USCG, the USACE and non-profit and commercial interests. In addition, the ground contact will follow up with a call to FACSFAC JAX to provide additional information if required. FACSFAC JAX records this valuable information and disseminates to all navy vessels and aircraft operating in the consultation area through the Secret Internet Protocol Router Network (SIPRNET) system. General sighting information and reporting procedures are broadcasted over the following methods: the NOAA weather radio; USCG NAVTEX system

and a Broadcast Notice to Mariners over VHF marine-band radio channel 16. The EWS is a wide communication effort to ensure all vessels are aware of the most recent right whale sightings as an avoidance measure.

II. Measures Applicable to the ''Consultation Area'' in the JAX/CHASN OPAREAs during North Atlantic Right Whale Calving Season

The following measures from the NMFS Biological Opinion issued in 1997 (NMFS, 1997) will be implemented:

1. Naval vessels operating within North Atlantic right whale critical habitat and the Associated Area of Concern (AAOC) will exercise extreme caution and use slow safe speed, that is, the slowest speed that is consistent with essential mission, training, and operations.

2. Exercise extreme caution and use slow, safe speed when a whale is sighted by a vessel or when the vessel is within 5 nm of a reported new sighting less than 12 hours old.

3. Circumstances could arise where, in order to avoid North Atlantic right whale(s), speed reductions could mean vessels must reduce speed to a minimum at which it can safety keep on course (bare steerageway) or vessels could come to an all stop.

4. During the North Atlantic right whale calving season north-south transits through the critical habitat are prohibited, except for those exercises that necessarily operate at a slow, safe speed. Naval vessel transits through the area shall be in an east-west direction, and shall use the most direct route available during the calving season.

5. Naval vessel operations in the North Atlantic right whale critical habitat and AAOC during the calving season will be undertaken during daylight and periods of good visibility, to the extent practicable and consistent with mission, training, and operation. When operating in the critical habitat and AAOC at night or during periods of poor visibility, vessels will operate as if in the vicinity of a recently reported NARW sighting.

6. Command, Control and Communication.

- FACSFAC JAX shall coordinate ship/aircraft clearance into the operating area based on prevailing conditions, including water temperature, weather conditions, whale sighting data, mission or event to be conducted and other pertinent information. Commander Submarine Atlantic (COMSUBLANT) will coordinate any submarine operations that may require clearance with FACSFAC JAX. FASFAC JAX will provide data to ships and aircraft, including USCG if requested, and will recommend modifying, moving or canceling events as needed to prevent whale encounters. Commander Submarine Group Ten (COMSUBGRU TEN) will provide same information/guidance to subs.
- Prior to transiting or training in the critical habitat ships will contact FASFAC JAX to obtain latest whale sighting and other information needed to make informed decisions regarding safe speed and path of intended movement. Subs shall contact COMSUBGRU TEN for similar information. Ships and aircraft desiring to train/operate inside the critical habitat or within the warning/operating area shall coordinate clearance with FASFAC JAX. Subs shall obtain same clearance from CTF–82 (COMSUBLANT).
- FACSFAC JAX will coordinate local procedures for whale data entry, update, retrieval and dissemination using joint maritime command information system. Ships not yet Officer in Tactical Command Information Exchange subsystem capable, including USCG, will communicate via satellite communication, telephone system or international marine/maritime satellite.

7. The only type of exercise that may be conducted inside the critical habitat and AAOC in calving season is precision anchorage drills and swept channel exercises. In addition, use of the Shipboard Electronic System Evaluation Facility range is authorized with clearance and advice from FACSFAC JAX.

*Proposed Mitigation Measures for Specific At-sea Training Events*

These actions are standard operating procedures that are in place currently and will be used in the future for all activities being analyzed in this LOA request.

I. Firing Exercise (FIREX) Using the Integrated Maritime Portable Acoustic Scoring System (IMPASS) (5–in Explosive Rounds)

In accordance with the NMFS Biological Opinion issued in 1997 (NMFS, 1997), the Navy has been conducting FIREX using IMPASS in one location in the JAX Study Area: Areas AA, BB and CC (see Figure 1 of the LOA application), which are adjacent to one another. Under the Biological Opinion, explosive ordnance could be used only in Areas BB and CC during non-North Atlantic right whale calving season. Recent explosive and non-explosive ordnance exposure analysis concluded there is no seasonal difference in exposure for the North Atlantic right whale between any of the gunnery boxes because there is no difference in densities between these areas; therefore, the restriction on the use of Area AA is unnecessary during calving season. Regardless, under the preferred alternative Area AA would continue to be restricted to avoid proximity to North Atlantic right whale critical habitat. This restriction is operationally feasible because the additional steaming time from the homeport of ships conducting FIREX with IMPASS (e.g. Naval Station Mayport, Florida) is not significantly greater than the steaming time required to reach Area AA. Further, surface ships conducting FIREX using IMPASS do not have strict distance from land restrictions like those imposed on aircraft that embark from shore-based facilities.

The following measures would be implemented for FIREX using IMPASS:

1. This activity would only occur in Areas BB and CC.

2. During North Atlantic right whale calving season no explosive ordnance will be used.

3. Pre-exercise monitoring of the target area will be conducted with ''Big Eyes'' prior to the event, during deployment of the IMPASS sonobuoy array, and during return to the firing position. Ships would maintain a lookout dedicated to visually searching for marine mammals and sea turtles 180 along the ship track line and 360 at each buoy drop-off location.

4. ''Big Eyes'' on the ship will be used to monitor a 600 yard (548 m) buffer zone for marine mammals during naval-gunfire events. Due to the distance between the firing position and the buffer zone, lookouts are only expected to visually detect breaching whales, whale blows, and large pods of dolphins and porpoises.

5. Ships will not fire on the target if marine mammals are detected within or approaching the 600 yd (548 m) buffer zone until the area is cleared. If marine mammals are present, operations would be suspended. Visual observation will occur for approximately 45 minutes, or until the animal has been observed to have cleared the area and is heading away from the buffer zone.

6. Post-exercise monitoring of the entire effect range will take place with ''Big Eyes'' and the naked eye during the retrieval of the IMPASS sonobuoy array following each firing exercise.

7. FIREX with IMPASS will take place during daylight hours only.

8. FIREX with IMPASS will only be used in Beaufort Sea State three (3) or less.

9. The visibility must be such that the fall of shot is visible from the firing ship during the exercise.

10. No firing will occur if marine mammals are detected within 70 yards (64 m) of the vessel.

II. Air-to-Surface Missile Exercises (Explosives)

Historically, this activity occurs in the Missile Laser Training Range (MLTR) in the JAX Study Area. This location was established to be far enough from shore to reduce civilian encounters (e.g., diving and recreational fishing), while remaining within 60 nm from shore-based facilities (the established flight distance restriction for helicopters during unit level training events).

The following measures will be implemented:

1. This activity will only occur in the Missile Laser Training Range (MLTR).

2. Aircraft will visually survey the target area for marine mammals. Visual inspection of the target area will be made by flying at 1,500 ft (457 m) altitude or lower, if safe to do so, and at slowest safe speed. Firing or range clearance aircraft must be able to actually see ordnance impact areas. Explosive ordnance shall not be targeted to impact within 1,800 yards (1,646 m) of sighted marine mammals.

III. Mine Neutralization Training Involving Underwater Detonations (up to and including 20–lb charges)

Mine neutralization involving underwater detonations occurs in shallow water (0 - 120 ft, or 0 - 36 m) and is executed by divers using SCUBA. NMFS issued a Biological Opinion (BO) in 2002 for UNDETs of up to 20–lbs explosive charges related to MINEX training (NMFS, 2002). This activity will occur in two locations: Undet North (10L) and Undet South (12I). These locations are offshore from Naval Weapons Station Charleston, South Carolina, a restricted-access Naval Installation. These locations have low bathymetric relief and a sand-silt bottom.

These exercises utilize small boats that deploy from shore based facilities. Often times these small boats are rigid-hulled inflatable boats, which are designed for shallow water and have limited seaworthiness necessitating a nearshore location. The exercise is a one-day event that occurs only during daylight hours; therefore, the distance from shore is limited.

1. Underwater detonations are restricted to Undet North and Undet South. These sites are located in the Charleston/JAX OPAREAs offshore of Charleston, South Carolina.

2. Observers will survey the buffer zone, a 700 yds (640 m) radius from detonation location, for marine mammals and sea turtles from all participating vessels during the entire operation. A survey of the buffer zone (minimum of three parallel tracklines 219 yds (200 m) apart using support craft will be conducted at the detonation location 30 minutes prior through 30 minutes post detonation. During late July through October, an additional surface observer will be added to more carefully look for hatchling turtles in the buffer zone. Aerial survey support will be utilized whenever assets are available.

3. Detonation operations will be conducted during daylight hours only.

4. If a marine mammal is sighted within the buffer zone, the animal will be allowed to leave of its own volition. The Navy will suspend detonation exercises and ensure the area is clear for a full 30 minutes prior to detonation.

5. Divers placing the charges on mines and dive support vessel personnel will survey the area for marine mammals and will report any sightings to the surface observers. These animals will be allowed to leave of their own volition and the buffer zone will be clear for 30 minutes prior to detonation.

6. No detonations will take place within 3.2 nm (5.93 km) of an estuarine inlet (e.g., Charleston Harbor).

7. No detonations will take place within 1.6 nm (2.96 km) of shoreline.

8. No detonations will take place within 1,000 ft (305 m) of any known artificial reef, shipwreck, or live hard-bottom community.

9. Personnel will record any protected species observations during the exercise as well as measures taken if species are detected within the buffer zone.

IV. Small Arms Training – Explosive hand grenades (such as the MK3A2 grenades)

1. Lookouts will visually survey for floating weeds, algal mats, Sargassum rafts, marine mammals, and sea turtles.

2. A 200 yd (182 m) radius buffer zone will be established around the intended target. The exercises will be conducted only if the buffer zone is clear of sighted marine mammals.

Adaptive Management

The final regulations governing the take of marine mammals incidental to Navy training exercises in JAX Range Complex will contain an adaptive management component. The use of adaptive management will give NMFS the ability to consider new data from different sources to determine (in coordination with the Navy), on an annual basis, if new or modified mitigation or monitoring measures are appropriate for subsequent annual LOAs. Following are some of the possible sources of applicable data:

- Results from the Navy's monitoring from the previous year (either from JAX or other locations)
- Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP, which is discussed elsewhere in this document)
- Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise)

Mitigation measures could be modified or added if new data suggests that such modifications would have a reasonable likelihood of accomplishing the goals of mitigation laid out in this proposed rule and if the measures are practicable. NMFS would also coordinate with the Navy to modify or add to the existing monitoring requirements if the new data suggest that the addition of a particular measure would more effectively accomplish the goals of monitoring laid out in this proposed rule. The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from the previous year to allow NMFS to consider the data in issuing annual LOAs. NMFS and the Navy will meet annually prior to LOA issuance to discuss the monitoring reports, Navy R&D developments, and current science and whether mitigation or monitoring modifications are appropriate.

**Monitoring and Reporting Measures**

The Navy would be required to cooperate with the NMFS, and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals.

The Navy must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity is thought to have resulted in the mortality or injury of any marine mammals, or in any take of marine mammals not identified in this document.

The Navy must conduct all monitoring and/or research required under the Letter of Authorization, if issued.The monitoring methods proposed for use during training events in the JAX Range Complex include a combination of individual elements designed to allow a comprehensive assessment include:

(1) Vessel and aerial surveys

(i) Visual surveillance of 2 events per year. The primary goal will be to survey

two different types of explosive events with one of them being a multiple detonation event.

(ii) For surveyed training events, aerial or vessel surveys will be used 1–2 days prior to, during if reasonably safe, and 1–5 days post detonation. The variation in the number of days after allows for the detection of animals that gradually return to an area, if they indeed do change their distribution in response to underwater detonation events.

(iii) Surveys will include any specified exclusion zone around a particular detonation point plus 2000 yards beyond the exclusion zone. For vessel-based surveys a passive acoustic system (hydrophone or towed array) could be used to determine if marine mammals are in the area before and/or after a detonation event. Depending on animals sighted, it may be possible to conduct focal surveys of animals outside of the exclusion zone (detonations could be delayed if marine mammals are observed within the exclusion zone) to record behavioral responses to the detonations.

(iv) When conducting a particular survey, the survey team will collect:

(A) species identification and group size;

(B) location and relative distance from the detonation site;

(C) the behavior of marine mammals including standard environmental and oceanographic parameters;

(D) date, time and visual conditions associated with each observation;

(E) direction of travel relative to the detonation site; and

(F) duration of the observation.

(v) An aerial survey team will conduct pre- and post-aerial surveys, taking local oceanographic currents into account, of the exercise area.

(2) Passive acoustic monitoring

(i) When practicable, a towed hydrophone array should be used whenever shipboard surveys are being conducted. The towed array would be deployed during daylight hours for each of the days the ship is at sea.

(ii) A towed hydrophone array is towed from the boat and can detect and localize marine mammals that vocalize and would be used to supplement the ship-based systematic line-transect surveys (particularly for species such as beaked whales that are rarely seen).

(iii) The array would need to detect low frequency vocalizations (< 1,000 Hz) for baleen whales and relatively high frequency vocalizations (up to 30 kHz) for odontocetes such as sperm whales. The use of two simultaneously deployed arrays can also allow more accurate localization and determination of diving patterns.

(3) Marine mammal observers on Navy platforms

(i) Marine mammal observers (MMOs) will be placed on a Navy platform during one of the exercises being monitored per year.

(ii) Qualifications must include expertise in species identification of regional marine mammal species and experience collecting behavioral data. Experience as a NMFS marine mammal observer is preferred, but not required. Navy biologists and contracted biologists will be used; contracted MMOs must have appropriate security clearance to board Navy platforms.

(iii) MMOs will not be placed aboard Navy platforms for every Navy training event or major exercise, but during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation will take into account safety, logistics, and operational concerns.

(iv) MMOs will observe from the same height above water as the lookouts.

(v) The MMOs will not be part of the Navy's formal reporting chain of command during their data collection efforts; Navy lookouts will continue to serve as the primary reporting means within the Navy chain of command for marine mammal sightings. The only exception is that if an animal is observed within the shutdown zone that has not been observed by the lookout, the MMO will inform the lookout of the sighting for the lookout to take the appropriate action through the chain of command.

(vi) The MMOs will collect species identification, behavior, direction of travel relative to the Navy platform, and distance first observed. All MMO sighting will be conducted according to a standard operating procedure.

The Navy would submit a report annually on September 1 describing the implementation and results (through June 1 of the same year) of the monitoring required above. Standard marine species sighting forms would be provided by the Navy and data collection methods will be standardized across ranges to allow for comparison in different geographic locations.

JAX Range Complex Comprehensive Report – The Navy will submit to NMFS a draft report that summarizes all of the marine mammal observations and data gathered during explosive exercises through June 1, 2012. This report will be submitted to NMFS at the end of the fourth year of the rule (November 2012).

The Navy will respond to NMFS comments on the draft comprehensive report if submitted within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three months after the submittal of the draft if NMFS does not comment by then. To implement the aforementioned monitoring measures, the Navy is developing an Integrated Comprehensive Monitoring Program (ICMP) for marine species in order to assess the effects of training activities on marine species and investigate population-level trends in marine species distribution, abundance, and habitat use in various range complexes and geographic locations where Navy training occurs. Although the ICMP is intended to apply to all Navy training, use of mid-frequency active (MFA) sonar in training, testing, and research, development, test, and evaluation (RDT&E) will comprise a major component of the overall program.

The ICMP will establish the overarching structure and coordination that will facilitate the collection and synthesis of monitoring data from Navy training and research and development projects. The Program will compile data from range-specific monitoring efforts as well as research and development (R&D) studies that are fully or partially Navy-funded. Monitoring methods across the ranges will include methods such as vessel and aerial surveys, tagging, and passive acoustic monitoring.

The Navy will coordinate with the local NMFS Stranding Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during or within 24 hours after completion of explosives training activities.

**Estimated Take of Marine Mammals**

As mentioned previously, for purposes of MMPA authorizations, NMFS' effects assessments have two primary purposes (in the context of the JAX Range Complex Final Rule, LOA, subsequent LOA, if appropriate): (1) to put forth the permissible methods of taking within the context of MMPA Level B Harassment (behavioral harassment) and Level A Harassment (injury); and (2) to determine whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival).

In the *Assessment of Marine Mammal Response to Anthropogenic Sound* section, NMFS' analysis identified the lethal responses, physical trauma, sensory impairment (permanent and

temporary threshold shifts and acoustic masking), physiological responses (particular stress responses), and behavioral responses that could potentially result from exposures from explosive ordnance. In this section, we will relate the potential effects to marine mammals from underwater detonation of explosives to the MMPA regulatory definitions of Level A and Level B Harassment and attempt to quantify the effects that might occur from the specific training activities that the Navy is proposing in the JAX Range Complex.

*Definition of Harassment*

As mentioned previously, with respect to military readiness activities, Section 3(18)(B) of the MMPA defines ''harassment'' as: (i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Level B Harassment

Of the potential effects that were described in the *Assessment of Marine Mammal Response to Anthropogenic Sound* and the *Explosive Ordnance Exposure Analysis* sections, the following are the types of effects that fall into the Level B Harassment category:

*Behavioral Harassment* – Behavioral disturbance that rises to the level described in the definition above, when resulting from exposures to underwater detonations, is considered Level B Harassment. Some of the lower level physiological stress responses discussed in the *Assessment of Marine Mammal Response to Anthropogenic Sound* section will also likely co-occur with the predicted harassments, although these responses are more difficult to detect and fewer data exist relating these responses to specific received levels of sound. When Level B Harassment is predicted based on estimated behavioral responses, those takes may have a stress-related physiological component as well.

*Acoustic Masking and Communication Impairment* – Acoustic masking is considered Level B Harassment as it can disrupt natural behavioral patterns by interrupting or limiting the marine mammal's receipt or transmittal of important information or environmental cues.

*TTS* – As discussed previously, TTS can effect how an animal behaves in response to the environment, including conspecifics, predators, and prey. The following physiological mechanisms are thought to play a role in inducing auditory fatigue: effects to sensory hair cells in the inner ear that reduce their sensitivity, modification of the chemical environment within the sensory cells, residual muscular activity in the middle ear, displacement of certain inner ear membranes, increased blood flow, and post-stimulatory reduction in both efferent and sensory neural output. Ward (1997) suggested that when these effects result in TTS rather than PTS, they are within the normal bounds of physiological variability and tolerance and do not represent a physical injury. Additionally, Southall *et al.* (2007) indicate that although PTS is a tissue injury, TTS is not because the reduced hearing sensitivity following exposure to intense sound results primarily from fatigue, not loss, of cochlear hair cells and supporting structures and is reversible. Accordingly, NMFS classifies TTS (when resulting from exposure to underwater detonations) as Level B Harassment, not Level A Harassment (injury).

Level A Harassment

Of the potential effects that were described in the Assessment of *Marine Mammal Response to Anthropogenic Sound* section, the following are the types of effects that fall into the Level A Harassment category:

*PTS* – PTS (resulting either from exposure to explosive detonations) is irreversible and considered to be an injury. PTS results from exposure to intense sounds that cause a permanent loss of inner or outer cochlear hair cells or exceed the elastic limits of certain tissues and membranes in the middle and inner ears and result in changes in the chemical composition of the inner ear fluids.

*Physical Disruption of Tissues Resulting from Explosive Shock Wave* – Physical damage of tissues resulting from a shock wave (from an explosive detonation) is classified as an injury. Blast effects are greatest at the gas-liquid interface (Landsberg, 2000) and gas-containing organs, particularly the lungs and gastrointestinal tract, are especially susceptible to damage (Goertner, 1982; Hill 1978; Yelverton *et al.*, 1973). Nasal sacs, larynx, pharynx, trachea, and lungs may be damaged by compression/expansion caused by the oscillations of the blast gas bubble (Reidenberg and Laitman, 2003). Severe damage (from the shock wave) to the ears can include tympanic membrane rupture, fracture of the ossicles, damage to the cochlea, hemorrhage, and cerebrospinal fluid leakage into the middle ear.

*Acoustic Take Criteria*

For the purposes of an MMPA incidental take authorization, three types of take are identified: Level B Harassment; Level A Harassment; and mortality (or serious injury leading to mortality). The categories of marine mammal responses (physiological and behavioral) that fall into the two harassment categories were described in the previous section.

Because the physiological and behavioral responses of the majority of the marine mammals exposed to underwater detonations cannot be detected or measured (not all responses visible external to animal, proportion of exposed animals underwater (so not visible), many animals located many miles froorm observers and covering very large area, etc.) and because NMFS must authorize take prior to the impacts to marine mammals, a method is needed to estimate the number of individuals that will be taken, pursuant to the MMPA, based on the proposed action. To this end, NMFS developed acoustic criteria that estimate at what received level (when exposed to explosive detonations) Level B Harassment, Level A Harassment, and mortality (for explosives) of marine mammals would occur. The acoustic criteria for Underwater Detonations are discussed below.

*Thresholds and Criteria for Impulsive Sound*

Criteria and thresholds for estimating the exposures from a single explosive activity on marine mammals were established for the Seawolf Submarine Shock Test Final Environmental Impact Statement (FEIS) (''Seawolf'') and subsequently used in the USS Winston S. Churchill (DDG–81) Ship Shock FEIS (''Churchill'') (DoN, 1998 and 2001a). NMFS adopted these criteria and thresholds in its final rule on unintentional taking of marine animals occurring incidental to the shock testing (NMFS, 2001a). Since the ship-shock events involve only one large explosive at a time, additional assumptions were made to extend the approach to cover multiple explosions for FIREX (with IMPASS). In addition, this section reflects a revised acoustic criterion for small underwater explosions (i.e., 23 pounds per square inch [psi] instead of previous acoustic criteria of 12 psi for peak pressure over all exposures), which is based on the final rule issued

to the Air Force by NMFS (NMFS, 2005c).

I.1. Thresholds and Criteria for Injurious Physiological Impacts

*I.1.a. Single Explosion*

For injury, the Navy uses dual criteria: eardrum rupture (i.e. tympanic-membrane injury) and onset of slight lung injury. These criteria are considered indicative of the onset of injury. The threshold for tympanic-membrane (TM) rupture corresponds to a 50 percent rate of rupture (i.e. 50 percent of animals exposed to the level are expected to suffer TM rupture). This value is stated in terms of an Energy Flux Density Level (EL) value of 1.17 inch pounds per square inch (in-lb/in2), approximately 205 dB re 1 microPa$^2$·sec.

The threshold for onset of slight lung injury is calculated for a small animal (a dolphin calf weighing 26.9 lbs), and is given in terms of the ''Goertner modified positive impulse,'' indexed to 13 psi-msec (DoN, 2001). This threshold is conservative since the positive impulse needed to cause injury is proportional to animal mass, and therefore, larger animals require a higher impulse to cause the onset of injury. This analysis assumed the marine species populations were 100 percent small animals. The criterion with the largest potential impact range (most conservative), either TM rupture (energy threshold) or onset of slight lung injury (peak pressure), will be used in the analysis to determine Level A exposures for single explosive events.

For mortality, the Navy uses the criterion corresponding to the onset of extensive lung injury. This is conservative in that it corresponds to a 1 percent chance of mortal injury, and yet any animal experiencing onset severe lung injury is counted as a lethal exposure. For small animals, the threshold is given in terms of the Goertner modified positive impulse, indexed to 30.5 psi-msec. Since the Goertner approach depends on propagation, source/animal depths, and animal mass in a complex way, the actual impulse value corresponding to the 30.5 psi-msec index is a complicated calculation. To be conservative, the analysis used the mass of a calf dolphin (at 26.9 lbs) for 100 percent of the populations.

*I.1.b. Multiple Explosions*

For this analysis, the use of multiple explosions only applies to FIREX (with IMPASS). Since FIREX require multiple explosions, the Churchill approach had to be extended to cover multiple sound events at the same training site. For multiple exposures, accumulated energy over the entire training time is the natural extension for energy thresholds since energy accumulates with each subsequent shot (detonation); this is consistent with the treatment of multiple arrivals in Churchill. For positive impulse, it is consistent with Churchill to use the maximum value over all impulses received.

I.2. Thresholds and Criteria for Non-Injurious Physiological Effects

The Navy criterion for non-injurious harassment is TTS a slight, recoverable loss of hearing sensitivity (DoN, 2001). For this assessment, there are dual criteria for TTS, an energy threshold and a peak pressure threshold. The criterion with the largest potential impact range (most conservative) either the energy or peak pressure threshold, will be used in the analysis to determine Level B TTS exposures.

*I.2.a. Single Explosion TTS-Energy Threshold*

The first threshold is a 182 dB re 1 microPa$^2$–sec maximum energy flux density level in any 1/3–octave band at frequencies above 100 Hertz (Hz) for toothed whales and in any 1/3–octave band above 10 Hz for baleen whales. For large explosives, as in the case of the Churchill FEIS, frequency range cutoffs at 10 and 100 Hz make a difference in the range estimates. For small explosives (<1,500 lb NEW), as what was modeled for this analysis, the spectrum of the shot arrival is broad, and there is essentially no difference in impact ranges for toothed whales or baleen whales.

The TTS energy threshold for explosives is derived from the Space and Naval Warfare Systems Center (SSC) pure-tone tests for TTS (Schlundt *et al.*, 2000, Finneran and Schlundt, 2004). The pure-tone threshold (192 dB as the lowest value) is modified for explosives by (a) interpreting it as an energy metric, (b) reducing it by 10 dB to account for the time constant of the mammal ear, and (c) measuring the energy in 1/3–octave bands, the natural filter band of the ear. The resulting threshold is 182 dB re 1 microPa$^2$–sec in any 1/3–octave band. The energy threshold usually dominates and is used in the analysis to determine potential Level B exposures for single explosion ordnance.

*I.2.b. Single Explosion TTS-Peak Pressure Threshold*

The second threshold applies to all species and is stated in terms of peak pressure at 23 psi (about 225 dB re 1 microPa). This criterion was adopted for Precision Strike Weapons (PSW) Testing and Training by Eglin Air Force Base in the Gulf of Mexico (NMFS, 2005b). It is important to note that for small shots near the surface (such as in this analysis), the 23–psi peak pressure threshold generally will produce longer impact ranges than the 182–dB energy metric. Furthermore, it is not unusual for the TTS impact range for the 23–psi pressure metric to actually exceed the without-TTS (behavioral change without onset of TTS) impact range for the 177–dB energy metric.

*I.2.c. Multiple Explosions – TTS*

For multiple explosions, accumulated energy over the entire training time is the natural extension for energy thresholds since energy accumulates with each subsequent shot/detonation. This is consistent with the energy argument in Churchill. For peak pressure, it is consistent with Churchill to use the maximum value over all impulses received.

I.3. Thresholds and Criteria for Behavioral Effects

*I.3.a. Single Explosion*

For a single explosion, to be consistent with Churchill, TTS is the criterion for Level B. In other words, because behavioral disturbance for a single explosion is likely to be limited to a short-lived startle reaction, use of the TTS criterion is considered sufficient protection and therefore behavioral effects (without TTS) are not considered for single explosions.

*I.3.b. Multiple Explosions – without TTS*

For this analysis, the use of multiple explosions only applies to FIREX (with IMPASS). Because multiple explosions would occur within a discrete time period, a new acoustic criterion-behavioral disturbance (without TTS) - is used to account for behavioral effects significant enough to be judged as harassment, but occurring at lower noise levels than those that may cause TTS.

The threshold is based on test results published in Schlundt *et al.* (2000), with derivation following the approach of the Churchill FEIS for the energy-based TTS threshold. The original Schlundt *et al.* (2000) data and the report of Finneran and Schlundt (2004) are the basis for thresholds for behavioral disturbance (without TTS). As reported by Schlundt *et al.* (2000), instances of altered behavior generally began at lower exposures than those causing TTS; however, there were many instances when subjects exhibited no altered behavior at levels above the onset-TTS levels. Regardless of reactions at higher

or lower levels, all instances of altered behavior were included in the statistical summary.

The behavioral disturbance (without TTS) threshold for tones is derived from the SSC tests, and is found to be 5 dB below the threshold for TTS, or 177 dB re 1 microPa$^2$–sec maximum energy flux density level in any 1/3–octave band at frequencies above 100 Hz for toothed whales and in any 1/3–octave band above 10 Hz for baleen whales. As stated previously for TTS, for small explosives (<1500 lb NEW), as what was modeled for this analysis, the spectrum of the shot arrival is broad, and there is essentially no difference in impact ranges for whales. The behavioral disturbance (without TTS) impact range for FIREX with IMPASS can, especially in shallower water, be about twice the impact range for TTS.

II. Summary of Thresholds and Criteria for Impulsive Sounds

Table 13 summarizes the effects, criteria, and thresholds used in the assessment for impulsive sounds. The criteria for behavioral effects without physiological effects used in this analysis are based on use of multiple explosives that only take place during a FIREX (w/IMPASS) event.

TABLE 13. EFFECTS, CRITERIA, AND THRESHOLDS FOR IMPULSIVE SOUNDS

| Effect | Criteria | Metric | Threshold | Effect |
|---|---|---|---|---|
| Mortality | Onset of Extensive Lung Injury | Goertner modified positive impulse | indexed to 30.5 psi-msec (assumes 100 percent small animal at 26.9 lbs) | Mortality |
| Injurious Physiological | 50% Tympanic Membrane Rupture | Energy flux density | 1.17 in-lb/in$^2$ (about 205 dB re 1 microPa$^2$-sec) | Level A |
| Injurious Physiological | Onset Slight Lung Injury | Goertner modified positive impulse | indexed to 13 psi-msec (assumes 100 percent small animal at 26.9 lbs) | Level A |
| Non-injurious Physiological | TTS | Greatest energy flux density level in any 1/3-octave band (> 100 Hz for toothed whales and > 10 Hz for baleen whales) - for total energy over all exposures | 182 dB re 1 microPa$^2$-sec | Level B |
| Non-injurious Physiological | TTS | Peak pressure over all exposures | 23 psi (for small explosives <2,000 lbs, else 12 psi) | Level B |
| Non-injurious Behavioral | Multiple Explosions Without TTS | Greatest energy flux density level in any 1/3-octave (> 100 Hz for toothed whales and > 10 Hz for baleen whales) - for total energy over all exposures (multiple explosions only) | 177 dB re 1 microPa$^2$-sec | Level B |

The criteria for mortality, Level A Harassment, and Level B Harassment resulting from explosive detonations were initially developed for the Navy's Sea Wolf and Churchill ship-shock trials and have not changed since other MMPA authorizations issued for explosive detonations. The criteria, which are applied to cetaceans and pinnipeds are summarized in Table 13. Additional information regarding the derivation of these criteria is available in the Navy's FEIS for the JAX Range Complex and in the Navy's CHURCHILL FEIS (U.S. Department of the Navy, 2001).

**Take Calculations**

In estimating the potential for marine mammals to be exposed to an acoustic source, the Navy completed the following actions:

(1) Evaluated potential effects within the context of existing and current regulations, thresholds, and criteria;

(2) Identified all acoustic sources that will be used during Navy training activities;

(3) Identified the location, season, and duration of the action to determine which marine mammal species are likely to be present;

(4) Determined the estimated number of marine mammals (i.e., density) of each species that will likely be present in the respective OPAREAs during the Navy training activities;

(5) Applied the applicable acoustic threshold criteria to the predicted sound exposures from the proposed activity. The results were then evaluated to determined whether the predicted sound exposures from the acoustic model might be considered harassment; and

(6) Considered potential harassment within the context of the affected marine mammal population, stock, and species to assess potential population viability. Particular focus on recruitment and survival are provided to analyze whether the effects of the action can be considered to have negligible effects to marine mammal species or population.

Starting with a sound source, the attenuation of an emitted sound due to propagation loss is determined. Uniform animal distribution is overlaid onto the calculated sound fields to assess if animals are physically present at sufficient received sound levels to be considered ''exposed'' to the sound. If the animal is determined to be exposed, two possible scenarios must be considered with respect to the animal's physiology - effects on the auditory system and effects on non-auditory system tissues. These are not independent pathways and both must be considered since the same sound could affect both auditory and non-auditory tissues. Note that the model does not account for any animal response; rather the animals are

considered stationary, accumulating energy until the threshold is tripped.

These modeling results do not take into account the mitigation measures (detailed in the Proposed Mitigation Measure section above) that lower the potential for exposures to occur given standard range clearance procedures and the likelihood that these species can be readily detected (e.g., small animals move quickly throughout the water column and are often seen riding the bow wave of large ships or in large groups). With the mitigation and monitoring measures implemented, NMFS does not believe that there would be any mortality of any marine mammal resulting from the proposed training activities. Therefore, mortality of marine mammals would not be authorized.

**Effects on Marine Mammal Habitat**

Activities from Atlantic Fleet training activities in the JAX Range Complex that may affect marine mammal habitat include changes in water quality, the introduction of sound into the water column, and temporary changes to prey distribution and abundance. There is a known North Atlantic right whale calving critical habitat within the JAX Range Complex. However, potential impacts to marine mammal habitat are not anticipated to alter the function of the habitat and, therefore, will have little to no impact of marine mammal species.

**Analysis and Negligible Impact Determination**

Pursuant to NMFS regulations implementing the MMPA, an applicant is required to estimate the number of animals that will be ''taken'' by the specified activities (i.e., takes by harassment only, or takes by harassment, injury, and/or death). This estimate informs the analysis that NMFS must perform to determine whether the activity will have a ''negligible impact'' on the species or stock. Level B (behavioral) harassment occurs at the level of the individual(s) and does not assume any resulting population-level consequences, though there are known avenues through which behavioral disturbance of individuals can result in population-level effects. A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (i.e., population-level effects). An estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), or any of the other variables mentioned in the first paragraph (if known), as well as the number and nature of estimated Level A takes, the number of estimated mortalities, and effects on habitat.

Based on the analysis contained here, NMFS has preliminarily determined that the issuance of 5–year regulations as LOA is appropriate for Navy training exercises utilizing underwater detonations will have a negligible impact on the marine mammal species and stocks present in the JAX Range Complex.

**Subsistence Harvest of Marine Mammals**

NMFS has preliminarily determined that the issuance of an LOA for Navy training exercises in the JAX Range Complex would not have an unmitigable adverse impact on the availability of the affected species or stocks for subsistence use, since there are no such uses in the specified area.

**ESA**

There are four marine mammal species that are listed as endangered under the ESA with confirmed or possible occurrence in the JAX Range Complex: humpback whale, North Atlantic right whale, fin whale, and sperm whale. The Navy has begun consultation with NMFS pursuant to section 7 of the ESA, and NMFS will also consult internally on the issuance of an LOA under section 101(a)(5)(A) of the MMPA for training exercises in the JAX Range Complex. Consultation will be concluded prior to a determination on the issuance of the final rule and an LOA.

**NEPA**

The Navy is preparing an Environmental Impact Statement (EIS) for the proposed JAX Range Complex training activities. A draft EIS was released for public comments from June 27 - August 11, 2008, and it is available at *http://www.jacksonvillerangecomplexeis.com/*. NMFS is a cooperating agency (as defined by the Council on Environmental Quality (40 CFR 1501.6)) in the preparation of the EIS. NMFS has reviewed the Draft EIS and will be working with the Navy on the Final EIS (FEIS).

NMFS intends to adopt the Navy's FEIS, if adequate and appropriate, and we believe that the Navy's FEIS will allow NMFS to meet its responsibilities under NEPA for the issuance of the 5–year regulation and LOAs for training activities in the JAX Range Complex. If the Navy's FEIS were not adequate, NMFS would supplement the existing analysis and documents to ensure that we comply with NEPA prior to the issuance of the final rule or LOA.

**Preliminary Determination**

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat and dependent upon the implementation of the mitigation measures, NMFS preliminarily finds that the total taking from Navy training exercises utilizing underwater explosives in the JAX Range Complex will have a negligible impact on the affected marine mammal species or stocks. NMFS has proposed regulations for these exercises that prescribe the means of affecting the least practicable adverse impact on marine mammals and their habitat and set forth requirements pertaining to the monitoring and reporting of that taking.

**Classification**

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act

Pursuant to the procedures established to implement section 6 of Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to Section 605B of the Regulatory Flexibility Act, the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Any requirements imposed by a Letter of Authorization issued pursuant to these regulations, and any monitoring or reporting requirements imposed by these regulations, will be applicable only to the Navy. Because this action, if adopted, would directly affect the Navy and not a small entity, NMFS concludes the action would not result in a significant economic impact on a substantial number of small entities.

**List of Subjects in 50 CFR Part 218**

Exports, Fish, Imports, Incidental take, Indians, Labeling, Marine mammals, Navy, Penalties, Reporting and recordkeeping requirements, Seafood, Sonar, Transportation.

Dated: December 9, 2008.

**Samuel D. Rauch III,**

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

For reasons set forth in the preamble, 50 CFR part 218, as proposed to be added at 73 FR 75655, December 12, 2008, is proposed to be amended as follows:

## PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for part 218 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*

2. Subpart B is added to part 218 to read as follows:

## Subpart B—Taking Marine Mammals Incidental to U.S. Navy Training in the Jacksonville Range Complex

Sec.
218.10 Specified activity and specified geographical region.
218.11 Permissible methods of taking.
218.12 Prohibitions.
218.13 Mitigation.
218.14 Requirements for monitoring and reporting.
218.15 Applications for Letters of Authorization.
218.16 Letters of Authorization.
218.17 Renewal of Letters of Authorization.
218.18 Modifications to Letters of Authorization.

## Subpart B—Taking Marine Mammals Incidental to U.S. Navy Training in the Jacksonville Range Complex

### § 218.10 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the JAX Range Complex, which is located along the southern east coast of the U.S. The two principal OPAREAs within the JAX Study Area are the Jacksonville OPAREA and the Charleston OPAREA (sometimes referred to collectively as the JAX/CHASN OPAREA, or simply the OPAREA). The northernmost point of the JAX/CHASN OPAREA is located just north of Wilmington, North Carolina (34°37' N) in waters less than 20 m (65.6 ft) deep, while the easternmost boundary lies 281 nm (518.6 km) offshore of Jacksonville, Florida (77°00' W in waters with a bottom depth of nearly 2,000 m (6,562 ft).

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities within the designated amounts of use:

(1) The detonation of the underwater explosives indicated in this paragraph (c)(1)(i) conducted as part of the training exercises indicated in this paragraph (c)(1)(ii):

(i) Underwater Explosives:

(A) AGM–114 (Hellfire missile);

(B) AGM–65 E/F (Maverick missile);

(C) Mine Neutralization (20 lb NEW charges);

(D) 5'' Naval Gunfire.

(ii) Training Events:

(A) Mine Neutralization (20 lb NEW charges) - up to 60 exercises over the course of 5 years (an average of 12 per year);

(B) Missile Exercise (MISSILEX) (Air-to-Surface; Hellfire missile) - up to 350 exercises over the course of 5 years (an average of 70 per year);

(C) Missile Exercise (MISSILEX) (Air-to-Surface; Maverick) - up to 15 exercises over the course of 5 years (an average of 3 per year);

(D) FIREX with IMPASS - up to 50 exercises over the course of 5 years (an average of 10 per year); and

(E) Small Arms Training with MK3A2 anti-swimmer concussion grenade (0.5 lbs NEW) - up to 400 events over the course of 5 years (an average of 80 events per year).

(2) [Reserved]

### § 218.11 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 of this chapter and 218.16, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals within the area described in § 218.10 (b), provided the activity is in compliance with all terms, conditions, and requirements of this subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 218.10 (c) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 218.10 (c) is limited to the following species, by the indicated method of take the indicated number of times:

(1) Level B Harassment:

(i) Bottlenose dolphin (*Tursiops truncatus*) – 15;

(ii) Pantropical spotted dolphin (*Stenella attenuata*) – 2;

(iii) Clymene dolphin (*S. clymene*) – 2;

(iv) Atlantic spotted dolphin (*S. frontalis*) – 56;

(v) Risso's dolphin (*Grampus griseus*) – 3;

(vi) Pilot whales (*Globicephala* sp.) – 1.

(2) Level A Harassment (injury):

(i) Atlantic spotted dolphin – 2.

(ii) [Reserved]

### § 218.12 Prohibitions.

Notwithstanding takings contemplated in § 218.11 and authorized by a Letter of Authorization issued under § 216.106 of this chapter and § 218.16, no person in connection with the activities described in § 218.10 may:

(a) Take any marine mammal not specified in § 218.11 (c);

(b) Take any marine mammal specified in § 218.11 (c) other than by incidental take as specified in § 218.11(c)(1) and (2);

(c) Take a marine mammal specified in § 218.11 (c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this Subpart or a Letter of Authorization issued under § 216.106 of this chapter and § 218.16.

### § 218.13 Mitigation.

(a) When conducting training activities identified in § 218.10(a), the mitigation measures contained in the Letter of Authorization issued under § 216.106 of this chapter and § 218.16 must be implemented. These mitigation measures include (but are not limited to):

(1) *General Maritime Measures.* The ''Standard Operating Procedures'' for mitigation measures presented below shall be taken by Navy personnel on a regular and routine basis.

(i) Personnel Training Lookouts:

(A) All bridge personnel, Commanding Officers, Executive Officers, officers standing watch on the bridge, maritime patrol aircraft aircrews, and Mine Warfare (MIW) helicopter crews shall complete MSAT.

(B) Navy lookouts shall undertake extensive training to qualify as a watchstander in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(C) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced watchstander. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard Program, certifying that they have

demonstrated the necessary skills (such as detection and reporting of partially submerged objects).

(D) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure to facilitate implementation of protective measures if marine species are spotted.

(E) Surface lookouts shall scan the water from the ship to the horizon and be responsible for all contacts in their sector. In searching the assigned sector, the lookout shall always start at the forward part of the sector and search aft (toward the back). To search and scan, the lookout shall hold the binoculars steady so the horizon is in the top third of the field of vision and direct the eyes just below the horizon. The lookout shall scan for approximately five seconds in as many small steps as possible across the field seen through the binoculars. They shall search the entire sector in approximately five-degree steps, pausing between steps for approximately five seconds to scan the field of view. At the end of the sector search, the glasses shall be lowered to allow the eyes to rest for a few seconds, and then the lookout shall search back across the sector with the naked eye.

(F) At night, lookouts shall scan the horizon in a series of movements that would allow their eyes to come to periodic rests as they scan the sector. When visually searching at night, they shall look a little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision. Lookouts shall also have night vision devices available for use.

(ii) Operating Procedures and Collision Avoidance:

(A) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order shall be issued to further disseminate the personnel training requirement and general marine species mitigation measures.

(B) Commanding Officers shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

(C) While underway, surface vessels shall have at least two lookouts with binoculars; surfaced submarines shall have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts shall watch for and report to the OOD the presence of marine mammals.

(D) Personnel on lookout will employ visual search procedures employing a scanning method in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(E) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(F) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a ''safe speed'' so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

(G) When whales have been sighted in the area, Navy vessels shall increase vigilance and implement measures to avoid collisions with marine mammals and avoid activities that might result in close interaction of naval assets and marine mammals. Such measures shall include changing speed and/or course direction and would be dictated by environmental and other conditions (e.g., safety or weather).

(H) Naval vessels shall maneuver to keep at least 500 yds (460 m) away from any observed whale and avoid approaching whales head-on.

(I) Where feasible and consistent with mission and safety, vessels shall avoid closing to within 200–yd (183 m) of marine mammals other than whales (whales addressed above).

(J) Navy aircraft participating in exercises at sea shall conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties. Marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate.

(K) All vessels shall maintain logs and records documenting training operations should they be required for event reconstruction purposes. Logs and records shall be kept for a period of 30 days following completion of a major training exercise.

(2) Coordination and Reporting Requirements:

(i) The Navy shall coordinate with the local NMFS Stranding Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during or within 24 hours after completion of training activities.

(ii) The Navy shall follow internal chain of command reporting procedures as promulgated through Navy instructions and orders.

(3) Mitigation Measures Applicable Vessel Transit in the Mid-Atlantic during North Atlantic Right Whale Migration:

(i) The mitigation measures apply to all Navy vessel transits, including those vessels that would transit to and from East Coast ports and OPAREAs.

(ii) Seasonal migration of right whales is described by NMFS as occurring from October 15th through April 30th, when right whales migrate between feeding grounds farther north and calving grounds farther south.

(A) Where vessel transits during the right whale migration season along certain identified ports including the Hampton Roads entrance to the Chesapeake Bay, Navy vessels shall use extreme caution and operate at a slow, safe speed consistent with mission and safety within a 20 nm (37 km) arc of the specified reference points listed on Table 12 of this document.

(B) During the indicated months, Navy vessels would practice increased vigilance with respect to avoidance of vessel-whale interactions along the mid-Atlantic coast, including transits to and from any mid-Atlantic ports not specifically identified above.

(C) Additional Mitigation Measures in the Consultation Area during North Atlantic Right Whale Calving Season. The following measures from the NMFS Biological Opinion issued in 1997 (NMFS, 1997) shall be implemented for activities the consultation area (roughly an area to 80 nm (148 km) seaward from Charleston, South Carolina, south to Sebastian Inlet, Florida) during North Atlantic right whale calving season:

(*1*) Naval vessels operating within North Atlantic right whale critical habitat and the Associated Area of Concern (AAOC) shall exercise extreme caution and use slow safe speed, that is, the slowest speed that is consistent with essential mission, training, and operations.

(*2*) Exercise extreme caution and use slow, safe speed when a whale is sighted by a vessel or when the vessel is within 5 nm (9 km) of a reported new sighting less than 12 hours old.

(*3*) During the North Atlantic right whale calving season north-south transits through the critical habitat are prohibited, except for those exercises that necessarily operate at a slow, safe speed. Naval vessel transits through the area shall be in an east-west direction, and shall use the most direct route available during the calving season.

(*4*) Naval vessel operations in the North Atlantic right whale critical habitat and AAOC during the calving season shall be undertaken during daylight and periods of good visibility, to the extent practicable and consistent with mission, training, and operation. When operating in the critical habitat and AAOC at night or during periods of poor visibility, vessels shall operate as if in the vicinity of a recently reported North Atlantic right whale sighting.

(*5*) Command, Control and Communication.

(*i*) Fleet Area Control and Surveillance Jacksonville (FACSFAC JAX) shall coordinate ship/aircraft clearance into the operating area based on prevailing conditions, including water temperature, weather conditions, whale sighting data, mission or event to be conducted and other pertinent information. Commander Submarine Atlantic (COMSUBLANT) shall coordinate any submarine operations that may require clearance with FACSFAC JAX. FASFAC JAX shall provide data to ships and aircraft, including USCG if requested, and shall recommend modifying, moving or canceling events as needed to prevent whale encounters. Commander Submarine Group Ten (COMSUBGRU TEN) shall provide same information/guidance to subs.

(*ii*) Prior to transiting or training in the critical habitat ships shall contact FASFAC JAX to obtain latest whale sighting and other information needed to make informed decisions regarding safe speed and path of intended movement. Subs shall contact COMSUBGRU TEN for similar information. Ships and aircraft desiring to train/operate inside the critical habitat or within the warning/operating area shall coordinate clearance with FASFAC JAX. Subs shall obtain same clearance from CTF–82 (COMSUBLANT).

(*iii*) FACSFAC JAX shall coordinate local procedures for whale data entry, update, retrieval and dissemination using joint maritime command information system. Ships not yet Officer in Tactical Command Information Exchange subsystem capable, including USCG, shall communicate via satellite communication, regular telephone system or international marine/maritime satellite.

(4) Proposed Mitigation Measures for Specific At-sea Training Events. The following actions are standard operating procedures that are in place currently and shall be used in the future for all activities being analyzed in this LOA request.

(i) Firing Exercise (FIREX) Using the Integrated Maritime Portable Acoustic Scoring System (IMPASS) (5–in Explosive Rounds):

(A) This activity shall only occur in Areas BB and CC.

(B) During North Atlantic right whale calving season no explosive ordnance shall be used.

(C) Pre-exercise monitoring of the target area shall be conducted with ''Big Eyes'' prior to the event, during deployment of the IMPASS sonobuoy array, and during return to the firing position. Ships shall maintain a lookout dedicated to visually searching for marine mammals 180 along the ship track line and 360 at each buoy drop-off location.

(D) ''Big Eyes'' on the ship shall be used to monitor a 600 yard (548 m) buffer zone for marine mammals during naval-gunfire events.

(E) Ships shall not fire on the target if any marine mammals are detected within or approaching the 600 yd (548 m) buffer zone until the area is cleared. If marine mammals are present, operations shall be suspended. Visual observation shall occur for approximately 45 minutes, or until the animal has been observed to have cleared the area and is heading away from the buffer zone.

(F) Post-exercise monitoring of the entire effect range shall take place with ''Big Eyes'' and the naked eye during the retrieval of the IMPASS sonobuoy array following each firing exercise.

(G) FIREX with IMPASS shall take place during daylight hours only.

(H) FIREX with IMPASS shall only be used in Beaufort Sea State three (3) or less.

(I) The visibility must be such that the fall of shot is visible from the firing ship during the exercise.

(J) No firing shall occur if marine mammals are detected within 70 yards (64 m) of the vessel.

(ii) Air-to-Surface Missile Exercises (Explosive):

(A) This activity shall only occur in the Missile Laser Training Range (MLTR).

(B) Aircraft shall visually survey the target area for marine mammals prior to the exercise. Visual inspection of the target area shall be made by flying at 1,500 ft (457 m) altitude or lower, if safe to do so, and at slowest safe speed. Firing or range clearance aircraft must be able to actually see ordnance impact areas. Explosive ordnance shall not be targeted to impact within 1,800 yards (1,646 m) of sighted marine mammals.

(iii) Mine Neutralization Training Involving Underwater Detonations (up to and including 20–lb charges):

(A) Underwater detonations are restricted to Undet North and Undet South. These sites are located in the Charleston/JAX OPAREAs offshore of Charleston, South Carolina.

(B) Observers shall survey the buffer zone, a 700 yds (640 m) radius from detonation location, for marine mammals and sea turtles from all participating vessels during the entire operation. A survey of the buffer zone (minimum of three parallel tracklines 219 yds (200 m) apart using support craft shall be conducted at the detonation location 30 minutes prior through 30 minutes post detonation. Aerial survey support shall be utilized whenever assets are available.

(C) Detonation operations shall be conducted during daylight hours only.

(D) If a marine mammal is sighted within the buffer zone, the animal shall be allowed to leave of its own volition. The Navy shall suspend detonation exercises and ensure the area is clear for a full 30 minutes prior to detonation.

(E) Divers placing the charges on mines and dive support vessel personnel shall survey the area for marine mammals and shall report any sightings to the surface observers. These animals shell be allowed to leave of their own volition and the buffer zone shall be clear for 30 minutes prior to detonation.

(F) Personnel shall record any marine mammal species observations during the exercise as well as measures taken if species are detected within the buffer zone.

(iv) Small Arms Training - Explosive hand grenades (such as the MK3A2 grenades):

(A) Lookouts shall visually survey for marine mammals prior to and during exercise.

(B) A 200 yd (182 m) radius buffer zone shall be established around the intended target. The exercises shall be conducted only if the buffer zone is clear of sighted marine mammals.

(v) Adaptive management:

(A) The final regulations governing the take of marine mammals incidental to Navy training exercises in JAX Range Complex shall contain an adaptive management component.

(B) The use of adaptive management shall give NMFS the ability to consider new data from different sources to determine (in coordination with the Navy), on an annual basis, if new or modified mitigation or monitoring measures are appropriate for subsequent annual LOAs.

**§ 218.14 Requirements for monitoring and reporting.**

(a) The Holder of the Letter of Authorization issued pursuant to

§ 216.106 of this chapter and § 218.16 for activities described in § 218.10(b) is required to cooperate with the NMFS, and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals.

(b) The Holder of the Authorization must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity identified in § 218.10(b) is thought to have resulted in the mortality or injury of any marine mammals, or in any take of marine mammals not identified in § 218.10(c).

(c) The Holder of the Letter of Authorization must conduct all monitoring and/or research required under the Letter of Authorization.

(d) The monitoring methods proposed for use during training events in JAX Range Complex include a combination of individual elements designed to allow a comprehensive assessment include:

(1) Vessel and aerial surveys:

(i) Visually survey two events per year. The primary goal shall be to survey two different types of explosive events with one of them being a multiple detonation event.

(ii) For surveyed training events, aerial or vessel surveys shall be used 1–2 days prior to, during if safely possible, and 1–5 days post detonation. The variation in the number of days after allows for the detection of animals that gradually return to an area, if they indeed do change their distribution in response to underwater detonation events.

(iii) Surveys shall include any specified exclusion zone around a particular detonation point plus 2000 yards beyond the exclusion zone. For vessel based surveys a passive acoustic system (hydrophone or towed array) could be used to determine if marine mammals are in the area before and/or after a detonation event. Depending on animals sighted, it may be possible to conduct focal surveys of animals outside of the exclusion zone (detonations could be delayed if marine mammals are observed within the exclusion zone) to record behavioral responses to the detonations.

(iv) When conducting a particular survey, the survey team shall collect:

(A) Species identification and group size;

(B) Location and relative distance from the detonation site;

(C) The behavior of marine mammals including standard environmental and oceanographic parameters;

(D) Date, time and visual conditions associated with each observation;

(E) Direction of travel relative to the detonation site; and

(F) Duration of the observation.

(2) Passive acoustic monitoring:

(i) When practical, a towed hydrophone array should be used whenever shipboard surveys are being conducted. The towed array shall be deployed during daylight hours for each of the days the ship is at sea.

(ii) A towed hydrophone array is towed from the boat and can detect and localize marine mammals that vocalize and shall be used to supplement the ship-based systematic line-transect surveys (particularly for species such as beaked whales that are rarely seen).

(iii) The array shall need to detect low frequency vocalizations (< 1,000 Hz) for baleen whales and relatively high frequency (up to 30 kHz) for odontocetes such as sperm whales. The use of two simultaneously deployed arrays can also allow more accurate localization and determination of diving patterns.

(3) Marine mammal observers on Navy platforms:

(i) Marine mammal observers (MMOs) shall be placed on a Navy platform during one of the exercises being monitored per year.

(ii) Qualifications must include expertise in species identification of regional marine mammal species and experience collecting behavioral data. Experience as a NMFS marine mammal observer is preferred, but not required. Navy biologists and contracted biologists shall be used; contracted MMOs must have appropriate security clearance to board Navy platforms.

(iii) MMOs shall not be placed aboard Navy platforms for every Navy training event or major exercise, but during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation shall take into account safety, logistics, and operational concerns.

(iv) MMOs shall observe from the same height above water as the lookouts.

(v) The MMOs shall not be part of the Navy's formal reporting chain of command during their data collection efforts; Navy lookouts shall continue to serve as the primary reporting means within the Navy chain of command for marine mammal sightings. The only exception is that if an animal is observed within the shutdown zone that has not been observed by the lookout, the MMO shall inform the lookout of the sighting for the lookout to take the appropriate action through the chain of command.

(vi) The MMOs shall collect species identification, behavior, direction of travel relative to the Navy platform, and distance first observed. All MMO sighting shall be conducted according to a standard operating procedure.

(e) Report from Monitoring required in paragraph (d) of this section. The Navy shall submit a report annually on September 1 describing the implementation and results (through June 1 of the same year) of the monitoring required in paragraph (d) of this section.

(f) JAX Range Complex Comprehensive Report The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during explosive exercises for which individual reports are required in § 218.14 (e). This report will be submitted at the end of the fourth year of the rule (November 2012), covering activities that have occurred through June 1, 2012.

(g) The Navy shall respond to NMFS comments on the draft comprehensive report if submitted within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three months after the submittal of the draft if NMFS does not comment by then.

(h) The Navy shall respond to NMFS comments on the draft comprehensive report if submitted within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three months after the submittal of the draft if NMFS does not comment by then.

### § 218.15 Applications for Letters of Authorization.

To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103 of this chapter) conducting the activity identified in § 218.10(a) (the U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 218.16 or a renewal under § 218.17.

### § 218.16 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually subject to annual renewal conditions in § 218.17.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

**§ 218.17 Renewal of Letters of Authorization.**

(a) A Letter of Authorization issued under § 216.106 of this chapter and § 218.16 for the activity identified in § 218.10(c) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.15 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 218.14(b); and

(3) A determination by the NMFS that the mitigation, monitoring and reporting measures required under § 218.13 and the Letter of Authorization issued under § 216.106 of this chapter and § 218.16, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under § 216.106 of this chapter and § 218.17 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

**§ 218.18 Modifications to Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to § 216.106 of this chapter and § 218.16 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 218.17, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 218.10(b), a Letter of Authorization issued pursuant to § 216.106 of this chapter and § 218.16 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

[FR Doc. E8–29761 Filed 12–16–08; 8:45 am]

BILLING CODE 3510–22–S

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 679

**RIN 0648–AX25**

## Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands and Gulf of Alaska Groundfish; Limited Access Privilege Programs

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

**ACTION:** Notice of availability of fishery management plan amendments; request for comments.

**SUMMARY:** Amendment 90 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area and Amendment 78 to the Fishery Management Plan for Groundfish of the Gulf of Alaska would modify the Fishery Management Plans (FMPs) to allow unlimited post–delivery transfers of cooperative quota. This action is necessary to mitigate potential overages, reduce enforcement costs, and provide for more precise total allowable catch management. This action is intended to promote the goals and objectives of the Magnuson–Stevens Act, the FMPs, and other applicable laws.

**DATES:** Comments on the amendment must be submitted on or before February 17, 2009.

**ADDRESSES:** Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by ''RIN 0648–AX25,'' by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the FederaleRulemaking Portal website at *http://www.regulations.gov*.
- Mail: P. O. Box 21668, Juneau, AK 99802.
- Fax: (907) 586–7557.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

Copies of Amendments 90 and 78, the Regulatory Impact Review/Initial Regulatory Flexibility Analyses (RIR/IRFAs) for this action, and the Categorical Exclusion prepared for the amendments may be obtained from the NMFS Alaska Region at the address above or from the Alaska Region website at *http://alaskafisheries.noaa.gov*. The proposed rule to implement Amendments 90 and 78 to the FMPs was categorically excluded from the need to prepare an environmental assessment under the National Environmental Policy Act.

**FOR FURTHER INFORMATION CONTACT:** Glenn Merrill, 907–586–7459, or Julie Scheurer, 907–586–7356.

**SUPPLEMENTARY INFORMATION:** The Magnuson–Stevens Act requires that each regional fishery management council submit any fishery management plan amendment it prepares to NMFS for review and approval, disapproval, or partial approval by the Secretary of Commerce. The Magnuson–Stevens Act also requires that NMFS, upon receiving a fishery management plan amendment, immediately publish a notice in the **Federal Register** announcing that the amendment is available for public review and comment. This notice announces that proposed Amendment 90 to the Fishery Management Plan for

Groundfish of the Bering Sea and Aleutian Islands Management Area and proposed Amendment 78 to the Fishery Management Plan for Groundfish of the Gulf of Alaska are available for public review and comment.

Amendments 90 and 78 would make minor changes to the FMPs to allow unlimited transfers of cooperative quota (CQ) in the Bering Sea and Aleutian Islands Management Area (BSAI) Amendment 80 Program and the Central Gulf of Alaska Rockfish Program (Rockfish Program) to cover harvesting overages. These two programs are commonly known as limited access privilege programs because the participants in these fisheries may receive exclusive access to fishery resources if specific conditions are met.

Under the Amendment 80 Program, NMFS issued quota share (QS) to persons based on their qualifying harvest histories using specific trawl catcher/processor vessels in six BSAI non–pollock groundfish fisheries during 1998 through 2004. Under the Rockfish Program, NMFS issued QS to persons based on their qualifying harvest histories using trawl catcher vessel and trawl catcher/processors in several Central Gulf of Alaska rockfish fisheries and associated species that are harvested during those rockfish fisheries based during 1996 through 2002. Each year, the person issued QS may choose to participate in a competitive limited access fishery with all other non–cooperative participants who hold QS, or may participate in a fishery cooperative with other QS holders.

The total amount of QS assigned to all members of a cooperative yields cooperative quota (CQ), an exclusive annual harvest privilege in specific fisheries. In addition, a cooperative also receives CQ that may be used for the incidental catch of a specific amount crab or halibut. Incidentally caught crab or halibut cannot be retained, processed, or sold, and are commonly called prohibited species catch (PSC).

The Amendment 80 Program and the Rockfish Program allow cooperatives to transfer their unused CQ among cooperatives. Transfers allow cooperatives to tailor their operations to specific harvesting conditions. All transfers must be approved by NMFS before they become effective. Under existing regulations, a cooperative in either the Amendment 80 Program or the Rockfish Program is prohibited from catching groundfish or PSC that exceeds the amount of CQ that is issued to that cooperative. This prohibits a cooperative and its members from having a negative CQ balance for a given species, and subsequently transferring CQ from another cooperative to rectify a negative CQ balance. A transfer of CQ after fish have been landed is commonly known as a post–delivery transfer.

If a harvester catches more groundfish or PSC CQ than the amount of CQ that the cooperative holds, that cooperative has violated existing regulations, commonly known as an overage. Overages can occur either through deliberate actions, or more commonly through unintentional errors. Generally, smaller overages are subject to forfeiture of the overage, with larger or repeat violations subject to additional penalties at the discretion of NOAA Office for Law Enforcement.

Amendments 90 and 78, if approved, would allow post–delivery transfers to cover overages of CQ. There would be no limit on the size of a post–delivery transfer nor on the number of post–delivery transfers a cooperative could undertake. However, a harvester who has assigned his vessel to a cooperative would be prohibited from beginning a new fishing trip if the CQ account for any groundfish or PSC species assigned to a cooperative was zero or negative. A cooperative would be prohibited from having a negative balance in its CQ account after the end of a calendar year. The Council recommended Amendments 90 and 78 to the FMPs to improve the fleet's flexibility, reduce the potential number of violations for overages, reduce enforcement costs, and allow more complete harvest of allocations.

The RIR/IRFAs prepared for this action describes in detail the costs and benefits of the proposed amendment (see **ADDRESSES** for availability). All of the directly regulated entities would be expected to benefit from this action relative to the status quo because the proposed amendment would allow greater flexibility and a longer time period over which to account for overages.

Public comments are being solicited on proposed Amendments 90 and 78 through the end of the comment period (see **DATES**). NMFS intends to publish in the **Federal Register** and seek public comment on a proposed rule that would implement Amendments 90 and 78, following NMFS( evaluation of the proposed rule under the Magnuson–Stevens Act. Public comments on the proposed rule must be received by the end of the comment period on Amendments 90 and 78 to be considered in the approval/disapproval decision on Amendments 90 and 78. All comments received by the end of the comment period on Amendments 90 and 78, whether specifically directed to the FMP amendments or the proposed rule, will be considered in the decision to approve or disapprove the amendments. Comments received after that date will not be considered in the decision on the amendments. To be considered, comments must be received, not just postmarked or otherwise transmitted, by the close of business on the last day of the comment period.

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

Dated: December 11, 2008.

**Emily H. Menashes,**

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

[FR Doc. E8–29927 Filed 12–16–08; 8:45 am]

**BILLING CODE 3510–22–S**

# Notices

Federal Register

Vol. 73, No. 243

Wednesday, December 17, 2008

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

### Submission for OMB Review; Comment Request

December 11, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

### Animal and Plant Health Inspection Service

*Title:* Importation of Gypsy Moth Host Materials from Canada.

*OMB Control Number:* 0579–0142.

*Summary of Collection:* The United States Department of Agriculture (USDA) is responsible for preventing plant diseases or insect pests from entering the United States, preventing the spread of pests not widely distributed in the United States, and eradicating those imported pests when eradication is feasible. Under the Plant Protection Act (7 U.S.C. 7701–7772), the Secretary of Agriculture is authorized to regulate the importation of plants, plant products, other articles to prevent the introduction of injurious plant pests. The Plant Protection and Quarantine Division of USDA's Animal and Plant Health Inspection Service (APHIS) are responsible for ensuring that these regulations are enforced. Implementing these regulations is necessary in order to prevent injurious insect pests and plant diseases from entering the United States, a situation that could produce serious consequences for U.S. agriculture. APHIS will collect information using phytosanitary certificates, certificates of origin, and signed statements from individuals both within and outside the United States

*Need and Use of the Information:* APHIS will collect information to ensure that importing foreign logs, trees, shrubs, and other articles do not harbor plant or insect pests such as the gypsy moth. Failing to collect this information would cripple APHIS's ability to ensure that trees, shrubs, logs, and a variety of other items imported from Canada do not harbor gypsy moths.

*Description of Respondents:* Business or other for-profit; Individuals or households; Federal Government.

*Number of Respondents:* 2,146.

*Frequency of Responses:* Reporting: On occasion.

*Total Burden Hours:* 81.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. E8–29830 Filed 12–16–08; 8:45 am]

BILLING CODE 3410–34–P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

**[Docket # AMS–FV–08–0099]**

### Notice of Request for a New Information Collection

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval from the Office of Management and Budget, for information collection for Regulations Governing Inspection, Certification and Standards for Fresh Fruits and Vegetables, and Other Products specifically related to audit based programs. Once approved, AMS will request that OMB merge this information collection into the currently approved OMB #0581–0125, Regulations Governing Inspection, Certification, and Standards for Fresh Fruits, Vegetables and other Products.

**DATES:** Comments on this notice must be received on or before February 17, 2009, to be assured of consideration.

**ADDRESSES:** Interested persons are invited to submit written comments on the Internet at: *http://www.regulations.gov* or to Kenneth S. Petersen, Audit Program Coordinator, Fresh Products Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., Room 1661 South Building, Stop 0240, Washington, DC 20250–0240, Fax (202) 720–8871. Comments should make reference to the dates and page number of this issue of the **Federal Register**. All comments received will be posted without change, including any personal information provided, and will be available for public inspection via the Internet at *http://www.regulations.gov* or at the address cited above during regular business hours.

*Additional Information:* Kenneth S. Petersen, Audit Program Coordinator, Fresh Products Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., Room 1661 South Building, Stop

0240, Washington, DC 20250–0240; Phone (202) 720–4560; Fax (202) 720–8871; E-mail *ken.petersen@usda.gov*.

**SUPPLEMENTARY INFORMATION:**

*Title:* Regulations Governing Inspection, Certification and Standards for Fresh Fruits, Vegetables, and Other Products 7 CFR part 51.

*OMB Number:* 0581–NEW.

*Expiration Date of Approval:* Three Years from Date of OMB Approval.

*Type of Request:* New Information Collection.

*Abstract:* The Agricultural Marketing Act of 1946, as amended 7 U.S.C. 1621 *et seq.* authorizes the Secretary to inspect and certify the quality of agricultural products and collect such fees as reasonable to cover the cost of services rendered. The Fresh Products Branch provides nationwide audit services for fresh fruits, vegetables, and other products to growers, shippers, importers, processors, sellers, buyers, and other financially interested parties on a ''user fee'' basis. The use of these services is voluntary and is made available only upon request. Information is needed to provide audit services. This information includes: The name and location of the person or company requesting the audit, the type and location of the product to be audited, the type of audit being requested, and any information that will identify the product.

In addition, any interested party who wishes to use an official logo in conjunction with the specific audit program must submit a request form for the logo's use. Information collected for the use of this logo include: The name of the company, name of the requestor, type of product, specifications for where and how the logo will be used, and the manufacturer's name and location who is reproducing this logo. Approved use of a logo requires that the interested party successfully adhere to the specific audit program requirements. As part of the audit process, auditee documentation must be made available to the Fresh Products Branch personnel for review to show conformance to the specific audit program.

*Estimate of Burden:* Public reporting burden for this collection of information is estimated to average 8.5 hours per response including documentation needed to conform to audit requirements.

*Respondents:* Growers, shippers, importers, processors, sellers, buyers, and others with a financial interest in lots of fresh fruits, vegetables and other products.

*Estimated Number of Respondents:* 2,000.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Total Annual Burden on Respondents: 17,000 hours.*

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: December 11, 2008.

**James E. Link,**

*Administrator, Agricultural Marketing Service.*

[FR Doc. E8–29829 Filed 12–16–08; 8:45 am]

**BILLING CODE 3410–02–P**

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## DEPARTMENT OF AGRICULTURE

### Forest Service

### Six Rivers National Forest, Mad River Ranger District, Ruth, California, Beaverslide Timber Sale and Fuel Treatment Project

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an environmental impact statement.

**SUMMARY:** The Forest Service is proposing the Beaverslide Timber Sale and Fuel Treatment Project to provide timber products to local economies and to reduce hazardous fuels in strategically located high-risk areas around communities in the vicinity of Ruth, California. The Beaverslide planning area encompasses approximately 13,236 acres; 11,757 acres are National Forest System (NFS) lands and 1,479 acres are in private ownership. The project would treat approximately 5,500 acres of NFS lands by harvesting timber through thinning on approximately 2,800 acres, and reducing fuels on an additional 2,700 acres.

The proposed project would take place within the Upper Mad River watershed on NFS lands administered by the Mad River Ranger District in Trinity County, California. The legal location includes portions of the following townships: Township 2 South, Range 7 East; Township 2 South, Range 8 East; and Township 3 South, Range 7 East; Township 3 South, Range 8 East, Humboldt Baseline and Meridian, and Township 26 North, Range 12 West; Township 27 North, Range 12 West, Mount Diablo Baseline and Meridian.

**DATES:** Scoping for this project is planned for December 2008. The draft environmental impact statement is expected by February 2009 and the final environmental impact statement is expected in June 2009.

**ADDRESSES:** Send written comments to: Thomas Hudson; Mad River Ranger District; 741 State Highway 36; Bridgeville, CA 95526. Comments may also be sent via e-mail to *comments-pacificsouthwest-six-rivers-mad-river@fs.fed.us,* attention of the Beaverslide Project or via facsimile to (707) 574–6273.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the respondent with standing to appeal the subsequent decision.

**FOR FURTHER INFORMATION CONTACT:** Thomas Hudson; Mad River Ranger District; 741 State Highway 36; Bridgeville, CA 95526 or by telephone at (707)–574–6233.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:**

The Beaverslide Timber Sale and Fuel Treatment Project is designed to contribute timber commodity outputs in support of the Six Rivers Forest National Forest Land and Resource Management Plan (LRMP). One of the goals of the LRMP is to provide a stable supply of outputs and services that contribute to local, regional, and national social and economic needs. The Six Rivers National Forest seeks to provide a sustainable, predictable, long-term timber supply for local economies (LRMP p. II–2).

The project area also occurs within the wildland-urban interface (WUI) for communities in the vicinity of Ruth, California. In 2005, the Trinity County Fire Safe Council completed a

Community Wildfire Protection Plan to address the fire risk surrounding these communities. There are several homes and businesses in the area that are within the WUI. Fuel hazards are moderate but fire risk relative to human safety and property is high due to the number of people in the area. The project is designed to reduce fire hazard and risk to the community.

**Purpose and Need for Action**

Given Forest goals, and environmental conditions within the planning area, the Purpose and Need for the proposed action is to:

• Provide timber commodities that contribute towards the Forest's goal to provide a sustainable, predictable, long-term timber supply for local economies; and

• Reduce fuel loading in strategic locations to improve fire protection and human safety around communities in the vicinity of Ruth, California.

Within the context of meeting the purpose and need, there would be opportunities for fuelwood or biomass utilization associated with proposed activities.

**Proposed Action**

The proposed action is designed to meet the project's purpose and need while meeting the standards and guidelines of the LRMP. The Beaverslide Timber Sale and Fuel Treatment Project would treat vegetation to provide commodities and reduce hazardous fuel conditions.

1. Approximately 20–30 million board feet (MMBF) of timber would be harvested from approximately 2,800 acres within 95 treatment units. Harvesting would be accomplished by utilizing ground-based, skyline, and helicopter logging systems.

Actions connected with commercial timber harvest include:

• Treating harvest activity generated fuel;

• Constructing approximately 5.4 miles of new temporary road, and re-opening/re-utilizing approximately 2.9 miles of existing non-system roads;

• Constructing new landings and reutilization of existing landings;

• Hauling of commercial timber products on County Road 504 and Forest Service System roads within the planning area;

• Felling and removal, where appropriate, of hazard trees along haul routes; and

• Decommissioning, maintaining, and reconstructing roads as needed.

2. Fuel loading would be reduced on approximately 2,700 acres within 20 fuel treatment units and 7 strategic fuel treatment corridors.

**Responsible Official**

The responsible official will be the Forest Supervisor for the Six Rivers National Forest.

**Nature of Decision To Be Made**

The responsible official will consider the comments, response, disclosure of environmental consequences, and applicable laws, regulations, and policies in making the decision and stating the rationale in the Record of Decision.

**Scoping Process**

This notice of intent initiates the scoping process, which guides the development of the environmental impact statement. Public scoping will include notices in the newspaper of record and mailings of the scoping package to interested and affected parties and posting of the project on the agency's project planning web page and notice in the agency's quarterly Schedule of Proposed Action. A preliminary scoping package was mailed to interested and affected parties in October 2008.

It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative appeal or judicial review.

Dated: December 10, 2008.

**Tyrone Kelley,**

*Forest Supervisor, Six Rivers National Forest.*

[FR Doc. E8–29706 Filed 12–16–08; 8:45 am]

BILLING CODE 3410–11–P

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## DEPARTMENT OF AGRICULTURE

### National Agricultural Library

### Notice of Intent To Seek Renewal of Existing Information Collection

**AGENCY:** USDA, Agricultural Research Service, National Agricultural Library.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget (OMB) regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995), this notice announces the National Agricultural Library's intent to request approval for a new electronic mailing list subscription form from researchers and practitioners working with water quality and water resources. This voluntary form gives individuals an opportunity to receive and post messages to an electronic discussion list maintained by the Water Quality Information Center (WQIC).

**DATES:** Comments on this notice must be received by February 20, 2009 to be assured of consideration.

**ADDRESSES:** You may submit comments by any of the following methods:

• *Agency Web site: http://www.nal.usda.gov/wqic/askaquestion.php*. Follow the instructions for submitting comments on the Water Quality Information Center Web site.

• *Fax:* 301–504–6409 attention Water Quality Information Center.

• *Mail/Hand Delivery/Courier:* Water Quality Information Center/National Agricultural Library, 10301 Baltimore Ave., Room 107, Beltsville, Maryland 20705–2351.

**SUPPLEMENTARY INFORMATION:**

*Title:* Electronic Mailing List Subscription Form.

*OMB Number:* 0518–0045.

*Expiration Date:* 3 years from date of approval.

*Type of Request:* Renewal of existing information collection from Water Quality Information Center distribution list subscribers.

*Abstract:* The National Agricultural Library's Water Quality Information Center (WQIC) currently maintains an on-line (electronic) announcement-only distribution list. Announcements are distributed to and by distribution list subscribers (participants) through e-mail messages (the service). Participants study or practice in the subject areas covering water and agriculture. Submission of the voluntary ''Electronic Mailing List Subscription Form'' gives individual researchers and practitioners the opportunity to directly receive and post (share) appropriate announcements through the service. This form contains five items and is used to collect information regarding subjects of interest of potential participants prior to the assignment of distribution list subscriptions. An electronic distribution list subscription form is in place to determine significant interest in potential subscribers through self-description. Information collected includes the potential participant's name, e-mail address, job title, work affiliation, and topics of interest. The online submission form will continue to serve as an efficient vehicle that allows WQIC staff to ensure topical integrity of

distribution list content as the information center communicates with researchers and practitioners whose significant interests are water and agriculture.

*Estimate of Burden for Electronic Mailing List Subscription Form:* Public reporting burden for this information collection is estimated to average 1.0 minutes per response.

*Respondents:* Water quality and water resources researchers and practitioners.

*Estimated Number of Respondents:* 60 per year.

*Estimated Total Annual Burden on Respondents:* 1.0 hrs.

*Comments:* Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance for the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who respond, including the use of appropriate automated, electronic, mechanical, or other technology. Comments should be sent to the address in the preamble. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: December 2, 2008.

**Antoinette A. Betschart,**

*Associate Administrator, ARS.*

[FR Doc. E8–29948 Filed 12–16–08; 8:45 am]

**BILLING CODE 3410–O3–P**

## DEPARTMENT OF AGRICULTURE

### National Agricultural Statistics Service

### Notice of Intent To Revise and Extend a Currently Approved Information Collection

**AGENCY:** National Agricultural Statistics Service, USDA.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 this notice announces the intention of the National Agricultural Statistics Service (NASS) to request revision and extension of a currently approved information collection, the Stocks Reports. Revision to burden hours may be needed due to changes in the size of the target population, sampling design, and/or questionnaire length.

**DATES:** Comments on this notice must be received by February 17, 2009 to be assured of consideration.

**ADDRESSES:** You may submit comments, identified by docket number 0535–0007, by any of the following methods:

- *E-mail: OMBofficer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *Fax:* (202) 720–6396.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue, SW., Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue, SW., Washington, DC 20250–2024.

**FOR FURTHER INFORMATION CONTACT:** Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

**SUPPLEMENTARY INFORMATION:**

*Title:* Stocks Reports.

*OMB Control Number:* 0535—0007.

*Expiration Date of Approval:* April 30, 2009.

*Type of Request:* Intent to Seek Approval to Revise and Extend an Information Collection.

*Abstract:* The primary objective of the National Agricultural Statistics Service is to prepare and issue State and national estimates of crop and livestock production, stocks, disposition, and prices. The Stocks Report Surveys provide estimates of stocks of grains, hops, oilseeds, peanuts, potatoes, and rice that are stored off-farm. These off-farm stocks are combined with on-farm stocks to estimate stocks in all positions. Stocks statistics are used by the U.S. Department of Agriculture to help administer programs; by State agencies to develop, research, and promote the marketing of products; and by producers to find their best market opportunity. The current expiration date for this docket is April 30, 2009. NASS intends to request that the survey be approved for another 3 years.

*Authority:* These data will be collected under the authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995).

*Estimated of Burden:* This information collection comprises 15 individual surveys that are conducted 1, 2, 3, 4, 7, or 12 times a year for an estimated total of 50,000 responses. Public reporting burden for this collection of information is estimated to average 18 minutes per response.

*Respondents:* Farms and businesses.

*Estimated Number of Respondents:* 13,000.

*Estimated Total Annual Burden on Respondents:* 15,000 hours.

Copies of this information collection and related instructions can be obtained without charge from David Hancock, NASS Clearance Officer, at (202) 690–2388.

*Comments:* Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, through the use of appropriate automated, electronic, mechanical, technological, or other forms of information technology collection techniques.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, November 05, 2008.

**Joseph T. Reilly,**

*Associate Administrator.*

[FR Doc. E8–29950 Filed 12–16–08; 8:45 am]

**BILLING CODE 3410–20–P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Order No. 1587]**

### Expansion of Foreign-Trade Zone 104, Savannah, GA, Area

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

*Whereas*, the Savannah Airport Commission, grantee of Foreign-Trade

Zone 104, submitted an application to the Board for authority to expand its zone to include a site at the Savannah Logistics Park at Morgan Center (Site 10—62.9 acres) in Pooler, Georgia, adjacent to the Savannah Customs and Border Protection port of entry (FTZ Docket 13–2008, filed 2/25/08);

*Whereas*, notice inviting public comment was given in the **Federal Register** (73 FR 12948, 3/11/08) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

*Whereas*, the Board adopts the findings and recommendations of the examiner's report and addendum report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

*Now, therefore*, the Board hereby orders:

The application to expand FTZ 104 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.28, subject to the Board's standard 2,000-acre activation limit for the overall general-purpose zone project, and further subject to a sunset provision that would terminate authority on November 30, 2013, for Site 10 if no activity has occurred under FTZ procedures before that date.

Signed at Washington, DC, this 20th day of November 2008.

**David M. Spooner,**

*Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.*

[FR Doc. E8–29984 Filed 12–16–08; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Order No. 1590]**

### Expansion of Foreign-Trade Zone 234 Gregg County, TX

Pursuant to its authority under the Foreign-Trade Zones (FTZ) Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

*Whereas*, Gregg County, Texas, grantee of Foreign-Trade Zone No. 234, submitted an application to the Board for authority to expand FTZ 234 to include a site at the Synergy Park at Elder Lake in Kilgore, Texas, adjacent to the Shreveport-Bossier Customs and Border Protection port of entry (FTZ Docket 29–2008, filed 5/5/2008);

*Whereas*, notice inviting public comment was given in the **Federal Register** (73 FR 27491, 5/13/2008) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

*Whereas*, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

*Now, therefore*, the Board hereby orders:

The application to expand FTZ 234 is approved, subject to the Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 20th day of November 2008.

**David M. Spooner,**

*Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.*

[FR Doc. E8–29989 Filed 12–16–08; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Docket 66–2008]**

### Foreign-Trade Zone 100—Dayton, Ohio; Application for Subzone Status; Thor Industries, Inc. (Recreational Vehicles Manufacturing); Jackson Center, OH

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Greater Dayton Foreign-Trade Zone, Inc., grantee of Foreign-Trade Zone (FTZ) 100, requesting special-purpose subzone status for the recreational vehicle manufacturing and distribution facilities of Thor Industries, Inc. (Thor) and its Airstream, Inc. subsidiary located in Jackson Center, Ohio. 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 December 4, 2008.

The Thor facility (89 acres, 12 buildings, 340 employees) is located at 419 West Pike Street in Jackson Center, Ohio, and is used for the manufacture, testing, warehousing and distribution of various types of recreational vehicles, including motor homes, travel trailers and fifth wheels (HTSUS numbers 8703.23, 8703.24, 8703.31, 8703.32, 8703.33 and 8716.10). At full capacity the Thor facility can produce up to 115 motor homes and 2,250 travel trailers and fifth wheels annually. Imported components and raw materials account for approximately 57 percent of the finished products' value. Parts and components that may be imported into the proposed subzone for manufacturing include: Glues and adhesives; plastic tubes, pipes and hoses; plastic floor coverings; self-adhesive plastic sheets, film, foil, tape and strip; plastic baths, shower baths, sinks and washbasins; plastic lavatory seats and covers; plastic flushing cisterns; plastic fittings for furniture; other plastic articles; compounded rubber plates, sheet or strip; vulcanized rubber sheets, strip and rods; vulcanized rubber tubes, pipes and hoses with or without fittings; pneumatic rubber tires; vulcanized rubber floor coverings; vulcanized rubber gaskets, washers, seals and other articles; ceramic sinks, washbasins, baths, bowls, bidets, flush-tanks and urinals; safety glass; windshields; rear-view mirrors; glass-fiber sheets, webs, mattresses and mats; platinum wire cloth or grill catalysts; iron or steel sleeves, butt-weld fittings, elbows, flanges or other articles; self-tapping screws; iron or steel screws and bolts with or without washers; iron or steel hooks, rivets, cotters, cotter pins and washers; spring washers; leaf springs and leaves; helical springs; hair springs; copper, iron or steel nails, tacks and drawing pins; copper pot scourers, polishing pads and parts; aluminum tubes, pipes and pipe fittings; aluminum screws, screw hooks, nails, tacks, rivets, cotters, cotter pins and washers; base-metal locks; base-metal mountings, brackets, fittings and castors; iron or steel flexible tubing; fuel, lubricating and cooling pumps for internal combustion engines; air and vacuum pumps and their parts; air conditioning machines and parts; check valves; safety and relief valves; thermostatically-controlled valves and their parts; electric motors and generators; static converters; lead-acid storage batteries; starter motors and generators; other generators; lighting and visual-signaling equipment; sound-signaling equipment; windshield wipers, defrosters, demisters and their parts; microwave ovens; water heaters, ovens, stoves and ranges; electric sound amplifier sets and their parts; sound turntables; sound reproducing apparatus; television receivers; antennas and antenna reflectors; reception apparatus parts; burglar and fire alarms; circuit breakers; relays; optical fiber cables; electrical switches; lamp holders; electrical consoles; sealed-beam electrical lamps; halogen lamps; electrical discharge lamps and their parts; insulated wire cable with connectors; diesel-powered motor vehicle chassis not exceeding 5 metric tons; diesel-powered motor vehicle chassis exceeding 5 metric tons

up to 20 metric tons; diesel-powered motor vehicle chassis exceeding 20 metric tons; spark-ignition internal combustion engine-powered motor vehicle chassis not exceeding 5 metric tons; spark-ignition internal combustion engine-powered motor vehicles exceeding 5 metric tons; road wheels and parts; trailers, semi-trailers and their parts; optical appliances and instruments; hydrometers, thermometers, pyrometers, barometers, hygrometers, psychrometers and their parts; gas or smoke analysis apparatus; speedometers, tachometers and stroboscopes; engine-testing equipment; voltage regulators and their parts; rubber or plastic mattresses; and, mattress supports. The duty rates on the imported components range from duty-free to 25 percent.

This application requests authority for Thor to conduct the manufacturing activity under FTZ procedures, which could exempt the company from customs duty payments on the imported components used in export production. Up to 5 percent of production could be exported. On domestic sales, the company could defer duty payment and choose the lower duty rate (duty-free to 5.7 percent) that applies to the finished products for the imported components used in manufacturing. Thor may also realize savings related to direct delivery and weekly customs entry procedures. The company would also realize savings on the elimination of duties on materials that become scrap/waste during manufacturing. The application indicates that the FTZ-related savings would improve the plant's international cost competitiveness.

In accordance with the Board's regulations, Christopher Kemp of the FTZ staff is 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 listed below. The closing period for their receipt is February 17, 2009. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to March 2, 2009.

A copy of the application and accompanying exhibits will be available at each of the following addresses: Greater Dayton Foreign-Trade Zone, Inc., 300 Terminal Drive, Dayton, OH 45377; and, Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230. For further information contact Christopher Kemp at *christopher_kemp@ita.doc.gov* or (202) 482–0862.

Dated: December 4, 2008.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. E8–29983 Filed 12–16–08; 8:45 am]

**BILLING CODE 3510–DS–P**

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## DEPARTMENT OF COMMERCE

## Foreign-Trade Zones Board

**[Docket 67–2008]**

## Foreign-Trade Zone 125—South Bend, Indiana Application for Subzone Status Thor Industries, Inc. (Recreational Vehicle and Commercial Bus Manufacturing) Goshen, Elkhart, Topeka, Bristol, Middlebury, Syracuse, Nappanee, Howe, IN

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the St. Joseph County Airport Authority, grantee of Foreign-Trade Zone (FTZ) 125, requesting special-purpose subzone status for the recreational vehicle and commercial bus manufacturing and distribution facilities of Thor Industries, Inc. (Thor) and its subsidiaries located in Goshen, Elkhart, Topeka, Bristol, Middlebury, Syracuse, Nappanee and Howe, Indiana. 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 December 4, 2008.

The Thor and subsidiary facilities (576 acres, 78 buildings, 5,400 employees) are located as follows: Elkhart—520 and 701 County Road 15, 604 Middleton Run Road, Bullard Road, 4210 and 4221 Pine Creek Road, 25161 Leer Road, 57941 Charlotte Avenue, 2850, 2929 and 2950 Gateway Drive, 1660 and 1730 Gateway Court, 2933, 2939 and 2946 Paul Drive, 2824 Jami Street, 52613 County Road 5, 0 County Road S; Goshen—2601, 2642, 2694, 2700, 2719, 2855, 2860 and 3246 Hackberry Drive, 2015, 2021, 2400 and 2431 Kercher Road, 2525 and 2530 Linden Drive, 2833 Sourwood Drive and Sourwood Land, 2420, 2425, 2442 and 2478 Davis Drive, 2769 Elders Drive, 2142 and 2145 Caragana Court, 0 Eisenhower Drive North, 2402 Dierdorf Road, 2639 and 2705 Lincoln Way; Bristol—700 South Division Street; Syracuse—813, 925 and 1000 West Brooklyn; Howe—7605 North Street and Road 9; Middlebury—965 North 1150 West; Topeka—300 and 305 Hawpatch Drive, 1100 and 1115 West Lake Street; Nappaanee—0 Tomahawk Trail, 365 and 656 North Delaware, and 0 Industrial Parkway. The facilities are used for the manufacture, testing, warehousing and distribution of various types of recreational vehicles, including motor homes, travel trailers and fifth wheels (HTSUS numbers 8703.23, 8703.24, 8703.31, 8703.32, 8703.33 and 8716.10) and commercial buses (HTSUS numbers 8702.10 and 8702.90). At full capacity the Thor facility can produce up to 9,800 motor homes, 119,000 travel trailers and fifth wheels and 1,800 buses annually. Imported components and raw materials account for approximately 57 percent of the finished products' value. Parts and components that may be imported into the proposed subzone for manufacturing include: Glues and adhesives; plastic tubes, pipes and hoses; plastic floor coverings; self-adhesive plastic sheets, film, foil, tape and strip; plastic baths, shower baths, sinks and washbasins; plastic lavatory seats and covers; plastic flushing cisterns; plastic fittings for furniture; other plastic articles; compounded rubber plates, sheet or strip; vulcanized rubber sheets, strip and rods; vulcanized rubber tubes, pipes and hoses with or without fittings; pneumatic rubber tires; vulcanized rubber floor coverings; vulcanized rubber gaskets, washers, seals and other articles; ceramic sinks, washbasins, baths, bowls, bidets, flush-tanks and urinals; safety glass; windshields; rear-view mirrors; glass-fiber sheets, webs, mattresses and mats; platinum wire cloth or grill catalysts; iron or steel sleeves, butt-weld fittings, elbows, flanges or other articles; self-tapping screws; iron or steel screws and bolts with or without washers; iron or steel hooks, rivets, cotters, cotter pins and washers; spring washers; leaf springs and leaves; helical springs; hair springs; copper, iron or steel nails, tacks and drawing pins; copper pot scourers, polishing pads and parts; aluminum tubes, pipes and pipe fittings; aluminum screws, screw hooks, nails, tacks, rivets, cotters, cotter pins and washers; base-metal locks; base-metal mountings, brackets, fittings and castors; iron or steel flexible tubing; fuel, lubricating and cooling pumps for internal combustion engines; air and vacuum pumps and their parts; air conditioning machines and parts; check valves; safety valves and relief valves; thermostatically-controlled valves and their parts; electric motors and generators; static converters; lead-acid storage batteries; starter motors and generators; other generators; lighting and visual-signaling equipment; sound-signaling equipment; windshield

wipers, defrosters and demisters and their parts; microwave ovens; water heaters, ovens, stoves and ranges; electric sound amplifier sets and their parts; sound turntables; sound reproducing apparatus; television receivers; antennas and antenna reflectors; reception apparatus parts; burglar and fire alarms; circuit breakers; relays; optical fiber cables; electrical switches; lamp holders; electrical consoles; sealed-beam electrical lamps; halogen lamps; electrical discharge lamps and their parts; insulated wire cable with connectors; diesel-powered motor vehicle chassis not exceeding 5 metric tons; diesel-powered motor vehicle chassis exceeding 5 metric tons up to 20 metric tons; diesel-powered motor vehicle chassis exceeding 20 metric tons; spark-ignition internal combustion engine-powered motor vehicle chassis not exceeding 5 metric tons; spark-ignition internal combustion engine-powered motor vehicles exceeding 5 metric tons; road wheels and parts; trailers, semi-trailers and their parts; optical appliances and instruments; hydrometers, thermometers, pyrometers, barometers, hygrometers, psychrometers and their parts; gas or smoke analysis apparatus; speedometers, tachometers and stroboscopes; engine-testing equipment; voltage regulators and their parts; rubber or plastic mattresses; and, mattress supports. The duty rates on the imported components range from duty-free to 25 percent.

This application requests authority for Thor to conduct the manufacturing activity under FTZ procedures, which could exempt the company from customs duty payments on the imported components used in export production. Up to 5 percent of production could be exported. On domestic sales, the company could defer duty payment and choose the lower duty rate (duty-free to 5.7 percent) that applies to the finished products for the imported components used in manufacturing. Thor may also realize savings related to direct delivery and weekly customs entry procedures. The company would also realize savings on the elimination of duties on materials that become scrap/waste during manufacturing. The application indicates that the FTZ-related savings would improve the plant's international cost competitiveness.

In accordance with the Board's regulations, Christopher Kemp of the FTZ staff is 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 listed below. The closing period for their receipt is February 17, 2009. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to March 2, 2009).

A copy of the application and accompanying exhibits will be available at each of the following addresses: The Saint Joseph County Airport Authority, 4477 Progress Drive, South Bend, Indiana 46628; and, Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230. **FOR FURTHER INFORMATION CONTACT** Christopher Kemp at *christopher_kemp@ita.doc.gov* or (202) 482–0862.

Dated: December 4, 2008.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. E8–29985 Filed 12–16–08; 8:45 am]

**BILLING CODE 3510–DS–P**

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## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Docket 65–2008]**

### Foreign-Trade Zone 207—Richmond, Virginia; Application for Subzone; Qimonda North America Corporation; (Dynamic Random Access Memory Modules Distribution); Sandston, VA

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Capital Region Airport Commission, grantee of FTZ 207, requesting special-purpose subzone status for the warehousing and distribution facility of Qimonda North America Corporation (Qimonda), located in Sandston, Virginia. 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 December 2, 2008.

The Qimonda facility (10 employees, 210 acres, 1,435,278 square feet) is located at 6000 Technology Boulevard, Sandston, Virginia. The facility is used for the storage and distribution of dynamic random access memory modules (duty-free).

FTZ designation would allow Qimonda to realize logistical benefits through the use of weekly customs entry procedures. The request indicates that the savings from FTZ procedures would help improve the facility's international competitiveness.

In accordance with the Board's regulations, Elizabeth Whiteman of the FTZ Staff is 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 February 17, 2009. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to March 2, 2009.

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations:

U.S. Department of Commerce Export Assistance Center, 400 N. 8th St., Suite 412, Richmond, VA 23240–0026.

Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, Room 2111, 1401 Constitution Ave., NW., Washington, DC 20230.

For further information, contact Elizabeth Whiteman at *Elizabeth_Whiteman@ita.doc.gov* or (202) 482–0473.

Dated: December 3, 2008.

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. E8–29990 Filed 12–16–08; 8:45 am]

**BILLING CODE 3510–DS–P**

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## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[Order No. 1591]**

### Grant of Authority for Subzone Status; Sondex, L.P. (Oil and Gas Field Services Equipment); Conroe, TX

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

*Whereas*, the Foreign-Trade Zones Act provides for " * * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," and authorizes the Foreign-Trade Zones Board to grant qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

*Whereas*, the Board's regulations (15 CFR Part 400) provide for the

establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in significant public benefit and is in the public interest;

*Whereas*, the City of Conroe, Texas, grantee of Foreign-Trade Zone 265, has made application to the Board for authority to establish a special-purpose subzone at the oil and gas field services equipment distribution facility of Sondex, L.P., located in Conroe, Texas (FTZ Docket 12–2008, filed 2/21/08);

*Whereas*, notice inviting public comment was given in the **Federal Register** (73 FR 12374, 3/7/08); and,

*Whereas*, the Board adopts the findings and recommendations of the examiner's report, and finds the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the application is in the public interest;

*Now, therefore*, the Board hereby grants authority for subzone status for activity related to oil and gas field services equipment distribution at the facility of Sondex, L.P., located in Conroe, Texas (Subzone 265B), as described in the application and **Federal Register** notice, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 4th day of December 2008.

**David M. Spooner,**

*Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.*

*Attest:*

**Andrew McGilvray,**

*Executive Secretary.*

[FR Doc. E8–29988 Filed 12–16–08; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Proposed Information Collection; Comment Request; Commercial Service—Client Focus Groups

**AGENCY:** International Trade Administration, Commerce.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before February 17, 2009.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Susan Crawford, 202–482–2050, *Susan.Crawford@mail.doc.gov*, Fax 202–482–2599.

**SUPPLEMENTARY INFORMATION:**

### I. Abstract

The International Trade Administration's U.S. Commercial Service (CS) is mandated by Congress to help U.S. businesses, particularly small and medium-sized companies, export their products and services to global markets.

As part of its mission, CS currently uses ''Quality Assurance Surveys'' to collect feedback from the U.S. business clients it serves. These surveys ask the client to evaluate the CS on its customer service provision. The results from the surveys are used to make improvements to business processes in order to provide better and more effective export assistance to U.S. companies. In addition to collecting client feedback through Quality Assurance Surveys, CS would like to use client focus groups as a mechanism to obtain further client feedback and substantiate customer service trends seen in the surveys. Qualitative client focus group data will enrich the quantitative survey data by providing insights and a descriptive context to explain the trends that emerge in the quantitative data.

The CS proposes to modify the previously approved collection. Focus groups previously addressed awareness and branding issues, but CS plans to revise the questions to address quality improvement issues. The revised focus group discussion guide will enable CS to obtain a better understanding of actions it can take to improve the export-related services provided to U.S. firms. In providing these services, CS promotes the goods and services of small and medium-sized U.S. businesses in foreign markets.

### II. Method of Collection

U.S. firms will be recruited via telephone to participate in focus group discussions. Firms may be current Commercial Service clients or potential clients. Data will be collected through either face-to-face focus group discussion forums (6–8 participants per focus group) and conference calls, or through one-on-one qualitative interviews either in person or via phone. A moderator will facilitate the discussions and notes will be transcribed via computer. All comments from participants will be anonymous.

### III. Data

*OMB Control Number:* 0625–0254.

*Form Number(s):* ITA–4153P.

*Type of Review:* Regular submission.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 96.

*Estimated Time per Response:* 45 minutes.

*Estimated Total Annual Burden Hours:* 72.

*Estimated Total Annual Cost to Public:* None.

### IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 10, 2008.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E8–29621 Filed 12–16–08; 8:45 am]

**BILLING CODE 3510–FP–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–868]**

### Folding Metal Tables and Chairs From the People's Republic of China: Extension of Time Limit for the Final Results of the Antidumping Duty Administrative Review

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

**DATES:** *Effective Date:* December 17, 2008.

**FOR FURTHER INFORMATION CONTACT:** Lilit Astvatsatrian, 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) 482–6412.

**SUPPLEMENTARY INFORMATION:**

#### Background

On July 26, 2007, the Department of Commerce (''Department'') published the initiation of the administrative review of the antidumping duty order on folding metal tables and chairs from the People's Republic of China (''PRC''). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 72 FR 41057 (July 26, 2007). On July 14, 2008, the Department published the preliminary results of review. *See Folding Metal Tables and Chairs from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke in Part,* 73 FR 40285 (July 14, 2008). This review covers the period June 1, 2006, through May 31, 2007.

#### Extension of Time Limit for Final Results of Review

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''Act''), the Department shall make a final determination in an administrative review of an antidumping duty order within 120 days after the date on which the preliminary results are published. The Act further provides that the Department may extend that 120-day period to 180 days after the preliminary results if it determines it is not practicable to complete the review within the foregoing time period.

On November 10, 2008, the Department published a notice extending the time limit until December 11, 2008, for the final results of this administrative review. *See Folding Metal Tables and Chairs from the People's Republic of China: Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review,* 73 FR 66595 (November 10, 2008).

The Department now finds that it is not practicable to complete the final results of the administrative review of folding metal tables and chairs from the PRC within the current deadline due to complex issues the parties have raised related to revocation, market-economy purchase prices, and surrogate financial statements. We find that additional time is needed to complete these final results. Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending by 30 days the time period for completion of the final results of this review. This extension makes these final results due 180 days after the date on which the preliminary results were published, *i.e.*, January 10, 2009. However, because January 10, 2009, falls on a weekend, the actual due date will be the first business day following the Search Term Begin weekend, *i.e.*, January 12, 2009.

This notice is published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: December 11, 2008.

**Gary Taverman,**

*Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. E8–29946 Filed 12–16–08; 8:45 am]

**BILLING CODE 3510–DS–P**

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Proposed Information Collection; Comment Request; Alaska Interagency Electronic Reporting System

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before February 17, 2009.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Patsy A. Bearden, (907) 586–7008 or *patsy.bearden@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Abstract

The Interagency Electronic Reporting System (IERS) and its data entry component, eLandings, was implemented for use in the Bering Sea and Aleutian Islands (BSAI) Crab Rationalization Program (CR) crab fisheries, commercial harvest and production of groundfish (including rockfish), and Pacific halibut. Once implementation is complete, eLandings will allow processors and others to make all three species' landings reports with a single reporting system to NMFS, the International Pacific Halibut Commission (IPHC), and Alaska Department of Fish and Game (ADF&G).

Using eLandings removes reporting duplications, and will make recordkeeping and reporting simpler. Additional benefits of the eLandings system include:

- Immediate verification of permits and vessel identification;
- Timely catch reports for management agency use;
- Options for processors to import or export catch and production information; and
- Significant reduction in data entry by management agencies and processors.

#### II. Method of Collection

Methods of submittal include e-mail of electronic forms, and mail and facsimile transmission of paper forms. Clients with no Web access, such as the at-sea fleet, will use eLandings client desktop software and submit landing reports as e-mail attachments. The vessels use satellite communications which may or may not include telephone, Internet, text messaging, e-mail, and e-mail attachment capabilities.

#### III. Data

*OMB Control Number:* 0648–0515.

*Form Number:* None.

*Type of Review:* Regular submission.

*Affected Public:* Individuals or households; business or other for-profit organizations.

*Estimated Number of Respondents:* 1,277.

*Estimated Time per Response:* 15 minutes for IERS processor registration; 35 minutes for eLandings landing report; 35 minutes for backup manual eLandings report; and 15 minutes for catcher/processor or mothership production report.

*Estimated Total Annual Burden Hours:* 57,762.

*Estimated Total Annual Cost to Public:* $14,931 in recordkeeping/reporting costs.

**IV. Request for Comments**

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 12, 2008.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E8–29922 Filed 12–16–08; 8:45 am]

**BILLING CODE 3510–22–P**

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Proposed Information Collection; Comment Request; American Fisheries Act: Vessel and Processor Permits Applications

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before February 17, 2009.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Patsy A. Bearden, (907) 586–7008 or *patsy.bearden@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

The American Fisheries Act (AFA) of 1998 established an allocation program for the pollock fishery of the Bering Sea and Aleutian Islands Management Area (BSAI). The purposes of the AFA are to tighten U.S. ownership standards that had been exploited under the Anti-Reflagging Act; to provide Alaska's BSAI pollock fleet the opportunity to conduct their fishery in a more rational manner; and to protect non-AFA participants in other fisheries. Reduced bycatch, higher utilization rates, increased economic returns, and improved safety are among the direct benefits of the AFA.

Under the AFA, only vessels and processors that met specific qualifying criteria are eligible to fish for and process pollock in the BSAI. The BSAI pollock quota is sub-allocated to groups of vessel owners who form fishing vessel cooperatives under the AFA. All pollock vessels and processors are required to have a valid AFA permit onboard the vessel or at the processing plant. The AFA vessel and processor permits have no expiration date and will remain valid indefinitely unless revoked by National Marine Fisheries Service (NMFS). With the exceptions of applications for inshore vessel cooperatives and for replacement vessels, the AFA permit program had a one-time application deadline of December 1, 2000. Inshore catcher vessel cooperatives must apply for an AFA permit annually, by December 1 for the following fishing year. Applications to replace lost or destroyed AFA vessels may be submitted to NMFS at any time.

**II. Method of Collection**

Respondents have a choice of either electronic or paper forms. Methods of submittal include e-mail of electronic forms, mail, and facsimile transmission of paper forms.

III. Data

*OMB Control Number:* 0648–0393.

*Form Number:* None.

*Type of Review:* Regular submission.

*Affected Public:* Individuals or households; business or other for-profit organizations.

*Estimated Number of Respondents:* 11.

*Estimated Time per Response:* 30 minutes for Application for AFA permit for replacement vessel; 30 minutes for Non-member inshore vessel contract fishing application; and 20 minutes for Application for AFA inshore catcher vessel cooperative permit.

*Estimated Total Annual Burden Hours:* 29 hours.

*Estimated Total Annual Cost to Public:* 0.

**IV. Request for Comments**

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 12, 2008.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E8–29921 Filed 12–16–08; 8:45 am]

**BILLING CODE 3510–22–P**

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Proposed Information Collection; Comment Request; International Billfish Angler Survey

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing

effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before February 17, 2009.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Suzanne Kohin, (858) 546–7104 or *Suzanne.Kohin@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

The International Billfish Angler Survey began in 1969 and is an integral part of the Billfish Research Program at NOAA's Southwest Fisheries Science Center (SWFSC). The Survey tracks recreational angler fishing catch and effort for billfish in the Pacific and Indian Oceans in support of the Pacific and Western Pacific Fishery Management Councils, authorized under the Magnuson-Stevens Fishery Management and Conservation Act. The data are used by scientists and fishery managers to assist with assessing the status of billfish stocks. The Survey is intended for anglers cooperating in the Billfish Program and is entirely voluntary. The National Marine Fisheries Service collects fishing catch and effort information for most domestic and foreign fisheries. This survey is specific to recreational anglers fishing for Istiophorid billfish in the Pacific and Indian Oceans; as such it provides the only estimates of catch per unit of effort for recreational billfish fishing in those areas.

## II. Method of Collection

The paper form is sent to anglers with recent participation in the SWFSC Billfish Research Program and is also available for downloading on the SWFSC Billfish Program website. Completed forms are submitted by mail.

## III. Data

*OMB Number:* 0648–0020.
*Form Number:* NOAA Form 88–10.
*Type of Review:* Regular submission.
*Affected public:* Individuals or households.
*Estimated Number of Respondents:* 1,000.
*Estimated Time Per Response:* 5 minutes.
*Estimated Total Annual Burden Hours:* 83.
*Estimated Total Annual Cost to Public:* $0.

## IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 12, 2008.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E8–29912 Filed 12–16–08; 8:45 am]

**BILLING CODE 3510–22–P**

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# DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## Proposed Information Collection; Comment Request; Reporting of Sea Turtle Incidental Take in Virginia Chesapeake Bay Pound Net Operations

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before February 17, 2009.

**ADDRESSES:** Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 7845, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Mary Colligan, (978) 281–9116 or *Mary.A.Colligan@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

This action would continue the reporting measure requiring all Virginia Chesapeake Bay pound net fishermen to report interactions with endangered and threatened sea turtles, found both live and dead, in their pound net operations. When a live or dead sea turtle is discovered during a pound net trip, the fisherman is required to report the incidental take to National Marine Fisheries Service and, if necessary, the appropriate rehabilitation and stranding network. This information will be used to monitor the level of incidental take in the state managed Virginia pound net fishery and ensure that the seasonal pound net leader restrictions (50 CFR 223.206(d)(10)) are adequately protecting listed sea turtles.

## II. Method of Collection

Reports may be made either by telephone or fax.

## III. Data

*OMB Control Number:* 0648–0470.
*Form Number:* None.
*Type of Review:* Regular submission.
*Affected Public:* Individuals or households.
*Estimated Number of Respondents:* 41.
*Estimated Time Per Response:* 10 minutes.
*Estimated Total Annual Burden Hours:* 102 hours.
*Estimated Total Annual Cost to Public:* $1,827.

## IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information

on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 12, 2008.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E8–29911 Filed 12–16–08; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF EDUCATION

**[CFDA No. 84.116M]**

### Fund for the Improvement of Postsecondary Education (FIPSE)—Special Focus Competition: U.S.-Brazil Higher Education Consortia Program

**ACTION:** Extension; Notice extending the deadline dates.

**SUMMARY:** We extend the *Deadline for Transmittal of Applications* and *Deadline for Intergovernmental Review* dates in the notice published on November 13, 2008 (73 FR 67137).

**SUPPLEMENTARY INFORMATION:** On November 13, 2008, we published a notice in the **Federal Register** (73 FR 67137) inviting applications for new awards for fiscal year (FY) 2009 for the Fund for the Improvement of Postsecondary Education (FIPSE)—Special Focus Competition: U.S.-Brazil Higher Education Consortia Program. The *Deadline for Transmittal of Applications* date (as published on pages 67137 and 67138) is extended to January 22, 2009 and the *Deadline for Intergovernmental Review* date (as published on pages 67137 and 67138) is extended to March 23, 2009. All other requirements and conditions stated in the notice remain the same.

**FOR FURTHER INFORMATION CONTACT:** Sarah T. Beaton, Fund for the Improvement of Postsecondary Education, U.S.-Brazil Higher Education Consortia Program, 1990 K Street, NW., room 6154, Washington, DC 20006–8544. Telephone: (202) 502–7621.

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an alternative format (e.g., braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

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**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: December 12, 2008.

**Cheryl A. Oldham,**

*Acting Assistant Secretary for Postsecondary Education.*

[FR Doc. E8–29981 Filed 12–16–08; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Paducah

**AGENCY:** Department of Energy (DOE)

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Paducah. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

**DATES:** Thursday, January 15, 2009. 6 p.m.

**ADDRESSES:** Barkley Centre, 111 Memorial Drive, Paducah, Kentucky 42001.

**FOR FURTHER INFORMATION CONTACT:** Reinhard Knerr, Deputy Designated Federal Officer, Department of Energy Paducah Site Office, Post Office Box 1410, MS–103, Paducah, Kentucky 42001, (270) 441–6825.

**SUPPLEMENTARY INFORMATION:** *Purpose of the Board:* The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management and related activities.

*Tentative Agenda:*

- Call to Order, Introductions, Review of Agenda.
- Deputy Designated Federal Officer's Comments.
- Federal Coordinator's Comments.
- Liaisons' Comments.
- Presentations.
- Public Comments.
- Administrative Issues
  - Motions.
  - Recommendations.
- Final Comments.
- Adjourn.

Breaks Taken as Appropriate.

*Public Participation:* The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Reinhard Knerr at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available by writing or calling Reinhard Knerr at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.pgdpcab.org/minutes.htm.*

Issued at Washington, DC on December 11, 2008.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. E8–29923 Filed 12–16–08; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Northern New Mexico

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

**DATES:** Wednesday, January 28, 2009, 2 p.m.–8 p.m.

**ADDRESSES:** Holiday Inn Santa Fe, 4048 Cerrillos Road, Santa Fe, New Mexico.

**FOR FURTHER INFORMATION CONTACT:** Menice Santistevan, Northern New Mexico Citizens' Advisory Board

(NNMCAB), 1660 Old Pecos Trail, Suite B, Santa Fe, NM 87505. Phone (505) 995–0393; Fax (505) 989–1752 or E-mail: *msantistevan@doeal.gov.*

**SUPPLEMENTARY INFORMATION:** *Purpose of the Board:* The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management, and related activities.

*Tentative Agenda*

2 p.m. Call to Order by Deputy Designated Federal Officer, Jeff Casalina.
Establishment of a Quorum, Lorelei Novak.
A. Roll Call.
B. Excused Absences.
Welcome and Introductions, J.D. Campbell.
Approval of Agenda.
Approval of November 19, 2008 Board Meeting Minutes.
2:15 p.m. Old Business.
A. Written Reports.
B. Open Discussion.
2:30 p.m. New Business.
A. Open Discussion.
2:45 p.m. Consideration and Action on Recommendations to DOE.
3:45 p.m. Break.
4 p.m. Environmental Protection Agency Update on Kerr Laboratory Review of Well Screen Analysis Report, Rich Mayer.
4:15 p.m. Update on Natural Resource Damage Assessment and Trustee Council Progress, Nancy Werdel.
4:40 p.m. Los Alamos Site Office Presentation on DOE Los Alamos National Laboratory Implementation of NNMCAB Recommendations, Jeff Casalina.
5 p.m. Dinner Break.
6 p.m. Public Comment Period.
6:15 p.m. Presentation on Well Network Analysis and Characterization of Groundwater at Site.
A. Identification of Planned New Wells with Approximate Schedule for Drilling.
B. Data Quality Objectives for Wells.
7:30 p.m. Open Discussion.
A. Press Releases, Editorials, etc.
B. Future Presentation Topics.
C. Other Items.
8 p.m. Adjourn, Jeff Casalina.

This agenda is subject to change at least one day in advance of the meeting.

*Public Participation:* The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Santistevan at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available by writing or calling Menice Santistevan at the address or phone number listed above. Minutes and other Board documents are on the Internet at: *http://www.nnmcab.org/minutes/board-minutes.htm.*

Issued at Washington, DC on December 11, 2008.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. E8–29920 Filed 12–16–08; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Portsmouth

**AGENCY:** Department of Energy (DOE).

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Portsmouth. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

**DATES:** Thursday, January 8, 2009. 6 p.m.

**ADDRESSES:** Ohio State University, Endeavor Center, 1862 Shyville Road, Piketon, Ohio 45661.

**FOR FURTHER INFORMATION CONTACT:** David Kozlowski, Deputy Designated Federal Officer, Department of Energy Portsmouth/Paducah Project Office, Post Office Box 700, Piketon, Ohio 45661, (740) 897–2759, *David.Kozlowski@lex.doe.gov.*

**SUPPLEMENTARY INFORMATION:** *Purpose of the Board:* The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management and related activities.

*Tentative Agenda*

- Call to Order, Introductions, Review of Agenda.
- Deputy Designated Federal Officer's Comments.
- Liaisons' Comments.
- Presentations.
- Public Comments.
- Administrative Issues—Actions:
  - Committee Updates.
  - Motions.
- Public Comments.
- Final Comments.
- Adjourn.

Breaks taken as appropriate.

*Public Participation:* The meeting is open to the public. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact David Kozlowski at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments.

*Minutes:* Minutes will be available by writing or calling David Kozlowski at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.ports-ssab.org/publicmeetings.html.*

Issued at Washington, DC on December 11, 2008.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. E8–29924 Filed 12–16–08; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13215–000, Project No. 13216–000]**

### Calligan Power, LLC, Renewable Energy Development, LLC; Notice of Competing Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

December 9, 2008.

Calligan Power, LLC , and Renewable Energy Development, LLC filed applications, on May 1, 2008, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Hancock Project, to be located on Hancock Creek, in King County, Washington.

*The proposed Hancock Project by Calligan Power, LLC consists of:* (1) A

proposed 60-foot-long, 8-foot-high weir diversion structure; (2) a proposed reservoir having a surface area of 0.3 acres and a storage capacity of 1 acre-foot and normal water surface elevation of 2170 feet National Geographic Vertical Datum (NGVD); (3) a proposed 3,100-foot-long, 36-inch-diameter steel penstock and 2,100-foot-long, 36-inch diameter tunnel, (4) a proposed powerhouse containing one new generating unity having an installed capacity of 6.6 megawatts; (5) a proposed 9,300-foot-long, 34.5 kilovolt transmission line; and (6) appurtenant facilities. The proposed Hancock Project would have an average annual generation of 24 gigawatt-hours.

*The proposed Hancock Project by Renewable Energy Development, LLC consists of:* (1) A proposed 65-foot-long, 7-foot-high concrete diversion structure; (2) a proposed reservoir having a surface area of 0.3 acres and a storage capacity of 1 acre-foot and normal water surface elevation of 2171 feet mean sea level; (3) a proposed 7,800-foot-long, 40-inch-diameter steel penstock, (4) a proposed powerhouse containing one new generating unity having an installed capacity of 7.4 megawatts; (5) an existing 9,500-foot-long, 34.5 kilovolt transmission line; and (6) appurtenant facilities. The proposed Hancock Project would have an average annual generation of 25 gigawatt-hours.

*Applicants Contact:* For Calligan Power, LLC: Mr. Jason M. Hines, Black Brook Environmental, Inc., 100 Harris Avenue, Bellingham, WA 98225, (360) 510–1763. For Renewable Energy Development, LLC: Laurin Schweet, Renewable Energy Development, LLC, P.O. Box 50061, Bellevue, WA 98015, (206) 551–1075.

*FERC Contact:* Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''eFiling'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13215 or P–13216) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29857 Filed 12–16–08; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13218–000; Project No. 13217–000]**

### Calligan Power, LLC; Renewable Energy Development, LLC; Notice of Competing Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

December 9, 2008.

Calligan Power, LLC , and Renewable Energy Development, LLC filed applications, on May 1, 2008, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Calligan Project, to be located on Calligan Creek, in King County, Washington.

The proposed Calligan Project by Calligan Power, LLC consists of: (1) A proposed 65-foot-long, 8-foot-high weir diversion structure; (2) a proposed reservoir having a surface area of 0.3 acres and a storage capacity of 1 acre-foot and normal water surface elevation of 2215 feet National Geographic Vertical Datum (NGVD); (3) a proposed 5,200-foot-long, 30-inch-diameter steel penstock, (4) a proposed powerhouse containing one new generating unity having an installed capacity of 4.5 megawatts; (5) a proposed 22,500-foot-long, 34.5 kilovolt transmission line; and (6) appurtenant facilities. The proposed Calligan Project would have an average annual generation of 17 gigawatt-hours..

The proposed Calligan Project by Renewable Energy Development, LLC consists of: (1) A proposed 60-foot-long, 9-foot-high concrete diversion structure; (2) a proposed reservoir having a surface area of 0.4 acres and a storage capacity of 1 acre-foot and normal water surface elevation of 2221 feet mean sea level; (3) a proposed 6,400-foot-long, 40-inch-diameter steel penstock, (4) a proposed powerhouse containing one new generating unity having an installed capacity of 7 megawatts; (5) a proposed 22,500-foot-long, 34.5 kilovolt transmission line; and (6) appurtenant facilities. The proposed Calligan Project would have an average annual generation of 25 gigawatt-hours..

*Applicants Contact:* For Calligan Power, LLC: Mr. Jason M. Hines, Black Brook Environmental, Inc., 100 Harris Avenue, Bellingham, WA 98225, (360) 510–1763. For Renewable Energy Development, LLC: Laurin Schweet, Renewable Energy Development, LLC, P.O. Box 50061, Bellevue, WA 98015, (206) 551–1075.

*FERC Contact:* Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''eFiling'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13218 or P–13217) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29858 Filed 12–16–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 8889–046]**

### Cordova Electric Cooperative, Inc.; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

December 10, 2008.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of License to complete Project Rehabilitation.

b. *Project No.:* 8889–046.

c. *Date Filed:* November 7, 2008.

d. *Applicant:* Cordova Electric Cooperative, Inc.

e. *Name of Project:* Humpback Creek Hydroelectric Project.

f. *Location:* On the Humpback Creek on Orca Inlet of Prince William Sound, near Cordova City, Alaska.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a—825r.

h. *Applicant Contact:* Mr. Clay Koplin, CEO, Cordova Electric Cooperative, Inc., P.O. Box 20, 705 Second Street, Cordova, Alaska 99574–0020, telephone: (907) 424–5555.

i. *FERC Contact:* Mrs. Anumzziatta Purchiaroni, Telephone (202) 502–6191, and e-mail address: *anumzziatta.purchiaroni@ferc.gov*.

j. *Deadline for filing comments, motions to intervene, and protest:* January 12, 2009.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* The licensee is proposing a non-capacity amendment to complete rehabilitation of the project and return to service the upper project features that were damaged during a severe flood event in 2006. The license is proposing the following changes to the project: relocation and construction of a new intake/diversion structure; and construction of a new tunnel housing a penstock to replace the old wood flume and upper penstock.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. Information about this filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov*, for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions To Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, State, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29862 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13052–000]**

### Green Wave Energy Solutions, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

December 9, 2008.

On October 19, 2007, Green Wave Energy Solutions, LLC each filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Green Wave San Luis Obispo Project, to be located on the Pacific Ocean in San Luis Obispo County, California.

*The proposed Green Wave San Luis Obispo Project consists of:* (1) 10 to 100 Pelamis or OPT devices having a total installed capacity of 100 megawatts, (2) a proposed 2- to 3-mile-long, 36 kilovolt transmission line, and (3) appurtenant facilities. The project is estimated to have an average annual generation of 250 gigawatt-hours, which would be sold to a local utility.

*Applicant Contact:* Mr. Wayne L. Burkamp, GreenWave Energy Solutions, LLC: 1014 S. Westlake Blvd., Suite 14, PMB 138, Westlake Village, CA 91361, phone (510) 654–7388.

*FERC Contact:* Robert Bell, (202) 502–6062.

*Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications:* 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D.

Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13052) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29855 Filed 12–16–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13053–000]**

### Green Wave Energy Solutions, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

December 9, 2008.

On October 19, 2007, Green Wave Energy Solutions, LLC each filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Green Wave Mendocino Project, to be located on the Pacific Ocean in Mendocino County, California.

The proposed Green Wave Mendocino Project consists of: (1) 10 to 100 Pelamis or OPT devices having a total installed capacity of 100 megawatts, (2) a proposed 2- to 3-mile-long, 36 kilovolt transmission line, and (3) appurtenant facilities. The project is estimated to have an average annual generation of 250 gigawatt-hours, which would be sold to a local utility.

*Applicant Contact:* Mr. Wayne L. Burkamp, GreenWave Energy Solutions, LLC is: 1014 S. Westlake Blvd., Suite 14, PMB 138, Westlake Village, CA 91361, phone (510) 654–7388.

*FERC Contact:* Robert Bell, (202) 502–6062.

*Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications:* 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's website under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13053) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29856 Filed 12–16–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 12595–001; Project No. 12604–001]**

### Greybull Valley Irrigation District; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

December 9, 2008.

On November 3, 2008, Greybull Valley Irrigation District filed applications, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Lower Sunshine Dam and Upper Sunshine Dam Projects, to be located on the Greybull River, Park County, Wyoming.

The proposed Lower Sunshine Dam Project consists of: (1) An existing 178-foot-high, 1660-foot-long earthfill dam, (2) an existing impoundment having a surface area of 1,049 acres, with a storage capacity of 58,750 acre-feet and normal water surface elevation of 5,100 feet mean sea level, (3) a proposed 50-foot-long Steel Penstock, (4) a proposed powerhouse containing two generating units with a total installed capacity of 5.0 megawatts, (5) a proposed 1,700-foot-long, 25 kilovolt transmission line, and (6) appurtenant facilities. The project would have an annual generation of 12.4 gigawatt-hours that would be sold to a local utility.

The proposed Upper Sunshine Dam Project consists of: (1) An existing 155-foot-high, 1,050-foot-long earthfill dam, (2) an existing impoundment having a surface area of 1,158 acres, with a storage capacity of 53,575 acre-feet and normal water surface elevation of 5,300 feet mean sea level, (3) a proposed 50-foot-long Steel Penstock, (4) an existing powerhouse containing a generating unit having an installed capacity of 5 megawatts, (5) a proposed 3-mile-long, 25 kilovolt transmission line, and (6) appurtenant facilities. The project would have an annual generation of 6 gigawatt-hours that would be sold to a local utility.

*Applicant Contact:* Mr. William B. Schlenker, Greybull Valley Irrigation District, P.O. Box 44, Emblem, WY 82422–0044, (307) 762–3555.

*FERC Contact:* Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–12604 and P–12595) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29853 Filed 12–16–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13278–000]**

### Natural Currents Energy Services, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

December 9, 2008.

On August 11, 2008, Natural Currents Energy Services, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Fisher's Island Project, to be located on Long Island Sound in Suffolk County, New York.

The proposed Fisher's Island Tidal Energy Project consists of: (1) 250 proposed Red Hawk TISEC generating units having a total installed capacity of 250 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The Natural Currents Energy Services, LLC, project would have an average annual generation of 900 gigawatt-hours and be sold to a local utility.

*Applicant Contact:* Mr. Roger Bason, Natural Currents Energy Services, 24 Roxanne Boulevard, Highland, New York 12561, phone (845) 691–4009.

*FERC Contact:* Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13278) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29859 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP07–44–007]**

### Southeast Supply Header, LLC and Southern Natural Gas Company; Notice of Amendment Application

December 9, 2008.

On December 8, 2008, Southeast Supply Header, LLC (SESH) and Southern Natural Gas Company (SONAT) filed an application requesting an amendment to the certificate of public convenience and necessity issued on September 20, 2007, in Docket Nos. CP07–44–000 and CP07–45–000 pursuant to section 7(c) of the Natural Gas Act, as amended, and section 157 Subpart A of the Federal Energy Regulatory Commission's (Commission) regulations. Specifically, Applicants requests approval to amend the Joint Ownership Agreement (JOA) governing capacity ownership interests on the jointly owned segment of the SESH system to allow for increased receipt point levels for SONAT. Applicants also seek approval for new provisions of the JOA dealing with capacity reductions in the event of a force majeure situation. Applicants request expedited action on this filing.

Any initial questions regarding this application should be directed to Brian D. O'Neill, at Dewey & LeBoeuf LLP, 1101 New York Avenue, NW., Suite 1100, Washington, DC 20005–4213 or by calling 202–346–8102.

Any person desiring to intervene or to protest in the above proceeding must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. (EST) on the specified comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time December 22, 2008.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29860 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 12611–004]**

### Verdant Power, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

December 9, 2008.

On December 1, 2008, Verdant Power, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Roosevelt Island Project, to be located on East River in New York County, New York.

The proposed Roosevelt Island Tidal Energy Project consists of: (1) A proposed 30 turbine array of the East Channel with an installed capacity of 1 megawatts, (2) a proposed 100 turbine array with an installed capacity of 4

megawatts the west channel, (3) a proposed transmission line, and (5) appurtenant facilities. The Verdant Power, LLC project using the Verdant turbines project, would have an average annual generation of 12 gigawatt-hours and be sold to a local utility.

*Applicant Contact:* Mr. William H. Taylor, Verdant Power, LLC, The Octogon, 888 Main Street, New York, NY 10044, phone (212) 888–8887.

*FERC Contact:* Robert Bell, (202) 502–6062.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–12611–004) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29854 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings # 1

December 10, 2008.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER08–577–003; ER08–578–003; ER08–579–003

*Applicants:* Noble Bellmont Windpark, LLC, Noble Chateaugay Windpark, LLC; Noble Wethersfield Windpark, LLC

*Description:* Noble Bellmont Windpark, LLC, Noble Chateaugay Windpark, LLC *et. al.* submits substitute market-based rate tariffs.

*Filed Date:* 12/10/2008.

*Accession Number:* 20081210–0076.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, December 16, 2008.

*Docket Numbers:* ER08–1536–001.

*Applicants:* Xcel Energy Services Inc.

*Description:* Northern States Power Company—MN submits the corrected Order 614 formatted agreement required by the Commission's 11/7/08 Letter order accepting an executed Consent and Assignment Agreement etc.

*Filed Date:* 12/08/2008.

*Accession Number:* 20081210–0061.

*Comment Date:* 5 p.m. Eastern Time on Monday, December 29, 2008.

*Docket Numbers:* ER99–3426–009.

*Applicants:* San Diego Gas & Electric Company.

*Description:* San Diego Gas & Electric Co. submits a clean and blackline tariff sheet to reflect the affiliate transaction authorization granted in the FERC's 11/6/08 letter order.

*Filed Date:* 12/08/2008.

*Accession Number:* 20081210–0062.

*Comment Date:* 5 p.m. Eastern Time on Monday, December 29, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. E8–29916 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings # 1

December 9, 2008.

*Take notice that the Commission received the following electric rate filings:*

*Docket Numbers:* ER94–1384–035; ER03–1108–008; ER03–1109–008; ER08–1432–002.

*Applicants:* Morgan Stanley Capitol Group Inc; MS Solar Solutions Corp; Power Contract Financing II, Inc.; Power Contract Financing II, L.L.C.

*Description:* Morgan Stanley Capital Group Inc submit Revisions to the MS Utilities Rate Schedules FERC 1 *et al.*

*Filed Date:* 12/04/2008.

*Accession Number:* 20081209–0154.

*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER02–537–021.

*Applicants:* Shady Hills Power Company, L.L.C.

*Description:* Shady Hills Power Company, LLC submits Triennial Market Power Analysis.

*Filed Date:* 12/04/2008.

*Accession Number:* 20081209–0153.

*Comment Date:* 5 p.m. Eastern Time on Monday, February 2, 2009.

*Docket Numbers:* ER07–459–003.

*Applicants:* Vermont Transco LLC.

*Description:* Compliance Filing of Vermont Electric Power Company, Inc., *et al.*

*Filed Date:* 11/17/2008.
*Accession Number:* 20081117–5188.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 19, 2008.

*Docket Numbers:* ER08–129–004.
*Applicants:* Southern Company Services, Inc.
*Description:* Alabama Power Company et al submit response to Commission letter dated 11/4/08 re its compliance filing made on 4/9/08.
*Filed Date:* 12/04/2008.
*Accession Number:* 20081209–0160.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER08–1340–002; ER08–1341–002; ER08–1342–002.
*Applicants:* Florida Power & Light Company; Progress Energy Florida; Tampa Electric Company.
*Description:* Florida Power & Light Company et al submit modifications to the Florida Reserve Sharing Group Agreement.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081209–0152.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER08–1564–001.
*Applicants:* MidAmerican Energy Company.
*Description:* MidAmerican Energy Company submits Service Agreement for Substation Operator Services and Substation Facility Maintenance Services.
*Filed Date:* 12/04/2008.
*Accession Number:* 20081209–0155.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER08–1589–001.
*Applicants:* PacifiCorp.
*Description:* PacifiCorp submit Exhibit A, a revised Network Integration Transmission Service Agreement.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081209–0156.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER09–100–001.
*Applicants:* AEP Service Corporation.
*Description:* AEP Power Marketing, Inc. *et al.* submit corrected version of the AEP Operating Companies cost based tariff designating the tariff as FERC Electric Tariff Original Volume 7.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081209–0157.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER09–352–000.
*Applicants:* West Valley Holdings, LLC.
*Description:* Request of West Valley Holdings, LLC for authorization to sell energy and capacity at market-based rates, request for waivers etc.
*Filed Date:* 12/02/2008.
*Accession Number:* 20081208–0405.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, December 23, 2008.

*Docket Numbers:* ER09–376–000.
*Applicants:* Pacific Gas and Electric Company.
*Description:* Pacific Gas and Electric Co. submit a compliance filing re rate change to FERC Electric Tariff, Sixth Revised Volume No. 5.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081208–0545.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER09–377–000.
*Applicants:* Phoenix Wind Power LLC
*Description:* Phoenix Wind Power LLC submits a Notice of Cancellation of its market-based rate tariff, FERC Electric Tariff, Third Revised Rate Schedule FERC No. 1.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081208–0544.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER09–378–000.
*Applicants:* New York Independent System Operator, Inc.
*Description:* New York Independent System Operator, Inc. submits revisions to Attachment W et al. re proposed revisions to the Transmission Congestion Contract Creditworthiness Provisions.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081208–0543.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER09–379–000.
*Applicants:* Wisconsin Public Service Corporation.
*Description:* Wisconsin Public Service Corp submits tariff revisions to extend the termination date of the Sinning Reserve Services Agreement.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081208–0542.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER09–380–000.
*Applicants:* PacifiCorp.
*Description:* PacifiCorp submits a Transmission Interconnection Agreement for Points of Delivery.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081208–0541.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER09–381–000.
*Applicants:* Pacific Gas and Electric Company.
*Description:* Pacific Gas and Electric Co. submits an executed Transmission Facilities Agreement.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081208–0540.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER09–383–000.
*Applicants:* Vermont Transco LLC
*Description:* Vermont Transco LLC submits an executed service agreement with Green Mountain Power Co. *et al.*
*Filed Date:* 12/05/2008.
*Accession Number:* 20081208–0539.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER09–384–000.
*Applicants:* Middletown Power LLC
*Description:* Middletown Power LLC and Montville Power LLC submits proposed revisions to their cost-of-service Reliability Must-Run Agreements.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081208–0538.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

Take notice that the Commission received the following open access transmission tariff filings:

*Docket Numbers:* OA08–101–001.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* PJM Interconnection, LLC, submits revisions to the PJM Open Access Transmission Tariff in compliance with FERC Letter Order issued 10/21/08.
*Filed Date:* 11/20/2008.
*Accession Number:* 20081124–0158.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, December 23, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be

listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. E8–29917 Filed 12–16–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings # 1

December 8, 2008.

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC09–28–000.
*Applicants:* Wapsipinicon Wind Project LLC.
*Description:* Application for Authorization Under Section 203 of the Federal Power Act for the Disposition of Jurisdictional Facilities, Request for Expedited Consideration and Confidential Treatment.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081205–5108.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 19, 2008.

*Docket Numbers:* EC09–29–000.
*Applicants:* Smoky Hills Wind Project II, LLC.
*Description:* Application of Smoky Hills Wind Project II, LLC for Authorization Under Section 203 of the Federal Power Act, Request for Expedited Consideration and Confidential Treatment.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081205–5139.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

Take notice that the Commission received the following exempt wholesale generator filings:

*Docket Numbers:* EG09–19–000.
*Applicants:* Hay Canyon Wind LLC.
*Description:* Notice of Self-Certification of Exempt Wholesale Generator Status of Hay Canyon Wind LLC.
*Filed Date:* 12/08/2008.
*Accession Number:* 20081208–5083.
*Comment Date:* 5 p.m. Eastern Time on Monday, December 29, 2008.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER01–1266–009; ER01–1268–010; ER01–1269–009; ER01–1270–012; ER01–1271–010; ER01–1273–010; ER01–1277–009; ER01–1278–012; ER02–1213–008.
*Applicants:* Mirant Bowline, LLC; Mirant Canal, LLC; Mirant Chalk Point, LLC; Mirant Delta, LLC; Mirant Kendall, LLC; Mirant Mid-Atlantic, LLC; Mirant Potomac River, LLC; Mirant Potrero, LLC; Mirant Energy Trading, LLC.
*Description:* Mirant Bowline, LLC et al. submits Amendment to 6/6/08 filing of Notice of Non Material Change in Status and Order 697 Tariff Revisions.
*Filed Date:* 12/02/2008.
*Accession Number:* 20081204–0118.
*Comment Date:* 5 p.m. Eastern Time on Monday, December 15, 2008.

*Docket Numbers:* ER06–1135–003; ER02–783–007; ER06–45–001; ER08–203–001; ER02–855–008; ER01–2262–009; ER03–438–007.
*Applicants:* EPCOR Energy Marketing (US) Inc.; EPCOR Merchant and Capital (US) Inc.; EPCOR Energy Marketing (US) Inc., EPCOR POWER (CASTLETON) LLC; Primary Energy of North Carolina LLC; EPDC, Inc.; Frederickson Power L.P.; ManChief Power Company LLC.
*Description:* EPCOR Energy Marketing (US) Inc et al submit a notice of change in status re market-based rate authority.
*Filed Date:* 12/01/2008.
*Accession Number:* 20081205–0032.
*Comment Date:* 5 p.m. Eastern Time on Monday, December 22, 2008.

*Docket Numbers:* ER07–195–012.
*Applicants:* Locust Ridge Wind Farm, LLC.
*Description:* Notice of Change in Status of Locust Ridge Wind Farm, LLC.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081205–5107.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER08–364–004.
*Applicants:* APX, Inc.
*Description:* APX, Inc submits a proposed revision to its FERC Electric Tariff, First Revised Volume 10.
*Filed Date:* 11/19/2008.
*Accession Number:* 20081124–0316.
*Comment Date:* 5 p.m. Eastern Time on Thursday, December 11, 2008.

*Docket Numbers:* ER08–1524–001.
*Applicants:* Duke Energy Carolinas, LLC.
*Description:* Duke Energy Carolinas, LLC submits Sub Original Sheet 55 to its 9/11/08 filing of Second Amended and Restated Partial Requirements Service Agreement with Rutherford Electric Membership Corp.
*Filed Date:* 12/03/2008.
*Accession Number:* 20081205–0031.
*Comment Date:* 5 p.m. Eastern Time on Wednesday, December 24, 2008.

*Docket Numbers:* ER09–187–001.
*Applicants:* Southern California Edison Company.
*Description:* Southern California Edison request that the Tariff Sheet be made effective on 1/1/09 the same date as the remainder of the filing.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081208–0620.
*Comment Date:* 5 p.m. Eastern Time on Monday, December 15, 2008.

*Docket Numbers:* ER09–328–001.
*Applicants:* TransCanada Energy Sales Ltd.
*Description:* TransCanada Energy Sales Ltd submits an amendment to its Rate Schedule FERC No. 1.
*Filed Date:* 12/02/2008.
*Accession Number:* 20081205–0030.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, December 12, 2008.

*Docket Numbers:* ER09–362–000.
*Applicants:* Carolina Power & Light Company.
*Description:* Carolina Power & Light Company et al submits revised Partial Requirements Service Agreement between Progress and Piedmont Electric Membership Corporation Rate Schedule FERC 172 etc.
*Filed Date:* 12/02/2008.
*Accession Number:* 20081204–0135.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, December 23, 2008.

*Docket Numbers:* ER09–363–000.
*Applicants:* Mid Continent Area Power Pool.
*Description:* Mid Continent Area Power Pool submits revisions to its FERC Electric Tariff 1R1 et al.
*Filed Date:* 12/03/2008.
*Accession Number:* 20081204–0125.
*Comment Date:* 5 p.m. Eastern Time on Wednesday, December 24, 2008.

*Docket Numbers:* ER09–364–000.
*Applicants:* Edison Sault Electric Company.

*Description:* Edison Sault Electric Company submits Supplemental Agreement No 11 to the Contract for Electric Service, dated 11/21/08 etc.
*Filed Date:* 12/03/2008.
*Accession Number:* 20081204–0126.
*Comment Date:* 5 p.m. Eastern Time on Wednesday, December 24, 2008.

*Docket Numbers:* ER09–365–000.
*Applicants:* Florida Power & Light Company.
*Description:* Florida Power & Light Company submits Service Agreement No 265 between FPL and Georgia Transmission Corporation etc.
*Filed Date:* 12/03/2008.
*Accession Number:* 20081204–0127.
*Comment Date:* 5 p.m. Eastern Time on Wednesday, December 24, 2008.

*Docket Numbers:* ER09–366–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* PJM Interconnection, LLC submits revisions to the PJM Open Access Transmission Tariff and on 12/8/09 PJM submit an errata to this filing.
*Filed Date:* 12/03/2008; 12/08/2008.
*Accession Number:* 20081204–0128; 20081208–5043.
*Comment Date:* 5 p.m. Eastern Time on Wednesday, December 24, 2008.

*Docket Numbers:* ER09–367–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* PJM Interconnection, LLC submits amendments to the PJM Open Access Transmission Tariff to add a new Schedule 12A etc.
*Filed Date:* 12/02/2008.
*Accession Number:* 20081204–0129.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, December 23, 2008.

*Docket Numbers:* ER09–368–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* PJM Interconnection, LLC submits revised tariff sheets to the PJM Open Access Transmission Tariff, and the Amended and Restated Operating Agreement.
*Filed Date:* 12/02/2008.
*Accession Number:* 20081204–0130.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, December 23, 2008.

*Docket Numbers:* ER09–369–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* PJM Interconnection, LLC submits amendments to the PJM Open Access Transmission Tariff, Amended and Restated Operating Agreement etc.
*Filed Date:* 12/02/2008.
*Accession Number:* 20081204–0131.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, December 23, 2008.

*Docket Numbers:* ER09–370–000.
*Applicants:* EPCOR USA North Carolina LLC.
*Description:* EPCOR USA North Carolina LLC submits a Notice of Name Change of Primary Energy of North Carolina LLC to EPCOR USA NC, *et al.*
*Filed Date:* 12/01/2008.
*Accession Number:* 20081204–0132.
*Comment Date:* 5 p.m. Eastern Time on Monday, December 22, 2008.

*Docket Numbers:* ER09–371–000.
*Applicants:* California Independent System Operator C.
*Description:* California Independent System Operator Corporation submits informational filing intended to provide notice regarding the CAISO's revised Transmission Access Charges, effective 9/1/08.
*Filed Date:* 12/02/2008.
*Accession Number:* 20081204–0133.
*Comment Date:* 5 p.m. Eastern Time on Tuesday, December 23, 2008.

*Docket Numbers:* ER09–372–000.
*Applicants:* Entergy Services, Inc.
*Description:* Entergy Services, Inc submits two amended Rate Schedules providing for power coordination and interchange services.
*Filed Date:* 12/04/2008.
*Accession Number:* 20081205–0191.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER09–373–000.
*Applicants:* Southern California Edison Company.
*Description:* Southern California Edison Co submits a revised rate sheet for the Communication Facilities Agreement with the City of Riverside.
*Filed Date:* 12/04/2008.
*Accession Number:* 20081205–0188.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER09–374–000.
*Applicants:* Wabash Valley Power Association, Inc.
*Description:* Wabash Valley Power Association, Inc submits Second Revised Sheet 47 et al to FERC Electric Tariff, Original Volume No. 1, effective 1/2/09.
*Filed Date:* 12/04/2008.
*Accession Number:* 20081205–0189.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

*Docket Numbers:* ER09–375–000.
*Applicants:* Black Hills Power, Inc.
*Description:* Black Hills Power, Inc submits First Revised Sheet No. 8 to FERC Electric Tariff, Original Volume 4, effective 12/5/08.
*Filed Date:* 12/04/2008.
*Accession Number:* 20081205–0190.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

Take notice that the Commission received the following open access transmission tariff filings:

*Docket Numbers:* OA08–71–002.
*Applicants:* Xcel Energy Services Inc.
*Description:* Xcel Energy Services Inc. files the Joint Open Access Transmission Tariff—First Revised Volume No. 1 Pursuant to Order No. 890 Compliance OATT Filing.
*Filed Date:* 12/05/2008.
*Accession Number:* 20081205–5069.
*Comment Date:* 5 p.m. Eastern Time on Friday, December 26, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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(866) 208–3676 (toll free). For TTY, call (202) 502–8659.

**Nathaniel J. Davis, Sr.,**

*Deputy Secretary.*

[FR Doc. E8–29918 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket Nos. EG08–92–000; EG08–93–000; EG08–94–000; EG08–95–000; EG08–96–000; EG08–97–000; EG08–98–000]**

### Ashtabula Wind, LLC; Greenfield Energy Centre, LP; Fowler Ridge Wind Farm LLC; Flat Ridge Wind Energy, LLC; Fowler Ridge III Wind Farm LLC; Walnut Creek Energy, LLC; Elbow Creek Wind Project LLC; Notice of Effectiveness of Exempt Wholesale; Generator Status

December 10, 2008.

Take notice that during the month of November 2008, the status of the above-captioned entities as Exempt Wholesale Generators Companies became effective by operation of the Commission's regulations 18 CFR 366.7(a).

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29873 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL09–16–000]**

### City of Azusa, CA; Notice of Filing

December 10, 2008.

Take notice that on December 5, 2008, City of Azusa, California filed its sixth annual revision to its Transmission Revenue Balancing Account Adjustment, to become effective January 1, 2009, consistent with its Transmission Owner Tariff filed with the Federal Energy Regulatory Commission in Docket No. EL03–14, and the California Independent System Operator Corporation Electric Tariff.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

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*Comment Date:* 5 p.m. Eastern Time on January 5, 2009.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29866 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL09–17–000]**

### City of Banning, CA; Notice of Filing

December 10, 2008.

Take notice that on December 5, 2008, City of Banning, California filed its sixth annual revision to its Transmission Revenue Balancing Account Adjustment, to become effective January 1, 2009, consistent with its Transmission Owner Tariff filed with the Federal Energy Regulatory Commission in Docket No. EL03–21, and the California Independent System Operator Corporation Electric Tariff.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on January 5, 2009.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29867 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL09–12–000]**

### Bonneville Power Administration; Notice of Filing

December 10, 2008.

Take notice that on November 26, 2008, The Bonneville Power Administration filed a petition for declaratory order regarding its Tiered Rate Methodology, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure (18 CFR 385.207).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to

the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

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*Comment Date:* 5 p.m. Eastern Time on December 31, 2008.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29863 Filed 12–16–08; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL09–13–000]**

### Missouri Basin Municipal Power Agency; Notice of Filing

December 10, 2008.

Take notice that on December 1, 2008, pursuant to Rule 307 of the Commission's Revised General Rules (18 CFR 375.307), Rules 303 and 402 of the Commission's Regulations, and Rule 212 of the Commission's Rule of Practice and Procedure (18 CFR 385.212), Missouri Basin Municipal Power Agency on behalf of itself and five of its members, Riverdale, North Dakota; Pickstown, South Dakota; and Breckenridge, Marshall and Melrose, Minnesota filed a Petition for waiver of certain obligations imposed under sections 292.303(a) and 292.303(b) of the Commission's Regulations (18 CFR part 292 subpart C) which implement section 210 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 824a–3), and as amended by the Energy Policy Act of 2005 (18 CFR 385.212).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on December 31, 2008.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29864 Filed 12–16–08; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL09–15–000]**

### City of Vernon, CA; Notice of Filing

December 10, 2008.

Take notice that on December 4, 2008, City of Vernon, California filed annual revision to its Transmission Revenue Balancing Account Adjustment, to become effective January 1, 2009, consistent with its Transmission Owner Tariff filed with the Federal Energy Regulatory Commission in Docket Nos. EL00–105 and EL08–54, and the California Independent System Operator Corporation Electric Tariff.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on January 5, 2009.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29865 Filed 12–16–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[P–13058–000–WA]**

### Grays Harbor Ocean Energy Project; Notice of Licensing Outreach Meeting: Understanding the FERC Licensing Process

December 10, 2008.

a. *Project:* Grays Harbor Ocean Energy Project, Grays Harbor County, Washington.

b. *Date and Time of Meeting:* Tuesday, February 24, 2009, 9 a.m. to 11 a.m. (PST); and 7 p.m. to 9 p.m.

c. *Place:* Ocean Shores Convention Center, 120 W Chance A La Mer NW Ocean Shores, WA. 98569.

d. *Purpose of the Meeting:* Explain the licensing and permitting process for hydrokinetic technologies.

e. All local, State, and Federal agencies, and interested parties, are hereby invited to attend the meeting. Please RSVP your attendance by notifying David Turner via e-mail at *david.turner@ferc.gov* by close of business Tuesday, February 10, 2009.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29872 Filed 12–16–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Sunshine Act Meeting Notice

December 11, 2008.

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. No. 94–409), 5 U.S.C. 552b:

Agency Holding Meeting: Federal Energy Regulatory Commission.

Date and Time: December 18, 2008, 10 a.m.

Place: Room 2C, 888 First Street, NE., Washington, DC 20426.

Status: Open.

Matters to be Considered: Agenda.

**Note:** Items listed on the agenda may be deleted without further notice.

**CONTACT PERSON FOR MORE INFORMATION:** Kimberly D. Bose, Secretary, Telephone (202) 502–8400. For a recorded message listing items struck from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed on line at the Commission's Web site at *http://www.ferc.gov* using the eLibrary link, or may be examined in the Commission's Public Reference Room.

942ND—MEETING

| Item No | Docket No. | Company |
|---|---|---|
| | **Administrative** | |
| A–1 | AD02–1–000 | Agency Administrative Matters. |
| A–2 | AD02–7–000 | Customer Matters, Reliability, Security and Market Operations. |
| A–3 | AD06–3–000 | Energy Market Update. |
| | **Electric** | |
| E–1 | EL02–28–006, EL02–33–007, EL02–38–006. | Nevada Power Company and Sierra Pacific Power Company v. Enron Power Marketing, Inc.; El Paso Merchant Energy; American Electric Power Services Corporation. |
| | EL02–29–006, EL02–30–006, EL02–31–006. | Nevada Power Company v. Morgan Stanley Capital Group; Calpine Energy Services; Mirant Americas Energy Marketing, L.P. |
| | EL02–32–006, EL02–34–006, EL02–39–006. | Reliant Energy Services; BP Energy Company; Allegheny Energy Supply Company, L.L.C. |
| | EL02–43–006 | Southern California Water Company v. Mirant Americas Energy Marketing L.P. |
| | EL02–56–006 | Public Utility District No. 1 Snohomish County, Washington v. Morgan Stanley Capital Group, Inc. |
| E–2 | EL08–34–002 | Maryland Public Service Commission v. PJM Interconnection, L.L.C. |
| | EL08–47–002 | PJM Interconnection, L.L.C. |
| E–3 | ER07–1372–002, ER07–1372–005, ER07–1372–011, ER07–1372–013. | Midwest Independent Transmission System Operator, Inc. |
| | ER08–1254–000 | Midwest Independent Transmission System Operator, Inc. and Transmission Owners of the Midwest Independent Transmission System Operator, Inc. |
| | ER08–1257–000, ER08–1257–001 | Midwest Independent Transmission System Operator, Inc. |
| | ER09–24–000 | Midwest Independent Transmission System Operator, Inc. |
| E–4 | ER07–1372–007 | Midwest Independent Transmission System Operator, Inc. |
| E–5 | ER09–14–000, ER09–14–001 | NSTAR Electric Company. |
| E–6 | ER09–88–000 | Southern Company Services, Inc. |
| E–7 | RM04–7–005 | Market-Based Rates For Wholesale Sales of Electric Energy, Capacity and Ancillary Services By Public Utilities. |
| E–8 | RC08–1–001 | Southeastern Power Administration. |
| E–9 | RC09–3–000 | North American Electric Reliability Corporation and Northeast Power Coordinating Council, Inc. |
| E–10 | RR06–1–016, RR06–1–017 | North American Electric Reliability Council, North American Electric Reliability Corporation. |
| | RR07–1–004 | Delegation Agreement Between the North American Electric Reliability Corporation and Texas Regional Entity, a division of ERCOT. |
| | RR07–2–004 | Delegation Agreement Between the North American Electric Reliability Corporation and Midwest Reliability Organization. |
| | RR07–3–004, RR07–3–005 | Delegation Agreement Between the North American Electric Reliability Corporation and Northeast Power Coordinating Council, Inc. |

942ND—MEETING—Continued

| Item No | Docket No. | Company |
|---|---|---|
| | RR07–4–004 | Delegation Agreement Between the North American Electric Reliability Corporation and ReliabilityFirst Corporation. |
| | RR07–5–005 | Delegation Agreement Between the North American Electric Reliability Corporation and SERC Reliability Corporation. |
| | RR07–6–004 | Delegation Agreement Between the North American Electric Reliability Corporation and Southwest Power Pool, Inc. |
| | RR07–7–004, RR07–7–005 | Delegation Agreement Between the North American Electric Reliability Corporation and Western Electricity Coordinating Council. |
| | RR07–8–004, RR07–8–005 | Delegation Agreement Between the North American Electric Reliability Corporation and Florida Reliability Coordinating Council. |
| E–11 | ER09–149–000 | Southwest Power Pool, Inc. |
| E–12 | ER08–1051–000, ER08–1051–001 | NSTAR Electric Company. |
| E–13 | ER08–1256–000, ER08–1256–001 | Midwest Independent Transmission System Operator, Inc. |
| E–14 | ER09–15–000 | Midwest Independent Transmission System Operator, Inc. |
| | ER09–97–000 | Midwest Independent Transmission System Operator, Inc. |
| E–15 | ER08–1055–000, ER08–1055–001 | Midwest Independent Transmission System Operator, Inc. |
| | ER08–1042–000, ER08–1042–001, ER08–1042–002. | Midwest Independent Transmission System Operator, Inc. |
| E–16 | OMITTED. | |
| E–17 | ER09–209–000 | ISO New England Inc. and New England Power Pool. |
| E–18 | ER09–239–000 | California Independent System Operator Corporation. |
| E–19 | ER09–12–000 | American Electric Power Service Corporation. |
| E–20 | ER09–187–000, ER08–1343–000, ER08–1353–000. | Southern California Edison Company. |
| E–21 | OMITTED. | |
| E–22 | ER07–869–004, ER07–475–005, ER06–615–030. | California Independent System Operator Corporation. |
| E–23 | ER08–375–002 | Southern California Edison Company. |
| E–24 | ER96–78–020 | Southern Company Services, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Power Company. |
| E–25 | OMITTED. | |
| E–26 | EL09–4–000 | Independent Power Producers of New York, Inc.; Astoria Generating Company, L.P.; ConsumerPower1ine, Inc.; East Coast Power, LLC; Energy Curtailment Specialists, Inc.; NRG Energy, Inc.; TC Ravenswood, LLC v. New York Independent System Operator, Inc. |
| E–27 | EL00–95–164 | San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator Corporation and the California Power Exchange Corporation. |
| | EL00–98–184 | Investigation of Practices of the California Independent System Operator Corporation and the California Power Exchange Corporation. |
| E–28 | OMITTED. | |
| E–29 | ER08–774–001, ER08–774–001 | Entergy Services, Inc. |
| E–30 | ER07–694–000 | New England Power Company. |
| E–31 | ER05–6–093, ER05–6–107 | Midwest Independent Transmission System Operator, Inc. |
| | EL04–135–096, EL04–135–111 | Midwest Independent Transmission System Operator, Inc. and PJM Interconnection, L.L.C. |
| | EL02–111–113, EL02–111–128 | Midwest Independent Transmission System Operator, Inc. |
| | EL03–212–109, EL03–212–124 | Ameren Services Company. |
| E–32 | ER07–1372–009, ER07–1372–010 | Midwest Independent Transmission System Operator, Inc. |
| | ER06–1552–000, ER06–1552–002, ER06–1552–003. | Midwest Independent Transmission System Operator, Inc. |
| E–33 | ER08–283–002 | New York Independent System Operator, Inc. |
| E–34 | ER08–370–004 | Missouri River Energy Services and Midwest Independent Transmission System Operator, Inc. |
| | EL08–22–002 | Missouri River Energy Services and Western Minnesota Municipal Power Agency. |
| E–35 | ER06–615–027, ER06–615–028 | California Independent System Operator Corporation. |
| E–36 | EL07–101–001 | American Electric Power Service Corporation v. Midwest Independent Transmission System Operator, Inc. and PJM Interconnection, L.L.C. |
| | ER05–6–103 | Midwest Independent Transmission System Operator, Inc. |
| | EL04–135–106 | Midwest Independent Transmission System Operator, Inc. PJM Interconnection, L.L.C. |
| | EL02–111–123 | Midwest Independent Transmission System Operator, Inc. PJM Interconnection, L.L.C. |
| | EL03–212–119 | Ameren Services Company. |
| E–37 | ER08–585–000 | California Independent System Operator Corporation. |
| E–38 | ER08–808–001, ER08–949–002, ER08–989–002, ER08–992–002, ER08–994–002, ER08–998–002, ER08–1029–001, ER08–1031–001, ER08–1033–001, ER08–1035–001, ER08–1037–001, ER08–1047–001, ER08–1062–001, ER08–1149–002. | Westar Energy, Inc. |
| E–39 | RM05–35–000 | Standard of Review for Modifications to Jurisdictional Agreement. |

942ND—MEETING—Continued

| Item No | Docket No. | Company |
|---|---|---|
| E–40 | EL08–86–000 | Renewable Energy Systems Americas Inc. and PEAK Wind Development, LLC v. Otter Tail Power Company and Minnkota Power Cooperative, Inc. |
| **Gas** | | |
| G–1 | RM07–10–002 | Transparency Provisions of Section 23 of the Natural Gas Act. |
| G–2 | RM07–9–000 | Review of FERC Form Nos. 6 and 6Q. |
| G–3 | RP00–107–011 | Williston Basin Interstate Pipeline Company. |
| G–4 | RP08–426–000, RP08–426–001 | El Paso Natural Gas Company. |
| G–5 | OMITTED. | |
| **Hydro** | | |
| H–1 | P–11945–003 | Symbiotics, LLC. |
| H–2 | P–12804–000 | Public Utility District No. 1 of Okanogan County, Washington. |
| H–3 | P–12606–000 | Avista Corporation. |
| H–4 | P–2545–091 | Avista Corporation. |
| **Certificates** | | |
| C–1 | CP08–96–000 | Arlington Storage Company, LLC. |
| C–2 | CP08–418–000 | Southeast Gas Storage, LLC. |

**Kimberly D. Bose,**

*Secretary.*

A free Webcast of this event is available through *http://www.ferc.gov*. Anyone with Internet access who desires to view this event can do so by navigating to *http://www.ferc.gov*'s Calendar of Events and locating this event in the Calendar. The event will contain a link to its Webcast. The Capitol Connection provides technical support for the free Webcasts. It also offers access to this event via television in the DC area and via phone bridge for a fee. If you have any questions, visit *http://www.CapitolConnection.org* or contact Danelle Springer or David Reininger at 703–993–3100.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in the Commission Meeting Room. Members of the public may view this briefing in the designated overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters, but will not be telecast through the Capitol Connection service.

[FR Doc. E8–29887 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. PL09–3–000]**

### Control and Affiliation for Purposes of the Commission's Market-Based Rate Requirements Under Section 205 of the Federal Power Act and the Requirements of Section 203 of the Federal Power Act; Notice Inviting Post-Workshop Comments

December 9, 2008.

On December 3, 2008, Commission staff convened a workshop with interested persons to discuss issues raised by the filing of the Electric Power Supply Association docketed in Docket No. PL09–3–000. The agenda for the workshop was published in a notice issued in this docket on November 21, 2008.

Topics discussed at the workshop included, but were not limited to, the meaning of the term ''control'' for purposes of sections 203 and 205 of the Federal Power Act (FPA); what actions by upstream investors should be deemed to constitute the exercise of control for purposes of sections 203 and 205 of the FPA; whether the Commission should rely on representations made by an investor on the Securities and Exchange Commission's Schedule 13G for purposes of determining whether the investor can exercise control over a public utility; and what actions by an upstream investor should be deemed to affect a seller's market-based rate authority.

The Commission invites written comments from workshop participants on any of the matters discussed at the workshop, including recommendations on actions the Commission can take to resolve any of the issues discussed. Comments should be submitted in this docket by January 16, 2009.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29851 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP08–465–000]**

### ANR Pipeline Company; Notice of Canceled Site Visit

December 9, 2008.

On December 10, 2008, staff of the Federal Energy Regulatory Commission was scheduled to conduct a site visit of ANR Pipeline Company's proposed Wisconsin 2009 Expansion Project in Janesville, Wisconsin. This notice announces the cancellation of that site visit due to adverse weather conditions.

Please note that this Notice cancels the site visit that was previously announced in the Revised Notice of Site Visit issued on December 4, 2008.

For additional information, please contact the Commission's Office of External Affairs at 1–866–208–FERC.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29852 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13038–001]**

### BPUS Generation Development, LLC; Notice of Surrender of Preliminary Permit

December 10, 2008.

Take notice that BPUS Generation Development, LLC, permittee for the proposed William H. Harsha Dam Hydroelectric Project, has requested that its preliminary permit be terminated. The permit was issued on February 21, 2008, and would have expired on January 31, 2011.[1] The project would have been located on the East Fork of the Little Miami River in Clermont County, Ohio.

The permittee filed the request on December 2, 2008, and the preliminary permit for Project No. 13038 shall remain in effect through the thirtieth day after issuance of this notice unless that day is a Saturday, Sunday, part-day holiday that affects the Commission, or legal holiday as described in section 18 CFR 385.2007, in which case the effective date is the first business day following that day. New applications involving this project site, to the extent provided for under 18 CFR part 4, may be filed on the next business day.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29868 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13040–001]**

### BPUS Generation Development, LLC; Notice of Surrender of Preliminary Permit

December 10, 2008.

Take notice that BPUS Generation Development, LLC, permittee for the proposed Olmstead Locks and Dam Hydroelectric Project, has requested that its preliminary permit be terminated. The permit was issued on February 21, 2008, and would have expired on January 31, 2011.[1] The project would have been located on the Ohio River in Ballard County, Kentucky.

The permittee filed the request on December 2, 2008, and the preliminary permit for Project No. 13040 shall remain in effect through the 30th day after issuance of this notice unless that day is a Saturday, Sunday, part-day holiday that affects the Commission, or legal holiday as described in section 18 CFR 385.2007, in which case the effective date is the first business day following that day. New applications involving this project site, to the extent provided for under 18 CFR Part 4, may be filed on the next business day.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29869 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13056–001]**

### BPUS Generation Development, LLC; Notice of Surrender of Preliminary Permit

December 10, 2008.

Take notice that BPUS Generation Development, LLC, permittee for the proposed Buckhorn Lake Dam Hydroelectric Project, has requested that its preliminary permit be terminated. The permit was issued on June 4, 2008, and would have expired on May 31, 2011.[1] The project would have been located on the Middle Fork of the Kentucky River in Perry County, Kentucky.

The permittee filed the request on December 2, 2008, and the preliminary permit for Project No. 13056 shall remain in effect through the thirtieth day after issuance of this notice unless that day is a Saturday, Sunday, part-day holiday that affects the Commission, or legal holiday as described in section 18 CFR 385.2007, in which case the effective date is the first business day following that day. New applications involving this project site, to the extent provided for under 18 CFR part 4, may be filed on the next business day.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29870 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13057–001]**

### BPUS Generation Development, LLC; Notice of Surrender of Preliminary Permit

December 10, 2008.

Take notice that BPUS Generation Development, LLC, permittee for the proposed Taylorsville Lake Dam Hydroelectric Project, has requested that its preliminary permit be terminated. The permit was issued on June 4, 2008, and would have expired on May 31, 2011.[1] The project would have been located on the Salt River in Spencer County, Kentucky.

The permittee filed the request on December 2, 2008, and the preliminary permit for Project No. 13057 shall remain in effect through the thirtieth day after issuance of this notice unless that day is a Saturday, Sunday, part-day holiday that affects the Commission, or legal holiday as described in section 18 CFR 385.2007, in which case the effective date is the first business day following that day. New applications involving this project site, to the extent provided for under 18 CFR Part 4, may be filed on the next business day.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–29871 Filed 12–16–08; 8:45 am]

BILLING CODE 6717–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2008–0002; FRL–8394–6]**

### Ace Info Solutions, Inc.; Transfer of Data

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces that pesticide related information submitted to EPA's Office of Pesticide Programs (OPP) pursuant to the Federal Insecticide, Fungicide, and Rodenticide

[1] 122 FERC ¶ 62,167.

[1] 122 FERC ¶ 62,169.

[1] 123 FERC ¶ 62,192.

[1] 123 FERC ¶ 62,193.

Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA), including information that may have been claimed as Confidential Business Information (CBI) by the submitter, will be transferred to Ace Info Solutions, Inc., in accordance with 40 CFR 2.307(h)(3) and 2.308(i)(2). Ace Info Solutions, Inc., has been awarded multiple contracts to perform work for OPP, and access to this information will enable Ace Info Solutions, Inc., to fulfill the obligations of these contracts.

**DATES:** Ace Info Solutions, Inc., will be given access to this information on or before December 22, 2008.

**FOR FURTHER INFORMATION CONTACT:** Felicia Croom, Information Technology and Resources Management Division (7502P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–0786; e-mail address: *croom.felicia@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

This action applies to the public in general. As such, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

### *B. How Can I Get Copies of this Document and Other Related Information?*

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0002. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

## II. Contractor Requirements

Under Contract No. EP–W–09–001, the contractor will perform the following:

• Build quickly small applications to fill specific or emergency needs which fall outside of the scope of work of the OPP Infrastructure Maintenance contract. This maintenance and application enhancement work may be in Oracle, Lotus Notes, Domino, Lotus Enterprise Integrator (LEI), Documentum, Business Objects, or any other software application platform that may be housed on OPP' s servers, or on other Agency servers at EPA Headquarters, or at EPA' s computer facility in Research Triangle Park, NC. The contractors will provide maintenance, application enhancements, and documenting existing applications.

• This contract covers those activities.

• This contract involves no subcontractors.

OPP has determined that the contract described in this document involves work that is being conducted in connection with FIFRA, in that pesticide chemicals will be the subject of certain evaluations to be made under this contract. These evaluations may be used in subsequent regulatory decisions under FIFRA.

Some of this information may be entitled to confidential treatment. The information has been submitted to EPA under sections 3, 4, 6, and 7 of FIFRA and under sections 408 and 409 of FFDCA.

In accordance with the requirements of 40 CFR 2.307(h)(3), the contract with Ace Info Solutions, Inc., prohibits use of the information for any purpose not specified in this contract; prohibits disclosure of the information to a third party without prior written approval from the Agency; and requires that each official and employee of the contractor sign an agreement to protect the information from unauthorized release and to handle it in accordance with the *FIFRA Information Security Manual*. In addition, Ace Info Solutions, Inc., is required to submit for EPA approval a security plan under which any CBI will be secured and protected against unauthorized release or compromise. No information will be provided to Ace Info Solutions, Inc., until the requirements in this document have been fully satisfied. Records of information provided to Ace Info Solutions, Inc., will be maintained by the EPA Project Officer for this contract. All information supplied to Ace Info Solutions, Inc., by EPA for use in connection with this contract will be returned to EPA when Ace Info Solutions, Inc., has completed its work.

## List of Subjects

Environmental protection, Business and industry, Government contracts, Government property, Security measures.

Dated: December 3, 2008.

**Kathryn Bouve**

*Acting Director, Office of Pesticide Programs.*

[FR Doc. E8–29465 Filed 12–16–08; 8:45 am]

**BILLING CODE 6560–50–S**

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OW–2008–0719, FRL–8753–1]**

## Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; National Pollutant Discharge Elimination System (NPDES) Program (Renewal); EPA ICR No. 0229.19; OMB Control No. 2040–0004

**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. This ICR describes the nature of the information collection and its estimated burden and cost.

**DATES:** Additional comments may be submitted on or before January 16, 2009.

**ADDRESSES:** Submit your comments, referencing Docket ID No. EPA–HQ–OW–2008–0719 to (1) EPA online using FDMS (our preferred method), by e-mail to *ow-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Water Docket, Mail Code 28221T, 1200 Pennsylvania Ave., 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:** Amelia Letnes, State and Regional Branch, Water Permits Division, OWM Mail Code: 4203M, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* (202) 564–5627; *e-mail address: letnes.amelia@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 September 29, 2008 (73 FR 56568), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received one comment during the comment period, which is address in the ICR supporting statement. 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–OW–2008–0719, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the Water 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 8:30 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 Water Docket is 202–566–2426.

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 ''search,'' then key in the docket ID number identified in this document. 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, 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:* National Pollutant Discharge Elimination System (NPDES) Program (Renewal).

*ICR Number:* EPA ICR No. 0229.19, OMB Control No. 2040–0004.

*ICR Status:* This ICR is currently scheduled to expire on December 31, 2008. 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 purpose of this ICR is to consolidate, streamline, and update EPA's NPDES-related ICRs into the currently approved ICR for NPDES and Sewage Sludge Monitoring Reports (OMB Control No.: 2040–0004). EPA identified 15 NPDES-related ICRs consisting of program-based (i.e., Pretreatment Program), activity-based (i.e., Applications, Discharge Monitoring Reports [DMRs]), and rule-based (i.e., Cooling Water Intake-Phase II, Stormwater Program Phase II) ICRs. Historically, EPA identified the five activity-based ICRs as representing the base NPDES program. Those ICRs include: (1) Applications ICR (OMB Control No. 2040–0086); (2) DMR ICR (OMB Control No. 2040–0004); (3) Modification/Variance ICR (OMB Control No. 2040–0068); (4) Compliance Assessment/Certification ICR (OMB Control No. 2040–0110); and (5) State Program ICR (OMB Control No. 2040–0057). Several additional ICRs include activities that contain similar activities to those identified in the five base NPDES program ICRs and as such, are being consolidated into this ICR. Those four ICRs include: (1) Stormwater Program Phase II (OMB Control No. 2040–0211); (2) Stormwater discharges associated with construction activities (OMB Control No. 2040–0188); (3) CSO Control Policy (OMB Control No. 2040–0170); and (4) NPDES Great Lakes Water Quality Guidance (OMB Control No. 2040–0180). In addition, the revised ICR accounts for the burden related to EPA's Eligible Commercial and Other Non-recreational Vessels General Permit.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 3.2 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:* Facilities required to have NPDES permit coverage, including but not limited to publicly owned treatment works (POTWs), privately owned treatment works (PrOTWs), manufacturing and commercial dischargers, mining operation, Concentrated Animal Feeding Operations (CAFOs), stormwater dischargers, and vessels.

*Estimated Number of Respondents:* 565,432 (564,814 facilities and 618 States/Tribes/Territories).

*Frequency of Response:* Once, every five years, annually, semi-annually, quarterly, bimonthly, monthly, biweekly, weekly, daily, ongoing, occasionally/as needed.

*Estimated Total Annual Hour Burden:* 30,943,308 hours.

*Estimated Total Annual Cost:* $1,403,683,489, includes $211,074 annualized capital costs and $18,397,153 annualized O&M costs.

*Changes in the Estimates:* There is an increase of 16,749,765 hours in this ICR, reflecting the consolidation of eight additional ICRs. In addition, the revised ICR accounts for the burden related to EPA's Eligible Commercial and Other Non-recreational Vessels General Permit. The current burden approved by OMB for the ICRs being consolidated is 31,342,736 hours. This consolidated ICR estimates a total burden that is 399,428 hours less than the currently approved burden for the same nine NPDES ICRs. This decrease in burden corresponds to 1.3 percent of the overall burden. The main overarching reason for the change in burden is EPA's continuous effort to improve the quality of data in its PCS, ICIS-NPDES, and stormwater databases. This change reflects more accurate data rather than a significant change in the number of permits actually administered. Some specific changes with significant impact on the overall result are: (1) Previous NPDES Modification and Variance Requests ICR (OMB Control No. 2040–0068) did not account for the burden related to standard permit conditions to all types of permittees. EPA is now correcting this and assuming that all permittees have the potential to incur time to report planned facility changes, anticipated noncompliances, facility and permit transfers, and inaccurate previous information. (2) In the previous Applications for the NPDES Discharge Permits and the Sewage Sludge Management Permits ICR (OMB Control No. 2040–0086), EPA assumed that the burden for Phase I MS4s to renew their permits was the same as the

burden estimated for a first time permit application. As specified in EPA's Interpretive Policy Memorandum (61 FR 41698), Phase I MS4s may use the fourth year annual report, which emphasizes changes to the stormwater management program, with the additional required basic information, as the MS4 permit reapplication. EPA has adjusted the burden assumptions, which significantly reduces the burden for permittees and states resulting from permit reapplication for Phase I MS4s.

Dated: December 11, 2008.

**Joseph A. Sierra,**

*Acting Director, Collection Strategies Division.*

[FR Doc. E8–29964 Filed 12–16–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2003–0034; FRL–8753–2]**

## Agency Information Collection Activities; Proposed Collection; Comment Request; Reporting Requirements Under EPA's Voluntary Aluminum Industrial Partnership (VAIP); EPA ICR No. 1867.04, OMB Control No. 2060–0411

**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 February 28, 2009. 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 February 17, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OAR–2003–0034, 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 and Radiation Docket and Information Center, Environmental Protection Agency, *Mailcode:* 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA Headquarters West Building, Room 3334, 1301 Constitution Avenue, 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-OAR–2003–0034 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. 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:** Sally Rand, Climate Change Division, Office of Atmospheric Programs, 6207J, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* 202–343–9739; *fax number:* 202–343–2202; *e-mail address: rand.sally@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–OAR–2003–0034, 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 *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?**

*Docket ID No. EPA–HQ–OAR–2003–0034*

*Affected entities:* Entities potentially affected by this action are those engaged in primary aluminum production.

*Title:* Reporting Requirements under the Voluntary Aluminum Industrial Partnership (VAIP).

*ICR numbers:* EPA ICR No. 1867.04, OMB Control No. 2060–0411.

*ICR status:* This ICR is currently scheduled to expire on February 28, 2008. 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:* EPA's Voluntary Aluminum Industrial Partnership (VAIP) was initiated in 1995 and is an important voluntary program contributing to the overall reduction in emissions of greenhouse gases. This program focuses on reducing direct greenhouse gas emissions including perfluorocarbon (PFC) and carbon dioxide ($CO_2$) emissions from the production of primary aluminum. Seven of the eight U.S. producers of primary aluminum participate in this program. PFCs are very potent greenhouse gases with global warming potentials several thousand times that of carbon dioxide and they persist in the atmosphere for thousands of years. $CO_2$ is emitted from consumption of the carbon anode. EPA has developed this ICR to renew authorization to collect information from companies in the VAIP. Participants voluntarily agree to the following: Designating a VAIP liaison; undertaking technically feasible and cost-effective actions to reduce PFC and direct $CO_2$ emissions; and reporting to EPA, on an annual basis, the PFC and $CO_2$ emissions or production parameters used to estimate emissions. The information contained in the annual reports of VAIP members is used by EPA to assess the success of the program in achieving its goals. The information contained in the annual reports may be considered confidential business information and is maintained as such.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 90.4 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.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

*Estimated total number of potential respondents:* 7.

*Frequency of response:* Annual.

*Estimated total average number of responses for each respondent:* one per respondent per year.

*Estimated total annual burden hours:* 90.4 hours.

*Estimated total annual costs:* $47,054. This includes an estimated burden cost of $47,054 and an estimated cost of $0 for capital investment or maintenance and operational costs.

**Are There Changes in the Estimates From the Last Approval?**

There is a decrease of 8 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. This decrease reflects EPA's revised estimates, the number of hours associated with additional activities such as partnership meetings which has decreased from 16.5 hours to 8.5.hours with a corresponding decrease in the associated burden. This change is an adjustment due the reduced frequency of partnership meetings and the use of teleconferencing.

**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: December 4, 2008.

**Dina Kruger,**

*Director, Climate Protection Division.*

[FR Doc. E8–29963 Filed 12–16–08; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2007–0990; FRL–8393–2]**

## Flumetralin Reregistration Eligibility Decision; Notice of Availability

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the availability of EPA's Reregistration Eligibility Decision (RED) for the pesticide flumetralin, and opens a public comment period on this document. The Agency's risk assessments and other related documents also are available in the flumetralin Docket. Flumetralin is a plant growth regulator registered for use only on tobacco. It is used to control axillary bud (sucker) growth on tobacco plants. There are no food uses and there are no residential uses. EPA has reviewed flumetralin through the public participation process that the Agency uses to involve the public in developing pesticide reregistration and tolerance reassessment decisions. Through these programs, EPA is ensuring that all pesticides meet current health and safety standards.

**DATES:** Comments must be received on or before January 16, 2009.

**ADDRESSES:** Submit your comments, identified by docket identification (ID)

number EPA–HQ–OPP–2007–0990, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions*: Direct your comments to docket ID number EPA–HQ–OPP–2007–0990. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:**

Katherine StClair, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 347–8778; fax number: (703) 308–7070; e-mail address: stclair.katherine@*epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

### *B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed 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:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Background

### *A. What Action is the Agency Taking?*

Under section 4 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is reevaluating existing pesticides to ensure that they meet current scientific and regulatory standards. EPA has completed a RED for the pesticide, flumetralin under section 4(g)(2)(A) of FIFRA. Flumetralin is a plant growth regulator registered for use only on tobacco. It is used to control axillary bud (sucker) growth on tobacco plants. There are no food uses and there are no residential uses. EPA has determined that the data base to support reregistration is substantially complete and that products containing flumetralin are eligible for reregistration, provided the risks are mitigated either in the manner described in the RED or by another means that achieves equivalent risk reduction. Upon submission of any required product specific data under section 4(g)(2)(B) of FIFRA and any necessary changes to the registration and labeling (either to address concerns identified in the RED or as a result of product specific data), EPA will make a final reregistration decision under section 4(g)(2)(C) of FIFRA for products containing flumetralin.

Although the flumetralin RED was signed on September 28, 2007, certain components of the document, which did

not affect the final regulatory decision, were undergoing final editing at that time. These components, including the list of additional generic data requirements, summary of labeling changes, appendices, and other relevant information, have been added to the flumetralin RED document.

EPA is applying the principles of public participation to all pesticides undergoing reregistration and tolerance reassessment. The Agency's Pesticide Tolerance Reassessment and Reregistration; Public Participation Process, published in the **Federal Register** on May 14, 2004, (69 FR 26819) (FRL–7357–9) explains that in conducting these programs, EPA is tailoring its public participation process to be commensurate with the level of risk, extent of use, complexity of issues, and degree of public concern associated with each pesticide. Due to its uses, risks, and other factors, flumetralin was reviewed through the modified 4–Phase process. Through this process, EPA worked extensively with stakeholders and the public to reach the regulatory decisions for flumetralin.

The reregistration program is being conducted under congressionally mandated time frames, and EPA recognizes the need both to make timely decisions and to involve the public. The Agency is issuing the flumetralin RED for public comment. This comment period is intended to provide an additional opportunity for public input and a mechanism for initiating any necessary amendments to the RED. All comments should be submitted using the methods in **ADDRESSES**, and must be received by EPA on or before the closing date. These comments will become part of the Agency Docket for flumetralin. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

The Agency will carefully consider all comments received by the closing date and will provide a Response to Comments Memorandum in the Docket and regulations.gov. If any comment significantly affects the document, EPA also will publish an amendment to the RED in the **Federal Register**. In the absence of substantive comments requiring changes, the flumetralin RED will be implemented as it is now presented.

*B. What is the Agency's Authority for Taking this Action?*

Section 4(g)(2) of FIFRA, as amended, directs that, after submission of all data concerning a pesticide active ingredient, the Administrator shall determine whether pesticides containing such active ingredient are eligible for reregistration, before calling in product specific data on individual end-use products and either reregistering products or taking other ''appropriate regulatory action.''

**List of Subjects**

Environmental protection, Pesticides and pests.

Dated: December 11, 2008.

**Peter Caulkins,**

*Acting Director, Special Review and Reregistration Division, Office of Pesticide Programs.*

[FR Doc. E8–29972 Filed 12–16–08; 8:45 am]

**BILLING CODE 6560–50–S**

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2008–0859; FRL–8392–9]**

## FIFRA Scientific Advisory Panel; Notice of Public Meeting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** There will be a 2–day meeting of the Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel (FIFRA SAP) to consider and review Scientific Issues Associated with Designating a Prion as a ''Pest'' under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and Related Efficacy Test Methods.

**DATES:** The meeting will be held on March 31 and April 1, 2009, from approximately 8:30 a.m. to 5 p.m, eastern time.

*Comments.* The Agency encourages that written comments be submitted by March 17, 2009, and requests for oral comments be submitted by March 24, 2009. However, written comments and requests to make oral comments may be submitted until the date of the meeting, but anyone submitting written comments after March 17, 2009, should contact the Designated Federal Official (DFO) listed under **FOR FURTHER INFORMATION CONTACT.** For additional instructions, see Unit I.C. of the **SUPPLEMENTARY INFORMATION**.

*Nominations.* Nominations of candidates to serve as ad hoc members of the FIFRA SAP for this meeting should be provided on or before December 29, 2008.

*Special accommodations.* For information on access or services for individuals with disabilities, and to request accommodation of a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

**ADDRESSES:** The meeting will be held at the Environmental Protection Agency, Conference Center, Lobby Level, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA 22202.

*Comments.* Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0859, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions.* Direct your comments to docket ID number EPA–HQ–OPP–2008–0859. If your comments contain any information that you consider to be CBI or otherwise protected, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting your comments. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends

that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

*Nominations, requests to present oral comments, and requests for special accommodations*. Submit nominations to serve as ad hoc members of the FIFRA SAP, requests for special seating accommodations, or requests to present oral comments to the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

**FOR FURTHER INFORMATION CONTACT:** Myrta R. Christian, DFO, Office of Science Coordination and Policy (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8498; fax number: (202) 564–8382; e-mail address: *christian.myrta@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

This action is directed to the public in general. This action may, however, be of interest to persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA), FIFRA, and the Food Quality Protection Act of 1996 (FQPA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

### *B. What Should I Consider as I Prepare My Comments for EPA?*

When submitting comments, remember to:

1. Identify the document by docket ID number and other identifying information subject heading, **Federal Register** date and page number.
2. 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.
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.

### *C. How May I Participate in this Meeting?*

You may participate in this meeting by following the instructions in this unit. To ensure proper receipt by EPA, it is imperative that you identify docket ID number EPA–HQ–OPP–2008–0859 in the subject line on the first page of your request.

1. *Written comments*. The Agency encourages that written comments be submitted, using the instructions in **ADDRESSES**, no later than March 17, 2009, to provide the FIFRA SAP the time necessary to consider and review the written comments. Written comments are accepted until the date of the meeting, but anyone submitting written comments after March 17, 2009, should contact the DFO listed under **FOR FURTHER INFORMATION CONTACT.** Anyone submitting written comments at the meeting should bring 30 copies for distribution to the FIFRA SAP.

2. *Oral comments*. The Agency encourages that each individual or group wishing to make brief oral comments to the FIFRA SAP submit their request to the DFO listed under **FOR FURTHER INFORMATION CONTACT** no later than March 24, 2009, in order to be included on the meeting agenda. Requests to present oral comments will be accepted until the date of the meeting and, to the extent that time permits, the Chair of the FIFRA SAP may permit the presentation of oral comments at the meeting by interested persons who have not previously requested time. The request should identify the name of the individual making the presentation, the organization if any, the individual will represent, and any requirements for audiovisual equipment e.g., overhead projector, 35 mm projector, chalkboard. Oral comments before the FIFRA SAP are limited to approximately 5 minutes unless prior arrangements have been made. In addition, each speaker should bring 30 copies of his or her comments and presentation slides for distribution to the FIFRA SAP at the meeting.

3. *Seating at the meeting*. Seating at the meeting will be open and on a first-come basis.

4. *Request for nominations to serve as ad hoc members of the FIFRA SAP for this meeting*. As part of a broader process for developing a pool of candidates for each meeting, the FIFRA SAP staff routinely solicits the stakeholder community for nominations of prospective candidates for service as ad hoc members of the FIFRA SAP. Any interested person or organization may nominate qualified individuals to be considered as prospective candidates for a specific meeting. Individuals nominated for this meeting should have expertise in one or more of the following areas: Microbiology, antimicrobial efficacy testing, prions (TSE agents). Nominees should be scientists who have sufficient professional qualifications, including training and experience, to be capable of providing expert comments on the scientific issues for this meeting. Nominees should be identified by name, occupation, position, address, and telephone number. Nominations should be provided to the DFO listed under **FOR FURTHER INFORMATION CONTACT** on or before December 31, 2008. The Agency will consider all nominations of prospective candidates for this meeting that are received on or before this date. However, final selection of ad hoc members for this meeting is a discretionary function of the Agency.

The selection of scientists to serve on the FIFRA SAP is based on the function of the panel and the expertise needed to address the Agency's charge to the panel. No interested scientists shall be ineligible to serve by reason of their membership on any other advisory committee to a Federal department or agency or their employment by a Federal department or agency except the EPA. Other factors considered during

the selection process include availability of the potential panel member to fully participate in the panel's reviews, absence of any conflicts of interest or appearance of lack of impartiality, independence with respect to the matters under review, and lack of bias. Although financial conflicts of interest, the appearance of lack of impartiality, lack of independence, and bias may result in disqualification, the absence of such concerns does not assure that a candidate will be selected to serve on the FIFRA SAP. Numerous qualified candidates are identified for each panel. Therefore, selection decisions involve carefully weighing a number of factors including the candidates' areas of expertise and professional qualifications and achieving an overall balance of different scientific perspectives on the panel. In order to have the collective breadth of experience needed to address the Agency's charge for this meeting, the Agency anticipates selecting approximately 8 to 10 ad hoc scientists.

FIFRA SAP members are subject to the provisions of 5 CFR part 2634, Executive Branch Financial Disclosure, as supplemented by the EPA in 5 CFR part 6401. In anticipation of this requirement, prospective candidates for service on the FIFRA SAP will be asked to submit confidential financial information which shall fully disclose, among other financial interests, the candidate's employment, stocks and bonds, and where applicable, sources of research support. The EPA will evaluate the candidates financial disclosure form to assess whether there are financial conflicts of interest, appearance of a lack of impartiality or any prior involvement with the development of the documents under consideration (including previous scientific peer review) before the candidate is considered further for service on the FIFRA SAP. Those who are selected from the pool of prospective candidates will be asked to attend the public meetings and to participate in the discussion of key issues and assumptions at these meetings. In addition, they will be asked to review and to help finalize the meeting minutes. The list of FIFRA SAP members participating at this meeting will be posted on the FIFRA SAP website at *http://epa.gov/scipoly/sap* or may be obtained from the OPP Regulatory Public Docket at *http://www.regulations.gov*.

## II. Background

### *A. Purpose of the FIFRA SAP*

The FIFRA SAP serves as the primary scientific peer review mechanism of EPA's Office of Prevention, Pesticides and Toxic Substances (OPPTS) and is structured to provide scientific advice, information and recommendations to the EPA Administrator on pesticides and pesticide-related issues as to the impact of regulatory actions on health and the environment. The FIFRA SAP is a Federal advisory committee established in 1975 under FIFRA that operates in accordance with requirements of the Federal Advisory Committee Act. The FIFRA SAP is composed of a permanent panel consisting of seven members who are appointed by the EPA Administrator from nominees provided by the National Institutes of Health and the National Science Foundation. FIFRA, as amended by FQPA, established a Science Review Board consisting of at least 60 scientists who are available to the Scientific Advisory Panel on an ad hoc basis to assist in reviews conducted by the Scientific Advisory Panel. As a peer review mechanism, the FIFRA SAP provides comments, evaluations and recommendations to improve the effectiveness and quality of analyses made by Agency scientists. Members of the FIFRA SAP are scientists who have sufficient professional qualifications, including training and experience, to provide expert advice and recommendation to the Agency.

### *B. Public Meeting*

EPA is developing a Notice of Proposed Rulemaking (NPRM) that describes how EPA proposes to revise its regulations to include ≥prion≥ in the definition of ≥pests≥ that fall under the jurisdiction of FIFRA. The work group for the NPRM drafted a ≥white paper≥ entitled, ≥Scientific Information Concerning the Issue of Whether Prions Are a 'Pest' under the Federal Insecticide, Fungicide, and Rodenticide Act.≥ The purpose of this paper was to provide the work group with sound knowledge about the scientific issues that are relevant to the proposed rule. Although the EPA's NPRM will be focused also on legal and policy matters and not exclusively on scientific discussion, EPA will nevertheless present this paper to the SAP for review as to the completeness and accuracy of its characterization of the scientific issues. EPA is not asking the SAP to interpret Congress' intent in drafting FIFRA.

In parallel with the NPRM, EPA is also developing guidance on a test protocol for measuring the performance of antimicrobial pesticides intended to reduce the infectivity of prions (TSE agents) on inanimate surfaces (hereafter referred to as a ≥prion-related claim≥). This draft document is entitled, ≥EPA Guidance for Efficacy Test Methods for Products Bearing Prion-Related Claims.≥ This guidance is needed because the proposed rule will require that antimicrobial products with prion-related claims be supported by valid efficacy data acceptable to EPA prior to registration. Although this guidance is not part of the rulemaking per se, it is important to the implementation of the rule, so EPA will present it to the SAP for comment on the scientific issues.

### *C. FIFRA SAP Documents and Meeting Minutes*

EPA's background paper, related supporting materials, charge/questions to the FIFRA SAP, FIFRA SAP composition (i.e., members and ad hoc members for this meeting), and the meeting agenda will be available by mid-March 2009. In addition, the Agency may provide additional background documents as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available electronically, at *http://www.regulations.gov* and the FIFRA SAP homepage at *http://www.epa.gov/scipoly/sap*.

The FIFRA SAP will prepare meeting minutes summarizing its recommendations to the Agency approximately 90 days after the meeting. The meeting minutes will be posted on the FIFRA SAP website or may be obtained from the OPP Regulatory Public Docket at *http://www.regulations.gov*.

## List of Subjects

Environmental protection, Pesticides and pests.

Dated: December 10, 2008

**Elizabeth Resek,**

*Acting Director, Office of Science Coordination and Policy.*

[FR Doc. E8–29977 Filed 12–16–08; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2008–0766; FRL–8394–9]**

## Registration Review; Mineral Acids Docket Opened for Review and Comment

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has established registration review dockets for the pesticides listed in the table in Unit III.A. With this document, EPA is opening the public comment period for these registration reviews. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Registration review dockets contain information that will assist the public in understanding the types of information and issues that the Agency may consider during the course of registration reviews. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

**DATES:** Comments must be received on or before March 17, 2009.

**ADDRESSES:** Submit your comments identified by the docket identification (ID) number for the specific pesticide of interest provided in the table in Unit III.A., by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions*: Direct your comments to the docket ID numbers listed in the table in Unit III.A. for the pesticides you are commenting on. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** *For pesticide specific information contact*: The Chemical Review Manager identified in the table in Unit III.A. for the pesticide of interest.

*For general information contact*: Kevin Costello, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5026; fax number: (703) 308–8090; e-mail address: *costello.kevin @epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farmworker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

### *B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed 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:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice*. EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this document, compared to the general population.

## II. Authority

EPA is initiating its reviews of the pesticides identified in this document pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA section 3(a), a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

## III. Registration Reviews

### *A. What Action is the Agency Taking?*

As directed by FIFRA section 3(g), EPA is reviewing the pesticide registrations identified in the table in this unit to assure that they continue to satisfy the FIFRA standard for registration—that is, they can still be used without unreasonable adverse effects on human health or the environment. A pesticide's registration review begins when the Agency establishes a docket for the pesticide's registration review case and opens the docket for public review and comment. At present, EPA is opening a registration review docket for the case identified in the following table.

TABLE—REGISTRATION REVIEW DOCKETS OPENING

| Registration Review Case Name and Number | Docket ID Number | Chemical Review Manager, Telephone Number, E-mail Address |
|---|---|---|
| Mineral Acids | EPA–HQ–OPP–2008–0766 | Eliza Blair,<br>(703) 308-7279,<br>*blair.eliza@epa.gov* |

### *B. Docket Content*

1. *Review dockets*. The registration review dockets contain information that the Agency may consider in the course of the registration review. The Agency may include information from its files including, but not limited to, the following information:

- An overview of the registration review case status.
- A list of current product registrations and registrants.
- **Federal Register** notices regarding any pending registration actions.
- **Federal Register** notices regarding current or pending tolerances.
- Risk assessments.
- Bibliographies concerning current registrations.
- Summaries of incident data.
- Any other pertinent data or information.

Each docket contains a document summarizing what the Agency currently knows about the pesticide case and a preliminary work plan for anticipated data and assessment needs. Additional documents provide more detailed information. During this public comment period, the Agency is asking that interested persons identify any additional information they believe the Agency should consider during the registration reviews of these pesticides. The Agency identifies in each docket the areas where public comment is specifically requested, though comment in any area is welcome.

2. *Other related information*. More information on these cases, including the active ingredients for each case, may be located in the registration review schedule on the Agency's website at *http://www.epa.gov/oppsrrd1/registration_review/schedule.htm*. Information on the Agency's registration review program and its implementing regulation may be seen at *http://www.epa.gov/oppsrrd1/registration_review*.

3. *Information submission requirements*. Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

- To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.
- The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audiographic or videographic record. Written material may be submitted in paper or electronic form.
- Submitters must clearly identify the source of any submitted data or information.
- Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.
- As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

## List of Subjects

Environmental protection, Pesticides and pests, antimicrobials, mineral acids.

Dated: December 7, 2008.

**Joan Harrigan-Farrelly,**

*Director, Antimicrobials Division, Office of Pesticide Programs.*

[FR Doc. E8–29975 Filed 12–16–08; 8:45 am]

BILLING CODE 6560–50–S

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–OW–8752–3]**

## National Recommended Draft Water Quality Criteria for Acrolein

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of availability of draft criteria and request for scientific views.

**SUMMARY:** Pursuant to section 304(a) of the Clean Water Act (CWA), the Environmental Protection Agency (EPA) is announcing the availability of draft national recommended water quality criteria for the protection of aquatic life for acrolein. The draft criteria are based on EPA's *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses (1985), (EPA/R–85–100).* EPA's recommended section 304(a) water quality criteria provide guidance to States and authorized Tribes in adopting water quality standards for protecting aquatic life and human health and provide guidance to EPA for promulgating Federal regulations under CWA section 303(c), when such action is necessary.

**DATES:** Scientific views must be received on or before March 17, 2009. Comments postmarked after this date may not be considered.

**ADDRESSES:** Submit your scientific views, identified by Docket ID No. EPA–HQ–OW–2008–0795, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: OW-Docket@epa.gov.*
- *Mail:* U.S. Environmental Protection Agency; EPA Docket Center (EPA/DC) Water Docket, MC 2822T; 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- *Hand Delivery:* EPA Docket Center, 1301 Constitution Ave, NW., EPA West, 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–OW–2008–0795. 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.*

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 Office of Water Docket/EPA/DC, 1301 Constitution Ave, NW., EPA West, Room 3334, Washington, DC. This Docket Facility is open from 8:30 am until 4:30 pm, EST, Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Office of Water is (202) 566–2426.

**FOR FURTHER INFORMATION CONTACT:** Dr. Frank Gostomski, Health and Ecological Criteria Division (4304T), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460; (202) 566–1105; *gostomski.frank@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. What Are Water Quality Criteria?

Water quality criteria are scientifically derived numeric values that protect aquatic life or human health from the deleterious effects of pollutants in ambient water.

Section 304(a)(1) of the Clean Water Act requires EPA to develop and publish and, from time to time, revise, criteria for water quality accurately reflecting the latest scientific knowledge. Water quality criteria developed under section 304(a) are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects. Section 304(a) criteria do not reflect consideration of economic impacts or the technological feasibility of meeting the chemical concentrations in ambient water.

Section 304(a) criteria provide guidance to States and authorized Tribes in adopting water quality standards that ultimately provide a basis for controlling discharges or releases of pollutants. The criteria also provide guidance to EPA when promulgating federal regulations under section 303(c) when such action is necessary. Under the CWA and its implementing regulations, States and authorized Tribes are to adopt water quality criteria to protect designated uses (e.g., public water supply, recreational use, industrial use). EPA's recommended water quality criteria do not substitute for the CWA or regulations, nor are they regulations themselves. Thus, EPA's recommended criteria do not impose legally binding requirements. States and authorized Tribes have the discretion to adopt, where appropriate, other scientifically defensible water quality standards that differ from these recommendations.

### II. What Are the Acrolein Criteria?

EPA is today publishing draft national recommended water quality criteria (NRWQC) for protecting aquatic life for acrolein. These draft criteria are based on EPA's *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses* (1985), (EPA/R–85–100). These Guidelines describe the Agency's current approach for deriving national recommended water quality criteria to protect aquatic life. Toxicity data and other information on the effects of acrolein were obtained from reliable sources and subjected to both internal and external peer review.

*Freshwater:* Freshwater aquatic organisms and their uses should not be affected unacceptably if the acute (one-hour average) concentration of acrolein does not exceed 3.0 ug/l more than once every three years on the average, and if the chronic (four-day average) concentration of acrolein does not exceed 3.0 ug/l more than once every three years on the average.

*Saltwater:* Saltwater criteria cannot be derived for acrolein at this time because of a lack of acute and chronic toxicity data.

### III. What Is the Relationship Between the Water Quality Criteria and State or Tribal Water Quality Standards?

As part of the water quality standards triennial review process defined in Section 303(c)(1) of the CWA, the States and authorized Tribes are responsible for maintaining and revising water quality standards. Water quality standards consist of designated uses, water quality criteria to protect those uses, a policy for antidegradation, and general policies for application and implementation. Section 303(c)(1) requires States and authorized Tribes to review and modify, if appropriate, their water quality standards at least once every three years.

States and authorized Tribes must adopt water quality criteria that protect designated uses. Protective criteria are based on a sound scientific rationale and contain sufficient parameters or constituents to protect the designated uses.

Consistent with 40 CFR131.21 [*see: EPA Review and Approval of State and Tribal Water Quality Standards* (65 FR 24641, April 27, 2000)], water quality criteria adopted by law or regulation by States and authorized Tribes prior to May 30, 2000, are in effect for CWA purposes unless superseded by federal regulations (*see,* for example, the *National Toxics Rule,* 40 CFR 131.36; *Water Quality Standards for Idaho,* 40 CFR 131.33). New or revised water quality criteria adopted into law or regulation by States and authorized Tribes on or after May 30, 2000 are in effect for CWA purposes only after EPA approval.

### IV. Where Can I Find More Information About Water Quality Criteria and Water Quality Standards?

For more information about water quality criteria and Water Quality Standards refer to the following: *Water Quality Standards Handbook* (EPA 823–B94–005a); *Advanced Notice of Proposed Rule Making (ANPRM),* (63 FR 36742); *Water Quality Criteria and Standards Plan—Priorities for the Future* (EPA 822–R–98–003); *Guidelines and Methodologies Used in the Preparation of Health Effects Assessment Chapters of the Consent Decree Water Criteria Documents* (45 FR 79347); *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* (2000), EPA–822–B–00–004); *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses* (EPA 822/R–85–100); *National Strategy for the Development of Regional Nutrient Criteria* (EPA 822–R–98–002); and *EPA Review and Approval of State and Tribal Water Quality Standards* (65 FR 24641).

You can find these publications through EPA's National Service Center for Environmental Publications (NSCEP, previously NCEPI) or on the Office of Science and Technology's Home-page (*http://www.epa.gov/waterscience*).

Dated: December 4, 2008.

**Ephraim S. King,**

*Director, Office of Science and Technology.*

[FR Doc. E8–29997 Filed 12–16–08; 8:45 am]

BILLING CODE 6560–50–P

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2008–0662; FRL–8391–7]**

## Pesticide Registration Review; New Dockets Opened for Review and Comment; Closure of the Mevinphos and Azinphos Methyl (AZM) Registration Review Cases

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has established registration review dockets for the pesticides listed in the table in Unit III.A. With this document, EPA is opening the public comment period for these registration reviews. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Registration review dockets contain information that will assist the public in understanding the types of information and issues that the Agency may consider during the course of registration reviews. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment. This document also announces the Agency's intent not to open a registration review docket for mevinphos. This pesticide does not currently have any actively registered pesticide products and is not, therefore, scheduled for review under the registration review program.

**DATES:** Comments must be received on or before March 17, 2009.

**ADDRESSES:** Submit your comments identified by the docket identification (ID) number for the specific pesticide of interest provided in the table in Unit III.A., by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions*: Direct your comments to the docket ID numbers listed in the table in Unit III.A. for the pesticides you are commenting on. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available

at *http://www.regulations.gov*. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** *For pesticide specific information contact*: The Chemical Review Manager identified in the table in Unit III.A. for the pesticide of interest.

*For general information contact*: Kevin Costello, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5026; fax number: (703) 308–8090; e-mail address: *costello.kevin @epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farmworker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

### *B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed 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:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice*. EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide(s) discussed in this document, compared to the general population.

## II. Authority

EPA is initiating its reviews of the pesticides identified in this document pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA section 3(a), a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

## III. Registration Reviews

### *A. What Action is the Agency Taking?*

As directed by FIFRA section 3(g), EPA is reviewing the pesticide registrations identified in the table in this unit to assure that they continue to satisfy the FIFRA standard for registration—that is, they can still be used without unreasonable adverse effects on human health or the environment. A pesticide's registration review begins when the Agency establishes a docket for the pesticide's registration review case and opens the docket for public review and comment. At present, EPA is opening registration review dockets for the cases identified in the following table.

TABLE—REGISTRATION REVIEW DOCKETS OPENING

| Registration Review Case Name and Number | Docket ID Number | Chemical Review Manager, Telephone Number, E-mail Address |
|---|---|---|
| 2-EEEBC; Case # 4031 | EPA–HQ–OPP–2008–0802 | Melanie Biscoe,<br>(703) 305–7106,<br>*biscoe.melanie@epa.gov* |

TABLE—REGISTRATION REVIEW DOCKETS OPENING—Continued

| Registration Review Case Name and Number | Docket ID Number | Chemical Review Manager, Telephone Number, E-mail Address |
|---|---|---|
| Chlorethoxyfos; Case # 7410 | EPA–HQ–OPP–2008–0843 | Kelly Ballard, (703) 305–8126, *ballard.kelly@epa.gov* |
| Ethoprop; Case # 0106 | EPA–HQ–OPP–2008–0560 | Monica Wait, (703) 347–8019, *wait.monica@epa.gov* |
| Imidacloprid; Case # 7605 | EPA–HQ–OPP–2008–0844 | Rusty Wasem, (703) 305–6979, *wasem.russell@epa.gov* |
| Iron salts; Case # 4058 | EPA–HQ–OPP–2008–0626 | Dana L. Friedman, (703) 347–8827, *friedman.dana@epa.gov* |
| Methamidophos; Case # 0043 | EPA–HQ–OPP–2008–0842 | Susan Bartow, (703) 603–0065, *bartow.susan@epa.gov* |
| Oxytetracycline; Case # 0655 | EPA–HQ–OPP–2008–0686 | José Gayoso, (703) 347–8652, *gayoso.jose@epa.gov* |
| Streptomycin; Case # 0169 | EPA–HQ–OPP–2008–0687 | José Gayoso, (703) 347–8652, *gayoso.jose@epa.gov* |
| Tebufenozide; Case # 7416 | EPA–HQ–OPP–2008–0824 | Rosanna Louie, (703) 308–0037, *louie.rosanna@epa.gov* |

The Agency is also announcing that it will not conduct a registration review for mevinphos (registration review case 0250) or for AZM (registration review case 0235). In October 2006, the Agency issued schedules for upcoming registration reviews and included mevinphos and AZM as pesticides scheduled for registration review. Since first identifying mevinphos as a registration review pesticide, the Agency has determined that there are no current mevinphos Section 3 or Section 24(c) registrations. In addition, on November 16, 2006, the Agency issued its final decision on AZM to phase out all remaining uses by September 30, 2012. Therefore, the Agency has determined that mevinphos and AZM are no longer subject to registration review. Registration review dockets will not be opened for mevinphos and AZM, and the mevinphos and AZM registration review cases have been closed pursuant to 40 CFR 155.42(c).

*B. Docket Content*

1. *Review dockets*. The registration review dockets contain information that the Agency may consider in the course of the registration review. The Agency may include information from its files including, but not limited to, the following information:

- An overview of the registration review case status.
- A list of current product registrations and registrants.
- **Federal Register** notices regarding any pending registration actions.
- **Federal Register** notices regarding current or pending tolerances.
- Risk assessments.
- Bibliographies concerning current registrations.
- Summaries of incident data.
- Any other pertinent data or information.

Each docket contains a document summarizing what the Agency currently knows about the pesticide case and a preliminary work plan for anticipated data and assessment needs. Additional documents provide more detailed information. During this public comment period, the Agency is asking that interested persons identify any additional information they believe the Agency should consider during the registration reviews of these pesticides. The Agency identifies in each docket the areas where public comment is specifically requested, though comment in any area is welcome.

2. *Other related information*. More information on these cases, including the active ingredients for each case, may be located in the registration review schedule on the Agency's website at *http://www.epa.gov/oppsrrd1/registration_review/schedule.htm*. Information on the Agency's registration review program and its implementing regulation may be seen at *http://www.epa.gov/oppsrrd1/registration_review*.

3. *Information submission requirements*. Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

- To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.
- The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audiographic or videographic record. Written material may be submitted in paper or electronic form.

- Submitters must clearly identify the source of any submitted data or information.
- Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.
- As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

**List of Subjects**

Environmental protection, Pesticides and pests.

Dated: December 9, 2008.

**Peter Aculkins,**

*Director, Special Review and Registration Division, Office of Pesticide Programs.*

[FR Doc. E8–29773 Filed 12–16–08; 8:45 am]

**BILLING CODE 6560–50–S**

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2008–0855; FRL–8394–3]**

## Registration Review; Citric Acid, and Salts Docket Opened for Review and Comment

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** EPA has established registration review dockets for the pesticides listed in the table in Unit III.A. With this document, EPA is opening the public comment period for these registration reviews. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Registration review dockets contain information that will assist the public in understanding the types of information and issues that the Agency may consider during the course of registration reviews. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

**DATES:** Comments must be received on or before March 17, 2009.

**ADDRESSES:** Submit your comments identified by the docket identification (ID) number for the specific pesticide of interest provided in the table in Unit III.A., by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions*: Direct your comments to the docket ID numbers listed in the table in Unit III.A. for the pesticides you are commenting on. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** *For pesticide specific information contact*: The Chemical Review Manager identified in the table in Unit III.A. for the pesticide of interest.

*For general information contact*: Kevin Costello, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5026; fax number: (703) 308–8090; e-mail address: *costello.kevin @epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farmworker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or

CD-ROM the specific information that is claimed 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:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

## II. Authority

EPA is initiating its reviews of the pesticides identified in this document pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA section 3(a), a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

## III. Registration Reviews

### *A. What Action is the Agency Taking?*

As directed by FIFRA section 3(g), EPA is reviewing the pesticide registrations identified in the table in this unit to assure that they continue to satisfy the FIFRA standard for registration—that is, they can still be used without unreasonable adverse effects on human health or the environment. A pesticide's registration review begins when the Agency establishes a docket for the pesticide's registration review case and opens the docket for public review and comment. At present, EPA is opening a registration review docket for the case identified in the following table.

TABLE—REGISTRATION REVIEW DOCKETS OPENING

| Registration Review Case Name and Number | Docket ID Number | Chemical Review Manager, Telephone Number, E-mail Address |
|---|---|---|
| Citric Acid, and Salts | EPA–HQ–OPP–2008–0855 | Heather Garvie,<br>(703) 308–0034,<br>*garvie.heather@*epa.gov |

### *B. Docket Content*

1. *Review dockets.* The registration review dockets contain information that the Agency may consider in the course of the registration review. The Agency may include information from its files including, but not limited to, the following information:

- An overview of the registration review case status.
- A list of current product registrations and registrants.
- **Federal Register** notices regarding any pending registration actions.
- **Federal Register** notices regarding current or pending tolerances.
- Risk assessments.
- Bibliographies concerning current registrations.
- Summaries of incident data.
- Any other pertinent data or information.

Each docket contains a document summarizing what the Agency currently knows about the pesticide case and a preliminary work plan for anticipated data and assessment needs. Additional documents provide more detailed information. During this public comment period, the Agency is asking that interested persons identify any additional information they believe the Agency should consider during the registration reviews of these pesticides. The Agency identifies in each docket the areas where public comment is specifically requested, though comment in any area is welcome.

2. *Other related information.* More information on these cases, including the active ingredients for each case, may be located in the registration review schedule on the Agency's website at *http://www.epa.gov/oppsrrd1/registration_review/schedule/htm.* Information on the Agency's registration review program and its implementing regulation may be seen at *http://www.epa.gov/oppsrrd1/registration_review.*

3. *Information submission requirements.* Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

- To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.
- The data or information submitted must be presented in a legible and

useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audiographic or videographic record. Written material may be submitted in paper or electronic form.

- Submitters must clearly identify the source of any submitted data or information.
- Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.
- As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

**List of Subjects**

Environmental protection, Pesticides and pests, antimicrobials, citric acid and salts

Dated: _____

_____

*Director, Antimicrobials Division, Office of Pesticide Programs.*

[FR Doc. E8–29974 Filed 12–16–08; 8:45 am]

BILLING CODE 6560–50–S

## OFFICE OF SCIENCE AND TECHNOLOGY POLICY

### Aeronautics Science and Technology Subcommittee, Committee on Technology, National Science and Technology Council; Notice of Meeting

**ACTION:** Notice of Meeting—Public Consultation on the National Aeronautics Research, Development, Test and Evaluation (RDT&E) Infrastructure Plan.

**SUMMARY:** The Aeronautics RDT&E Infrastructure Interagency Working Group (IIWG) of the Aeronautics Science and Technology Subcommittee (ASTS) of the National Science and Technology Council's (NSTC) Committee on Technology will hold a public meeting to discuss development of the National Aeronautics RDT&E Infrastructure Plan. Executive Order (E.O.) 13419—National Aeronautics Research and Development—signed December 20, 2006, calls for the development of this plan. The plan is to be guided by both the National Aeronautics Research and Development (R&D) Policy and the National Plan for Aeronautics R&D and Related Infrastructure that were developed by the NSTC and approved by the President in 2006 and 2007 respectively.

**DATES AND ADDRESSES:** The meeting will be held in conjunction with the 47th AIAA Aerospace Sciences Meeting at the Orlando World Center Marriott, 8701 World Center Drive, Orlando, Florida, 32821 on Thursday, January 8, 2009, from 3:30 p.m. to 5:30 p.m. in the Grand Ballroom 12 (Session 270–APA–36/GT–10). Information regarding the 47th AIAA Aerospace Sciences Meeting is available at the AIAA Web site: *http://www.aiaa.org.* Note: persons solely attending the ASTS public meeting do not need to register for the AIAA Meeting. There will be no admission charge for persons solely attending the public meeting.

**SUPPLEMENTARY INFORMATION:** E.O. 13419 and the National Aeronautics R&D Policy call for executive departments and agencies conducting aeronautics R&D to engage industry, academia and other non-Federal stakeholders in support of government planning and performance of aeronautics R&D. At this meeting, members of the IIWG and the specialized task forces that were established under the IIWG will discuss the structure and content to date of the National Aeronautics RDT&E Infrastructure Plan. The main purposes of the meeting are to: allow government representatives to provide the current status of the effort to develop the National Aeronautics RDT&E Infrastructure Plan; and, obtain information and comments from individuals regarding the aeronautics RDT&E infrastructure requirements to support the national aeronautics R&D goals and objectives related to mobility, national defense, aviation safety, and energy and the environment that are stated in the National Plan for Aeronautics R&D and Related Infrastructure. Additional information and links to E.O. 13419, the National Aeronautics R&D Policy, and the National Plan for Aeronautics R&D and Related Infrastructure are available by visiting the Office of Science and Technology Policy's NSTC Web site at: *http://www.ostp.gov/nstc/aeroplans* or by calling 202–456–6046.

**M. David Hodge,**

*Operations Manager, OSTP.*

[FR Doc. E8–29826 Filed 12–16–08; 8:45 am]

BILLING CODE 3170–W9–P

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

December 11, 2008.

**SUMMARY:** As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (Commission or FCC) invites the general public and other Federal agencies to comment on the following information collection(s). Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid OMB control number.

**DATES:** Written PRA comments should be submitted on or before January 16, 2009. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Submit your comments to Nicholas A. Fraser, Office of Management and Budget (e-mail address: *nfraser@omb.eop.gov*), and to the FCC's PRA mailbox (e-mail address: *PRA@fcc.gov*). Include in the e-mails the OMB control number of the collection as shown in the **SUPPLEMENTARY INFORMATION** section below or, if there is no OMB control number, the Title as shown in the **SUPPLEMENTARY**

**INFORMATION** section. If you are unable to submit your comments by e-mail contact the person listed below to make alternate arrangements.

**FOR FURTHER INFORMATION CONTACT:** For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov*.

To view or obtain a copy of this information collection request (ICR) submitted to OMB: (1) Go to the OMB/GSA Web page *http://reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* None.

*Title:* Information Collection for the Preparation of Annual Reports to Congress regarding the Collection and Expenditure of Fees or Charges for the Support or Implementation of 911 or Enhanced 911 (E911) Services as set forth in the NET 911 Improvement Act of 2008, Public Law 110–283.

*Form No.:* Not Applicable.

*Type of Review:* New collection.

*Respondents:* States (50), District of Columbia (1), inhabited U.S. Territories and possessions (5).

*Number of Respondents:* 56 respondents and responses.

*Estimated Time Per Response:* Ten to fifty hours.

*Frequency of Response:* Annual reporting.

*Obligation to Respond:* Voluntary.

*Total Annual Burden:* 560 to 2800 hours.

*Total Annual Cost:* None.

*Privacy Act Impact Assessment:* This information collection does not affect individuals or households, and therefore a privacy impact assessment is not required.

*Nature and Extent of Confidentiality:* There are no assurances of confidentiality provided to respondents. The Commission's rules address the issue of confidentiality at sections 0.457, 0.459, and 0.461 (47 CFR 0.457, 0.459, and 0.461). These rules address access to records that are not routinely available to the public, requests and requirements that materials submitted to the Commission be withheld from public inspection, and requests for inspection of materials not routinely available for public inspection.

*Needs and Uses:* The Federal Communications Commission (Commission) is directed by statute (New and Emerging Technologies 911 Improvement Act of 2008, Pub. L. No. 110–283, 122 Stat. 2620 (2008) (NET 911 Act)) to submit annually a ''Fee Accountability Report'' to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representative ''detailing the status in each State of the collection and distribution [of] fees or charges'' for ''the support or implementation of 911 or enhanced 911 services,'' including ''findings on the amount of revenues obligated or expended by each State or political subdivision thereof for any purpose other than the purpose for which any such fees or charges are specified.'' (NET 911 Act, 122 Stat. at 2622)

The statute directs the Commission to submit its first annual report within one year after the date of enactment of the NET 911 Act. (NET 911 Act, 122 Stat. at 2622) Given that the NET 911 Act was enacted on July 23, 2008, the first annual report is due to Congress on July 22, 2009. The information sought by the Commission in this information collection is essential to its ability to prepare the Fee Accountability Report that it is obliged by the NET 911 Act to submit to Congress.

*Description of Information Collection:* The Commission will collect information for the annual preparation of the Fee Accountability Report via a Web-based survey that appropriate State officials (e.g., State 911 Administrators and Budget Officials) will be able to access to submit data pertaining to the collection and distribution of fees or charges for the support or implementation of 911 or enhanced 911 services. As described in our 60-day notice [73 FR 56583], this information will include data regarding whether the respective state collects and distributes such fees or charges, the nature (e.g., the amount and method of assessment of collection) and the amount of revenues obligated or expended for any purpose other than the purpose for which any such 911 or enhanced 911 service fees or charges are specified. More specifically, the survey would request information regarding whether the respective state has established a funding mechanism designated for or imposed for the purposes of 911 or enhanced 911 implementation (including a citation to the legal authority for such mechanism), the amount of the fee or charge, the total amount collected from the surcharge, the process by which funds collected for the purpose of 911 or enhanced 911 implementation are made available to localities, whether the state has established written criteria on the allowable uses of the collected funds (and the legal citation to any such criteria), what entity in the state has authority to approve the expenditure of funds collected for purposes of 911 or enhanced 911, a description of the major aspects of any oversight procedures, if established, whether all of the funds collected for the purposes of 911 or enhanced 911 implementation have been made available or used for the purposes designated by the funding mechanism or otherwise used to support the implementation of 911 or enhanced 911, what amount of funds collected for purposes of 911 or enhanced 911 implementation were made available or used for any purposes other than the ones designated by the funding mechanism or otherwise unrelated to 911 or enhanced 911 implementation, and the unrelated purposes for which the funds collected for the purposes of 911 or 911 implementation were made available or used. Respondents may also provide any other comments on their funding mechanism for 911 or enhanced 911 implementation they wish to provide.

Consistent with Section 6(f) of the NET 911 Act, the Commission will request that state officials report this information with respect to the fees and charges in connection with implementation of 911 or enhanced 911 services within their state, including any political subdivision, Indian tribe and/or village and regional corporation serving any region established pursuant to the Alaska Native Claims Settlement Act that otherwise lie within their state boundaries. In addition, consistent with the definition of ''State'' set out in 47 U.S.C. 153(40) of the Communications Act, the Commission will collect this information from states as well as the District of Columbia and the inhabited U.S. Territories and possessions.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. E8–29915 Filed 12–16–08; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Sunshine Act Meeting; Open Commission Meeting; Thursday, December 18, 2008

December 11, 2008.

The Federal Communications Commission will hold an Open Meeting on the subjects listed below on Thursday, December 18, 2008, which is scheduled to commence at 10 a.m. in Room TW–C305, at 445 12th Street, SW., Washington, DC.

| Item No. | Bureau | Subject |
|---|---|---|
| 1 | Office of Engineering and Technology & Wireless Tele-Communications. | *Title:* Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band (WT Docket No. 07–195); Service Rules for Advanced Wireless Services in the 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz Bands (WT Docket No. 04–356); Applications for License and Authority to Operate in the 2155–2175 MHz Band (WT Docket No. 07–16); Petitions for Forbearance Under 47 U.S.C. 160 (WT Docket No. 07–30).<br>*Summary:* The Commission will consider a Report and Order and Order on Reconsideration concerning application, licensing, operating, and technical rules for the 2155–2180 MHz Band and an Order on Reconsideration concerning petitions for reconsideration filed in WT Dockets No. 07–16 and 07–30, as well as a Further Notice of Proposed Rulemaking for the 2155–2180 MHz band. |
| 2 | Wireless Tele-Communications | *Title:* Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 To Establish License Renewal and Discontinuance of Operation Policies and Procedures for Certain Wireless Radio Services; Imposition of a Freeze on the Filing of Competing renewal Applications for Certain Wireless Radio Services and the Processing of Already-Filed Competing Renewal Applications.<br>*Summary:* The Commission will consider a Notice of Proposed Rulemaking and Order concerning harmonization of the Commission's requirements regarding license renewal and permanent discontinuance of operations for WRS licensees, as well as a related Order that would impose a freeze on the filing of competing renewal applications and the processing of already-filed competing renewal applications. |
| 3 | Media | *Title:* Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations.<br>*Summary:* The Commission will consider a Notice of Proposed Rulemaking concerning creation of a replacement digital television translator service. |
| 4 | Media | *Title:* Development of Competition and Diversity in Video Programming Distribution and Carriage (MB Docket No. 07–42); Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements (MB Docket No. 07–198).<br>*Summary:* The Commission will consider a Report and Order modifying the program carriage rules and procedures and a Further Notice of Proposed Rulemaking seeking comment on the practices of programmers and broadcasters. |
| 5 | Enforcement | *Title:* Apparent Violations of the Commission's DTV Transition Notice Requirements for Eligible Telecommunications Carriers and Multichannel Video Programming Distributors.<br>*Summary:* The Commission will consider an omnibus NAL against various companies for apparent violations of the Commission's DTV consumer education requirements. |
| 6 | Public Safety & Homeland Security. | *Title:* Wireless E911 Location Accuracy Requirements (PS Docket No. 07–114).<br>*Summary:* The Commission will consider a Second Report and Order adopting revised wireless Enhanced 911 location accuracy and reliability requirements. |
| 7 | Office of Engineering and Technology International & Wireless Tele-Communications. | *Title:* Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band (WT Docket No. 07–293); Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310–2360 MHz Frequency Band (IB Docket No. 95–91; General Docket No. 90–37); Sirius Satellite Radio, Inc., Request for Special Temporary Authority to Operate four Satellite DARS Terrestrial Repeaters in Alaska and Hawaii.<br>*Summary:* The Commission will consider a Report and Order and Second Report and Order concerning proposed revisions to the service rules for mobile, fixed and base stations in the Wireless Communications Service (WCS), and proposed service rules for terrestrial repeaters to be used in conjunction with the Satellite Digital Audio Radio Service (SDARS). |

The meeting site is fully accessible to people using wheelchairs or other mobility aids. Sign language interpreters, open captioning, and assistive listening devices will be provided on site. Other reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need. Also include a way we can contact you if we need more information. Last minute requests will be accepted, but may be impossible to fill. Send an e-mail to: *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Additional information concerning this meeting may be obtained from Audrey Spivack or David Fiske, Office of Media Relations, (202) 418–0500; TTY 1–888–835–5322. Audio/Video coverage of the meeting will be broadcast live with open captioning over the Internet from the FCC's Audio/Video Events Web page at *http://www.fcc.gov/realaudio*.

For a fee this meeting can be viewed live over George Mason University's Capitol Connection. The Capitol

Connection also will carry the meeting live via the Internet. To purchase these services call (703) 993–3100 or go to *http://www.capitolconnection.gmu.edu*.

Copies of materials adopted at this meeting can be purchased from the FCC's duplicating contractor, Best Copy and Printing, Inc. (202) 488–5300; Fax (202) 488–5563; TTY (202) 488–5562. These copies are available in paper format and alternative media, including large print/type; digital disk; and audio and video tape. Best Copy and Printing, Inc. may be reached by e-mail at *FCC@BCPIWEB.com*.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. E8–29910 Filed 12–12–08; 4:15 pm]

BILLING CODE 6712–01–P

## FEDERAL COMMUNICATIONS COMMISSION

### Open Commission Meeting Scheduled for Thursday, December 18, 2008, Canceled

December 12, 2008.

The Federal Communications Commission has canceled the Open Meeting on the items listed below, previously scheduled for Thursday, December 18, 2008, at 445 12th Street, SW., Washington, DC. The following items will remain on circulation for the Commissioners to vote:

**Advanced Wireless Services (AWS)**

• A Report and Order and Order on Reconsideration addressing service rules for fixed and mobile services, including advanced wireless services (AWS), in the 2155–2180 MHz band (AWS–3).

**Program Carriage and Program Access**

• A Report and Order modifying the program carriage rules and procedures and a Further Notice of Proposed Rulemaking seeking comment on the practices of programmers and broadcasters.

**DTV Translators**

• A Notice of Proposed Rulemaking proposing a new digital television translator service for analog loss areas.

**DTV Consumer Education Notice of Apparent Liability**

• An omnibus NAL against various companies for apparent violations of the Commission's DTV consumer education requirements.

**E911 Location Accuracy Requirements**

• A Second Report and Order addressing the geographic area over which wireless carriers must meet the Enhanced 911 (E911) location accuracy requirements.

**Regulatory Framework for SDARS and WCS in the 2305–2360 MHz Band**

• A Report and Order and Second Report and Order and Order addressing the a regulatory framework for the coexistence of licensees in the Satellite Digital Audio Radio Service (SDARS) and the Wireless Communications Service (WCS) in the 2305–2360 MHz frequency band.

**Wireless Radio Services (WRS) Renewals**

• A Notice of Proposed Rulemaking and Order addressing Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 To Establish License Renewal and Discontinuance of Operation Policies and Procedures for Certain Wireless Radio Services; Imposition of a Freeze on the Filing of Competing Renewal Applications for Certain Wireless Radio Services and the Processing of Already-Filed Competing Renewal Applications.

Additional information concerning this meeting may be obtained from Audrey Spivack or David Fiske, Office of Media Relations, (202) 418–0500; TTY 1–888–835–5322.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. E8–30100 Filed 12–15–08; 4:15 pm]

BILLING CODE 6712–01–P

## FEDERAL MARITIME COMMISSION

### Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments on agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Web site (*http://www.fmc.gov*) or contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov*.

*Agreement No.:* 012059.

*Title:* CSAV/NYK Venezuela Space Charter Agreement.

*Parties:* Compania Sud Americana De Vapores S.A. and Nippon Yusen Kaisha.

*Filing Party:* Michael B. Holt, Vice President and General Counsel; NYK Line; 300 Lighting Way, 5th Floor; Secaucus, NJ 07094.

*Synopsis:* The agreement authorizes CSAV to charter space to NYK in the trade from Newark, NJ, Baltimore, MD, and Miami, FL, to ports in Venezuela.

By Order of the Federal Maritime Commission.

Dated: December 12, 2008.

**Tanga S. Fitzgibbon,**

*Alternate Federal Register Liaison Officer.*

[FR Doc. E8–29945 Filed 12–16–08; 8:45 am]

BILLING CODE 6730–01–P

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications 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 January 12, 2009.

**A. Federal Reserve Bank of New York** (Anne MacEwen, Bank Applications Officer) 33 Liberty Street, New York, New York 10045-0001:

*1. Morgan Stanley, New York, New York;* to acquire additional common

shares up to 9.9 percent of the voting shares of Chinatrust Financial Holding Company, Ltd., Taipei, Taiwan, and thereby acquire Chinatrust Bank (U.S.A.), Torrance, California.

Board of Governors of the Federal Reserve System, December 12, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E8–29914 Filed 12–16–08; 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 January 12, 2008.

**A. Federal Reserve Bank of Richmond** (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

*1. Capital One Financial Corporation, McLean, Virginia;* to acquire Chevy Chase Bank, Federal Savings Bank, McLean, Virginia, and thereby engage in operation a savings and loan association pursuant to section 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, December 12, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E8–29913 Filed 12–16–08; 8:45 am]

**BILLING CODE 6210–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–N–0439]**

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Blood Establishment Registration and Product Listing, Form FDA 2830

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by January 16, 2009.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0052. Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794.

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

#### Blood Establishment Registration and Product Listing, Form FDA 2830—(OMB Control Number 0910–0052)—Extension

Under section 510 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360), any person owning or operating an establishment that manufactures, prepares, propagates, compounds, or processes a drug or device must register with the Secretary of Health and Human Services, on or before December 31 of each year, his or her name, place of business, and all such establishments, and must submit, among other information, a listing of all drug or device products manufactured, prepared, propagated, compounded, or processed by him or her for commercial distribution. In part 607 (21 CFR part 607), FDA has issued regulations implementing these requirements for manufacturers of human blood and blood products.

Section 607.20(a), in brief, requires owners or operators of certain establishments that engage in the manufacture of blood products to register and to submit a list of every blood product in commercial distribution. Section 607.21, in brief, requires the owners or operators of establishments entering into the manufacturing of blood products to register within 5 days after beginning such operation and to submit a list of every blood product in commercial distribution at the time. If the owner or operator of the establishment has not previously entered into such operation for which a license is required, registration must follow within 5 days after the submission of a biologics license application. In addition, establishments are required to register annually between November 15 and December 31 and update their blood product listing every June and December of each year. Section 607.22 requires the use of Form FDA 2830, Blood Establishment Registration and Product Listing, for initial registration, for annual registration, and for blood product listing. Section 607.25 indicates the information required for establishment registration and blood product listing. Section 607.26, in brief, requires certain changes to be submitted on FDA Form 2830 as amendments to the establishment registration within 5 days of such changes. Section 607.30(a), in brief, indicates the information required for owners or operators of establishments to update their blood product listing information every June and December, or at the discretion of the registrant at the time the change occurs. Section 607.31 requires that additional blood product listing information be provided upon FDA request. Section 607.40, in brief, requires certain foreign blood product establishments to register and submit the blood product listing information, and to provide the name and address of the establishment and the name of the individual responsible for submitting blood product listing

information as well as the name, address, and phone number of its U.S. agent.

Among other uses, this information assists FDA in its inspections of facilities, and its collection is essential to the overall regulatory scheme designed to ensure the safety of the nation's blood supply. Form FDA 2830 is used to collect this information.

Respondents to this collection of information are human blood and plasma donor centers, blood banks, certain transfusion services, other blood product manufacturers, and independent laboratories that engage in quality control and testing for registered blood product establishments.

FDA estimates the burden of this collection of information based upon information obtained from FDA's Center for Biologics Evaluation and Research's database and FDA experience with the blood establishment registration and product listing requirements. The time needed for industry to complete the Form FDA 2830 is estimated to be 1 hour for new firms. The blood establishments for the most part are familiar with the regulations and registration requirements to fill out this form for the first time. Approximately 111 new Form FDA 2830s are received annually. With annual re-registration of blood establishments, the time needed for industry to complete the Form FDA 2830 is estimated to be 0.5 hours. The blood establishments need only to refer to their files or written instructions for a small portion of the information required. Approximately 2,621 Form FDA 2830s are received annually for re-registration. Approximately 180 Form FDA 2830s are received annually for the product listing update with an estimated average of 0.25 hours to complete the form.

In the **Federal Register** of August 12, 2008 (73 FR 46909), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

| 21 CFR Section | Form FDA 2830 | No. of Respondents | Annual Frequency per Response | Total Annual Responses | Hours per Response | Total Hours |
|---|---|---|---|---|---|---|
| 607.20(a), 607.21, 607.22, 607.25, and 607.40 | Initial Registration | 111 | 1 | 111 | 1 | 111 |
| 607.21, 607.22, 607.25, 607.26, 607.31, and 607.40 | Re-registration | 2,621 | 1 | 2,621 | 0.5 | 1,311 |
| 607.21, 607.25, 607.30(a), 607.31, and 607.40 | Product Listing Update | 180 | 1 | 180 | 0.25 | 45 |
| Total | | | | | | 1,467 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: December 10, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–29898 Filed 12–16–08; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–N–0606]**

### Agency Information Collection Activities; Proposed Collection; Comment Request; Export of Food and Drug Administration Regulated Products: Export Certificates

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on information collection requirements imposed on firms that intend to export to countries that require an export certificate as a condition of entry for FDA regulated products, pharmaceuticals, biologics, and devices as indicated in the Federal Food, Drug, and Cosmetic Act (the act) as amended.

**DATES:** Submit written or electronic comments on the collection of information by February 17, 2009.

**ADDRESSES:** Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794.

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Export of Food and Drug Administration Regulated Products: Export Certificates (OMB Control Number 0910–0498)—Extension**

In April 1996 a law entitled ''The FDA Export Reform & Enhancement Act of 1996'' (FDAERA) amended sections 801(e) and 802 of the act (21 U.S.C. 381(e) and 382). It was designed to ease restrictions on exportation of unapproved pharmaceuticals, biologics, and devices regulated by FDA. Section 801(e)(4) of the FDAERA provides that persons exporting certain FDA-regulated products may request FDA to certify that the products meet the requirements of 801(e) or 802 or other requirements of the act. This section of the law requires FDA to issue certification within 20 days of receipt of the request and to charge firms up to $175 for the certifications.

This new section of the act authorizes FDA to issue export certificates for regulated pharmaceuticals, biologics, and devices that are legally marketed in the United States, as well as for these same products that are not legally marketed but are acceptable to the importing country, as specified in sections 801(e) and 802 of the act. FDA has developed five types of certificates that satisfy the requirements of section 801(e)(4)(B) of the act: (1) Certificates to Foreign Governments, (2) Certificates of Exportability, (3) Certificates of a Pharmaceutical Product, (4) Non-Clinical Research Use Only Certificates, and (5) Certificates of Free Sale. Table 1 of this document lists the different certificates and details their use:

TABLE 1

| Type of Certificate | Use |
|---|---|
| ''Supplementary Information Certificate to Foreign Government Requests''<br>''Exporter's Certification Statement *Certificate to Foreign Government*''<br>''Exporter's Certification Statement *Certificate to Foreign Government* (For Human Tissue Intended for Transplantation)'' | For the export of products legally marketed in the United States |
| ''Supplementary Information Certificate of Exportability Requests''<br>''Exporter's Certification Statement *Certificate of Exportability*'' | For the export of products not approved for marketing in the United States (unapproved products) that meet the requirements of sections 801(e) or 802 of the act |
| ''Supplementary Information Certificate of a Pharmaceutical Product''<br>''Exporter's Certification Statement *Certificate of a Pharmaceutical Product*'' | Conforms to the format established by the World Health Organization and is intended for use by the importing country when the product in question is under consideration for a product license that will authorize its importation and sale or for renewal, extension, amending, or reviewing a license |
| ''Supplementary Information Non-Clinical Research Use Only Certificate''<br>''Exporter's Certification Statement *Non-Clinical Research Use Only*'' | For the export of a non-clinical research use only product, material, or component that is not intended for human use which may be marketed in, and legally exported from the United States under the act |
| (5) Certificates of Free Sale | For food, cosmetic products, and dietary supplements that may be legally marketed in the United States |

FDA will continue to rely on self-certification by manufacturers for the first three types of certificates listed in table 1 of this document. Manufacturers are requested to self-certify that they are in compliance with all applicable requirements of the act, not only at the time that they submit their request to the appropriate center, but also at the time that they submit the certification to the foreign government.

The appropriate FDA centers will review product information submitted by firms in support of their certificate and any suspected case of fraud will be referred to FDA's Office of Criminal Investigations for followup. Making or submitting to FDA false statements on any documents may constitute violations of 18 U.S.C. 1001, with penalties including up to $250,000 in fines and up to 5 years imprisonment.

TABLE 2.—TOTAL ESTIMATED ANNUAL REPORTING BURDEN[1]

| FDA Center | No. of Respondents | Annual Frequency per Response | Total Annual Responses | Hours per Response | Total Hours |
|---|---|---|---|---|---|
| Center for Biologics Evaluation and Research | 1,501 | 1 | 1,501 | 1 | 1,501 |
| Center for Drug Evaluation and Research | 4,803 | 1 | 4,803 | 1 | 4,803 |

TABLE 2.—TOTAL ESTIMATED ANNUAL REPORTING BURDEN[1]—Continued

| FDA Center | No. of Respondents | Annual Frequency per Response | Total Annual Responses | Hours per Response | Total Hours |
|---|---|---|---|---|---|
| Center for Devices and Radiological Health | 6,091 | 1 | 6,091 | 2 | 12,182 |
| Center for Veterinary Medicine | 664 | 1 | 664 | 1 | 664 |
| Center for Food Safety and Applied Nutrition | 1,794 | 5 | 8,876 | 2 | 17,752 |
| Total | 14,853 | | 21,935 | | 36,902 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

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.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

Dated: December 10, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–29897 Filed 12–16–08; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–D–0623]**

### Draft Guidance for Industry on Anesthetics for Companion Animals; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry #192 entitled ''Anesthetics for Companion Animals.'' This guidance makes recommendations for the development of anesthetic new animal drug products for companion animals. The guidance discusses the contents of the target animal safety, effectiveness, and labeling technical sections of a new animal drug application (NADA) for general anesthetics.

**DATES:** Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by March 2, 2009.

**ADDRESSES:** Submit written requests for single copies of the guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests.

Submit written comments on the draft 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.regulations.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

**FOR FURTHER INFORMATION CONTACT:** Germaine Connolly, Center for Veterinary Medicine (HFV–116), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8331, e-mail: *germaine.connolly@fda.hhs.gov*.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

FDA is announcing the availability of a draft guidance for industry #192 entitled ''Anesthetics for Companion Animals.'' This guidance document makes recommendations to assist developers of general anesthetic drugs (injectable or inhalational) for use in companion animals (dogs, cats, and horses). The guidance specifically describes what should be considered while planning and executing safety and field studies for the proposed anesthetic. In addition, the guidance includes recommendations on how to analyze and package the collected data for submission to the Center for Veterinary Medicine.

#### II. Significance of Guidance

This level 1 draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on this topic. 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 statutes and regulations.

#### III. Paperwork Reduction Act of 1995

This draft 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 (44 U.S.C. 3501–3520). The collections of information have been approved under OMB control number 0910–0032.

#### IV. 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.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management

System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

**V. Electronic Access**

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/cvm* or *http://www.regulations.gov*.

Dated: December 11, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–29953 Filed 12–16–08; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–N–0043]**
**[FDA No. 225–08–8003]**

### Memorandum of Understanding Between the Office of the Assistant Secretary of Defense (Health Affairs), the Veterans Health Administration, and the U.S. Food and Drug Administration

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) between the Office of the Assistant Secretary of Defense (Health Affairs), the Veterans Health Administration, and the U.S. Food and Drug Administration. The purpose of the MOU is to enhance knowledge and efficiency by providing for the sharing of information and expertise between the Federal partners. The goals of the collaboration are to explore ways to: Further enhance information sharing efforts through more efficient and robust interagency activities; promote efficient utilization of tools and expertise for product risk identification, validation and analysis; and build infrastructure and processes that meet the common needs for evaluating the safety, efficacy, and utilization of drugs, biologics, and medical devices, as well as the safety and utilization of foods. The MOU is available on FDA's Web site at *www.fda.gov/oc/mous/domestic/domesticmous.htm*.

**DATES:** The agreement became effective November 25, 2008.

**FOR FURTHER INFORMATION CONTACT:** Erik Mettler, Office of Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, rm. 4324, Silver Spring, MD 20993, 301–796–4830.

**SUPPLEMENTARY INFORMATION:** In accordance with 21 CFR 20.108(c), which states that all written agreements and MOUs between FDA and others shall be published in the **Federal Register**, the agency is publishing notice of this MOU.

Dated: December 11, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

FDA Record No. 225-08-8003

**MEMORANDUM OF UNDERSTANDING**

**BETWEEN**

**THE OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE (HEALTH AFFAIRS),**

**THE VETERANS HEALTH ADMINISTRATION**

**AND**

**THE UNITED STATES FOOD AND DRUG ADMINISTRATION**

## 1. Preamble

The Food and Drug Administration (FDA) as part of the Department of Health and Human Services, the Office of the Assistant Secretary of Defense (Health Affairs) as part of the Department of Defense (DoD), and the Veterans Health Administration (VHA), as part of the Department of Veterans Affairs, all United States Federal Government entities and hereinafter also referred to as "Federal partners", agree to work together to promote safety initiatives related to the review and use of FDA-regulated drugs, biologics, medical devices, and foods, including dietary supplements, as defined by the Federal Food, Drug and Cosmetic Act (see 21 U.S.C. 321) and the Public Health Service Act (see 42 U.S.C. 262).

## 2. Purpose and Goals

The purpose of the MOU is to enhance knowledge and efficiency by providing for the sharing of information and expertise between the Federal partners. The goals of the collaboration are to explore ways to:

a. Further enhance information sharing efforts through more efficient and robust inter-agency activities.

b. Promote efficient utilization of tools and expertise for product risk identification, validation and analysis.

c. Build infrastructure and processes that meet the common needs for evaluating the safety, efficacy, and utilization of drugs, biologics, and medical devices, as well as the safety and utilization of foods.

## 3. Substance of the Agreement - Program Areas and Responsibilities/Activities

a. Each Federal partner will establish a single Agency liaison to facilitate the actions carried out under this MOU. Ideally, the liaisons will be organizationally aligned under the Office of the FDA Commissioner, the DoD Office of the Assistant Secretary of Defense (Health Affairs), and the VHA Office of the Under Secretary for Health.

b. DoD, VHA, and FDA agree to attend an initial meeting to establish the specific procedures and safeguards necessary to implement this MOU. The initial meeting will take place within 30 days of signing and approval of this MOU. Periodic meetings will be scheduled thereafter on a

quarterly basis. DoD, VHA and FDA agree not to share information under this MOU unless, and until, adequate procedures and safeguards agreed upon by each Federal partner are established and implemented.

c. VHA, DoD, and FDA agree that each initial request for information will be made by and transmitted to the Agency liaisons designated according to Section 3.a. of this MOU. Subsequent communications pertaining to that issue may occur between other staff as approved by the liaisons.

d. FDA, VHA, and DoD agree that any Federal partner may decide not to share information or expertise in response to a particular request for information made according to the procedures established under Section 3.b., or to limit the scope of information and expertise sharing in response to a particular request. A decision not to share information in response to a specific request may be based on several factors, including, for example, the amount of resources necessary to fulfill the request, the reasonableness of the request, the responding Federal partner's priorities, or legal restrictions. In the event that Federal partners can not reach consensus on a decision to share or not share information, the issue will be referred to the FDA Deputy Commissioner, the DoD Assistant Secretary of Defense (Health Affairs), and/or the VHA Under Secretary for Health for a final decision.

e. FDA, VHA and DoD agree to establish reasonable timelines for responding to information requests and to refer instances of delays to the Agency liaisons for resolution.

f. FDA, DoD, and VHA recognize that information transmitted between them in any medium and from any source, that contains any of the following types of information must be protected from unauthorized disclosure: (1) confidential commercial information, such as the information that would be protected from public disclosure pursuant to Exemption 4 of the Freedom of Information Act (FOIA); (2) personal privacy information, such as the information that would be protected from public disclosure pursuant to Exemption 6 or 7(c) of the FOIA; or (3) information that is otherwise protected from public disclosure by Federal statutes and their implementing regulations (e.g., Trade Secrets Act (18 U.S.C. § 1905), the Privacy Act (5 U.S.C. § 552a), the Freedom of Information Act (5 U.S.C. § 552), the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), and the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. 104-191).

g. FDA, VHA, and DoD agree to promptly notify the relevant Federal partner(s) of any actual or suspected unauthorized disclosure of information shared under this MOU.

## 4. General Provisions

### A. Safeguarding & Limiting Access to Shared Information

The procedures established under Section 3.b. must include proper safeguards against unauthorized use and disclosure of the information exchanged under this MOU. Proper safeguards shall include the adoption of policies and procedures to ensure that the information shared under this MOU shall be used solely in accordance with Trade Secrets Act [18 U.S.C. § 1905], the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.], the Privacy Act of 1974, as amended [5 U.S.C. § 552a], the Freedom of Information Act 5 U.S.C. § 552], and their

implementing regulations, as well as the HIPAA Privacy Rule [45 C.F.R. Parts 160 and 164]. DoD, VHA, and FDA shall establish appropriate administrative, technical, procedural, and physical safeguards to protect the confidentiality of the information and to prevent unauthorized access to the information provided by the other Federal partner.

Access to the information shared under this MOU shall be restricted to authorized FDA, DoD, and VHA employees, agents and officials who require access to perform their official duties in accordance with the uses of the information as authorized in this MOU. Such personnel shall be advised of (1) the confidential nature of the information; (2) safeguards required to protect the information, and (3) the administrative, civil and criminal penalties for noncompliance contained in applicable Federal laws. DoD and VHA contractors, their subcontractors and agents who are determined to be business associates of the DoD or VHA and require access to any protected health information shared under this agreement will be required to sign a Business Associate Agreement.

If an agency that has received information under this MOU receives a Freedom of Information Act (FOIA) request for the shared information, it will refer the request to the information-sharing agency for it to respond directly to the requestor regarding the releasability of the information. In such cases, the agency making the referral will notify the requestor that a referral has been made and that a response will issue directly from the information-sharing agency.

**B. Restriction on Use of Information**

All information provided by the Federal partners shall be used solely for the purposes outlined in Section 2. If a Federal partner wishes to use the information provided by one of the other Federal partners under this MOU for any purpose other than those outlined above, the requesting agency shall make a written request to the other agency describing the additional purposes for which it seeks to use the information. If the agency receiving this request determines that the request to use the information provided hereunder is acceptable, it shall provide the requesting agency with written approval of the additional use of the information.

**C. Effect on Existing Statutes and Regulations**

FDA, DoD, and VHA agree to take actions under this collaboration that are consistent with existing laws and regulations, and that nothing in the MOU shall be construed as changing the current requirements under the statutes and regulations administered and enforced by DoD, VHA, and FDA, including but not limited to: title 10 of the United States Code, the Public Health Service Act, and the Federal Food, Drug, and Cosmetic Act. Further, nothing contained in this MOU constitutes a mandate or a requirement imposed on FDA, VHA, or DoD that is additional to the mandates or requirements imposed on DoD, FDA, or VHA by Federal statutes and regulations.

**D. Resource Obligations:**

FDA, VHA, and DoD will designate respective liaisons to oversee the administration of, and adherence to, the content of this MOU. These liaisons shall include one or more designated individuals from FDA's Office of the Commissioner, DoD's Office of the Assistant Secretary of

Defense (Health Affairs), and VHA's Office of the Under Secretary for Health; from FDA's Center for Drug Evaluation and Research, Center for Devices and Radiological Health, Center for Biologics Evaluation and Research, and Center for Food Safety and Applied Nutrition, DoD's TRICARE Management Activity, Pharmaceutical Operations Directorate, and VHA's Pharmacy Benefits Management Services.

FDA, DoD, and VHA will make reasonable efforts to provide the necessary staff to implement this MOU in an efficient and effective manner.

## 5. Assessment Mechanisms

FDA, VHA, and DoD staff involved in implementing the MOU will provide regular and consistent oversight and reevaluation of all terms and conditions contained herein.

## 6. Terms, Termination or Modification

This MOU becomes effective upon the signature of all three Federal partners and the implementation of the procedures and safeguards agreed upon by the Federal partners described in Section 3. This agreement may be modified by unanimous consent or terminated by any party upon 60 days written notice. This agreement may be modified by unanimous consent or terminated by any party immediately upon written notice in the event that a Federal statute is enacted or a regulation is issued by a Federal partner that materially affects this MOU.

## 7. Liaison Officers

Jeffrey Shuren
Associate Commissioner for Policy and Planning
U.S. Food and Drug Administration
5600 Fishers Lane
Rockville, MD 20257
301 -827-3360

RADM Thomas J. McGinnis
Chief, Pharmaceutical Operations Directorate
TRICARE Management Activity
Five Skyline Place, Suite 8 10
5111 Leesburg Pike
Falls Church, Virginia 22041-3 206
703-681-2890

Michael Valentino
Chief Consultant
Pharmacy Benefits Management Services
810 Vermont Avenue NW
Washington, DC 20420
202-461-7360

FDA Record No. 225-08-8003

**APPROVED AND ACCEPTED FOR:**

**THE FOOD AND DRUG ADMINISTRATION**

**Andrew C. von Eschenbach, MD**
**Commissioner of Food and Drugs**
**Department of Health and Human Services**

7/23/08
**Date**

**THE DEPARTMENT OF DEFENSE**

**S. Ward Casscells, MD**
**Assistant Secretary of Defense (Health Affairs)**
**Department of Defense**

NOV 25 2008
**Date**

**THE VETERANS HEALTH ADMINISTRATION**

Michael J. Kussman

**Michael J. Kussman, MD, MS, MACP**
**Under Secretary for Health**
**Department of Veterans Affairs**

9/8/08
**Date**

FDA Record No. 225-08-8003

## APPENDIX A

### PROCESS FOR INFORMATION SHARING

Pursuant to Section 3.d of the Memorandum Of Understanding (MOU) entered into by the Food and Drug Administration (FDA), the Veterans Health Administration (VHA), and the Department of Defense (DoD), any Federal partner "may decide not to share information or expertise in response to a particular request for information made according to the procedures established under Section 3.b., or to limit the scope of information and expertise sharing in response to a particular request." Nothing in the process described below changes Section 3.d.

When, under the current MOUs, staff at the FDA, the VHA, or the DoD request from the other agency information that may contain confidential material, the request should be in writing, which includes an informal email, and need only identify the subject for which information is requested. Although a more specific description of the information asked for may be helpful, it would not be required for purposes of making a request. However, the following language should be included in the request:

"Information that is shared under this request will be under the 2008 FDA-VHA-DoD Memorandum of Understanding to Share Information. We agree not to disclose any shared information in any manner without your written permission." With the inclusion of this statement, requestors would not have to use a particular format or include other pre-specified text.

A response to a request should also be in writing, but it, too, can be an informal email that acknowledges transmission of information in response to the request. Although identifying each piece of information/document provided may be helpful, it would not be required for purposes of responding to a request. However, the following language should be included in the response:

"Pursuant to the 2008 FDA, VHA, DoD Memorandum of Understanding to Share Information, this communication may contain privileged and/or confidential information exempt from public disclosure. It may not be disclosed or shared in any manner outside of the parties to this MOU." With the inclusion of this statement, responders would not have to use a particular format or include other pre-specified text.

# Protocol for Information Sharing Under MOU 225-08-8003

**Between**

**Veterans Health Administration (VHA) and the Food and Drug Administration (FDA)**

**Surveillance for Unexpected Adverse Events and Product Problems Associated with the Use of Cardiac Devices**

## Introduction:

The Veterans Health Administration (VHA) has extensive methods for ensuring quality and safety in the provision of care. For instance, the Cardiovascular Assessment Reporting and Tracking system (CART) has been implemented as a national solution for managing procedure reporting in the cardiac catheterization laboratory. All VHA facilities enter data in the same standardized fashion for pre-procedure notes and for diagnostic catheterization, interventions, and other procedure reports. The output from CART is an appropriate note written into the patient's electronic medical record. In addition, computable data points and some free-text are stored in a national database (CART Data Repository). Included among this is the opportunity to document any unexpected problems encountered with equipment or devices used in the course of the procedure.

The Food and Drug Administration (FDA) is charged with ensuring patient safety, which includes oversight of biomedical devices. Despite rigorous testing of new devices prior to general availability, problems and complications do not always manifest during the pivotal clinical trials. While the MedWatch program is in place to communicate device problems directly from clinicians to the FDA, it is inconsistently used and is generally limited to the more egregious events. It is therefore important to engage in more sensitive systems for surveillance as devices migrate into use in broader practice, and thus other sources of information are needed to better characterize device performance in the post market period.

Both VHA and FDA concur that the CART process could serve as an important mechanism to identify problem(s) with cardiovascular devices early.

## Purpose:

It is the intention of VHA and FDA to bi-directionally share data regarding problems or issues with cardiac devices that might serve to identify potential patient safety issues early. This protocol will establish terms governing that exchange of data, specifically regarding performance of cardiovascular devices.

**Agreement:**

**VHA will:**

1. Identify a liaison within the CART management group to serve as the point-of-contact for the FDA. (CART point of contact)
2. Review CART data fields for indications of unexpected problem(s) with cardiac devices on a regular basis.
3. Notify FDA of any signal from CART suggesting there might be a problem with a particular device.
4. Review CART reports for indications of problems with a specific device at the request of FDA.

**VHA will not:**

1. Reveal patient specific identifiers to the FDA.
2. Release any data attributable to the FDA to any other entity without written permission from the FDA.

**FDA will:**

1. Review CART device reports to determine if there are other data sources suggesting a similar problem, and notify VHA of those findings.
2. Notify VHA if there is indication of device failures originating from other sources so VHA can survey its database looking specifically for similar issues within VA's system.

**FDA will not:**

1. Release any data that is attributable to VHA to any other entity without written permission from VHA.

**Data Exchange Levels:**

Data will be shared between the CART program staff and the FDA in three step-wise levels of increasing detail. All data exchange will begin with Level I, defined below, and proceed consecutively to Level II or III, as warranted by patient safety or device surveillance concerns.

Level I data exchange represents a simple accounting of the text comments provided in the CART unexpected device complications field. Basic information regarding the procedure and device is provided, de-identified to the hospital level. Summary reports will be shared and discussed with FDA on a monthly basis. No protected health information (PHI) is included.

The information provided may not be disclosed or used for any purpose other than as outlined in this Agreement except and unless specific approval is obtained. All data and information provided by VA and FDA shall be used solely for the purposes outlined in the Agreement. If FDA wishes to use the data and information provided by VA under this Agreement for any purpose other than those outlined above, FDA shall make a written request to VA describing the additional purposes for which it seeks to use the data. If VA determines that the FDA's request to use the data and information provided hereunder is acceptable, VA shall provide FDA with written approval of the additional use of the data.

**Agreement Terms:**

The ~~MOU~~ protocol will cover the period from the date of execution through fiscal year 2010. Any changes to this agreement must be mutually agreed upon in writing by both parties. The ~~MOU~~ protocol can be extended based on mutual agreement of both parties. Either FDA or VHA can end the agreement at the end of any fiscal year, should the needs and requirements of either organization not be met. Should the agreement end, all data must be returned to its source of origin or destroyed.

**Execution:**

Executed on this 4 day of December 2008.

Between

Michael J. Kussman

Michael J. Kussman, MD, MS, MACP
Under Secretary for Health
Veterans Health Administration

Lillian J. Gill for

Daniel G. Schultz, MD
Director, FDA Center for Devices and Radiological Health
Food and Drug Administration

[FR Doc. E8–29952 Filed 12–16–08; 8:45 am]

BILLING CODE 4160–01–S

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Submission for OMB Review; Comment Request; The Effectiveness of the NIH Curriculum Supplements Programs and Career Resources

*Summary:* Under the provisions of section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Office of the Director, Office of Science Policy, Office of Science Education, National Institutes of Health has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in the **Federal Register** on September 23, 2008 (Volume 73, Number 185, page 54840) and allowed 60-days for public comment. One comment was received. The purpose of this notice is to allow 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB number.

*Proposed Collection Title:* The Effectiveness of the NIH Curriculum Supplements Programs and Career Resources.

*Information Collection Request:* Reinstatement.

*Need and Use of Information Collection:* The survey will attempt to assess customer demographics and their satisfaction with the NIH curriculum supplements in presenting science in a more engaging and interactive way. The supplements help K–12 educators teach science by featuring the latest NIH research and utilized research-based instructional methods. A typical supplement contains two weeks of student activities on the science behind a health topic, such as cancer, sleep or obesity. Web-based simulations, animations and experiments enhance the ''pencil and paper'' activities. In addition to developing and distributing the supplements, OSE conducts professional workshops to help teachers successfully implement these lessons with their students. Since January 2000, over 6,000 teachers have attended an OSE workshop. OSE also develops a series of videos, *Women Are Scientists,* that aim to excite middle school students on careers in the health sciences. Assessing the effectiveness of the NIH curriculum supplements, teacher workshops, and career resources is critical to determining if OSE is successfully fulfilling its mission. OSE has the database infrastructure in place to easily collect data from supplement and career video requesters and workshop attendees. At present, we do not have clearance to contact our customers to determine how NIH resources are meeting their educational needs.

**Burden Table**

| Type of respondent: Survey title | Number of respondents | Frequency of response | Average time per response (hours) | Hour burden per year (hours) |
|---|---|---|---|---|
| Supplement requestor | 16,000 | 1 | 0.17 | 910 |
| Career video requestor | 1,500 | 1 | 0.17 | 85 |
| Workshop Teacher: initial survey | 2,000 | 1 | 0.17 | 117 |
| Workshop Teacher: in-depth survey | 200 | 1 | 0.5 | 34 |
| Totals | 19,700 | [a] | [a] | 1,146 |

[a] N/A.

*Request for Comments:* Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) ways to enhance the quality, utility, and clarity of the information to be collected; and (3) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

*Direct Comments to OMB:* 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: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. David Vannier, National Institutes of Health, Office of Science Education, 6100 Executive Boulevard, Suite 3E01, Bethesda, MD 20892, or call 301–496–8741, or e-mail your request including your address to *vannierd@od.nih.gov.*

*Comments Due Date:* Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: December 4, 2008.

**David Vannier,**

*Office of Science Education, National Institutes of Health.*

[FR Doc. E8–29815 Filed 12–16–08; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2); notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Clinical Studies P01.

*Date:* February 18, 2009.

*Time:* 8 a.m. to 7 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

*Contact Person:* Majed M. Hamawy, PhD, Scientific Review Officer, Research Programs Review Branch, Division Of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 8135, Bethesda, MD 20852, 301–594–5659, *mh101v@nih.gov*.

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Quantitative Imaging for Evaluation of Responses to Cancer Therapies.

*Date:* March 2–3, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hilton Washington DC North Gaithersburg, 620 Perry Parkway, Gaithersburg, MD 20877.

*Contact Person:* Kenneth L. Bielat, PhD, Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 7147, Bethesda, MD 20892–8329, 301–496–7576, *bielatk@mail.nih.gov*.

*Name of Committee:* National Cancer Institute Special Emphasis Panel; NCI Cancer Prevention Research.

*Date:* March 16–17, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* St. Gregory Luxury Hotel and Suites, 2033 M Street, NW., Washington, DC 20036.

*Contact Person:* Irina Gordienko, PhD, Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Rm. 7073, Bethesda, MD 20892, 301–594–1566, *gordienkoiv@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 9, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–29822 Filed 12–16–08; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Cancer Institute Initial Review Group; Subcommittee I—Career Development.

*Date:* February 10–11, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Doubletree Hotel Washington DC, 1515 Rhode Island Ave, Washington, DC 20005.

*Contact Person:* Sonya Roberson, PhD, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Room 8109, Bethesda, MD 20892, 301–594–1182, *robersos@mail.nih.gov.*

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Molecular Profiles in Tumors.

*Date:* February 19, 2009.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* Kenneth L. Bielat, PhD, Scientific Review Officer, Special Review & Logistics Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 7147, Bethesda, MD 20892–8329, 301–496–7576, *bielatk@mail.nih.gov.*

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Innovative Strategies to Protect Radiosensitive Organs.

*Date:* February 26, 2009.

*Time:* 9:30 a.m. to 1:30 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* National Institutes of Health, 6116 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* Marvin L Salin, PhD, Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 7073, Bethesda, MD 20892–8329, 301–496–0694, *msalin@mail.nih.gov.*

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Innovative Technologies for Molecular Analysis of Cancer (R21).

*Date:* March 4–5, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Marriott Bethesda North Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

*Contact Person:* Adriana Stoica, PhD, Scientific Review Officer, Special Review & Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd, Ste 703, Room 7072, Bethesda, MD 20892–8329, 301–594–1408, *Stoicaa2@mail.nih.gov.*

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Platforms for Improved Diagnosis of Cancer.

*Date:* March 16–17, 2009.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* Hilton Washington DC North/ Gaithersburg, 620 Perry Parkway, Gaithersburg, MD 20877.

*Contact Person:* Kenneth L. Bielat, PhD, Scientific Review Officer, Special Review & Logistics Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 7147, Bethesda, MD 20892–8329, 301–496–7576, *bielatk@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 9, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–29824 Filed 12–16–08; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Cancer Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the meeting of the President's Cancer Panel.

The meeting will be open to the public as indicated below, with

attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B), Title 5 U.S.C., as amended, because the premature disclosure of these discussions would be likely to significantly frustrate implementation of recommendations.

*Name of Committee:* President's Cancer Panel.

*Date:* January 27, 2009.

*Open:* January 27, 2009, 8 a.m.–4:25 p.m.

*Agenda:* Environmental Factors in Cancer

*Place:* Embassy Suites Phoenix North, 2577 W. Greenway Road, Phoenix, AZ 85023.

*Closed:* January 27, 2009, 4:45 p.m.–7 p.m.

*Agenda:* Discussion of testimony given in open session on Environmental Factors in Cancer; consideration of thematic concepts for the 2009/2010 series.

*Place:* Embassy Suites Phoenix North, 2577 W. Greenway Road, Phoenix, AZ 85023.

*Contact Person:* Abby Sandler, PhD, Executive Secretary, National Cancer Institute, National Institutes of Health, Building 6116, Room 220, MSC 8349, 6116 Executive Boulevard, Bethesda, MD 20892, 301/451–9399.

Any interested person may file written comments with the committee by forwarding the comments to the Contact Person listed on this notice. The comments should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *deainfo.nci.nih.gov/advisory/pcp/pcp.htm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 9, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–29825 Filed 12–16–08; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel, Ancillary Studies in Immunomodulati on Clinical Trials.

*Date:* January 13, 2009.

*Time:* 2 p.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

*Contact Person:* Paul A. Amstad, PhD., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, DHHS/National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–402–7098, *pamstad@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 10, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–29819 Filed 12–16–08; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Methods for Prevention Packages Program (MP3).

*Date:* January 8, 2009.

*Time:* 12:30 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

*Contact Person:* Gregory P. Jarosik, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, 301–496–0695, *gjarosik@niaid.nih.govZ.*

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Immune Mechanisms of Viral Control (U19).

*Date:* January 12–13, 2009.

*Time:* 8:30 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hilton Silver Spring, 8727 Colesville Road, Silver Spring, MD 20910.

*Contact Person:* B. Duane Price, PhD, Scientific Review Officer, Scientific Review Program, DHHS/NIH/NIAID/DEA, Room 3139, 6700B Rockledge Drive, MSC 7616. Bethesda, MD 20892–7616, 301–496–2550, *pricebd@niaid.nih.gov.*

*Name of Committee:* National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Immune Mechanisms of Viral Control (U01).

*Date:* January 14–15, 2009.

*Time:* 8:30 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hilton Silver Spring, 8727 Colesville Road, Silver Spring, MD 20910.

*Contact Person:* B. Duane Price, PhD, Scientific Review Officer, Scientific Review Program, DHHS/NIH/NIAID/DEA, Room 3139, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–496–2550, *pricebd@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 10, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–29821 Filed 12–16–08; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Nursing Research; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Council for Nursing Research.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory Council for Nursing Research.

*Date:* January 27–28, 2009.

*Open:* January 27, 2009, 1 p.m. to Adjournment.

*Agenda:* Discussion of Program Policies and Issues.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6C, Room 6, Bethesda, MD 20892.

*Closed:* January 28, 2009, 9 a.m. to 1 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6C, Room 6, Bethesda, MD 20892.

*Contact Person:* Mary E. Kerr, FAAN, RN, PhD, Deputy Director, National Institute of Nursing, National Institutes of Health, 31 Center Drive, Room 5B–05, Bethesda, MD 20892–2178, 301/496–8230, *kerrme@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.nih.gov/ninr/a_advisory.html*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program No. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: December 10, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–29835 Filed 12–16–08; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket No. DHS–2008–0197]**

### Science and Technology (S&T) Directorate; Submission for Review; Information Collection Request for the DHS S&T Project 25 (P25) Compliance Assessment Program (CAP)

**AGENCY:** Science and Technology Directorate, DHS.

**ACTION:** 30-day notice and request for comment.

**SUMMARY:** The Department of Homeland Security (DHS) invites the general public to comment on a new data collection form for the DHS Science and Technology Directorate's Project 25 (P25) Compliance Assessment Program (CAP): SUPPLIER'S DECLARATION OF COMPLIANCE (SDoC) (DHS Form 10044) and SUMMARY TEST REPORT (DHS Form 10056). The attacks of September 11, 2001, and the destruction of Hurricane Katrina made apparent the need for emergency response radio systems that can interoperate, regardless of which organization manufactured the equipment. In response, and per congressional direction, DHS and the National Institute of Standards and Technology (NIST) developed the P25 CAP to improve the emergency response community's confidence in purchasing land mobile radio (LMR) equipment built to P25 LMR standards. The P25 CAP establishes a process for ensuring that equipment complies with P25 standards and is capable of interoperating across manufacturers.

The Department of Homeland Security needs to be able to collect essential information from manufacturers on their products that have met P25 standards as demonstrated through the P25 CAP. Equipment suppliers will provide information to publicly attest to their products' compliance with a specific set of P25 standards. Accompanied by a Summary Test Report that substantiates this declaration, the SDoC constitutes a company's formal, public attestation of compliance with the standards for the equipment. In providing this information, companies will consent making this information public. In turn, the emergency response community will use this information to identify P25-compliant communications systems.

The P25 CAP Program Manager will perform a simple administrative review to ensure the documentation is complete and accurate in accordance with the current P25 CAP processes. This notice and request for comments is required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

**DATES:** Comments are encouraged and will be accepted until January 16, 2009.

**ADDRESSES:** Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Desk Officer for the Department of Homeland Security, Science & Technology Directorate, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974. Please include docket number [DHS–2008–0197] in the subject line of the message.

**FOR FURTHER INFORMATION CONTACT:** Michael Bowerbank, 202–254–6895.

**SUPPLEMENTARY INFORMATION:** The SDoC and Summary Test Report forms will be posted on the SAFECOM Web site at *http://www.safecomprogram.gov/SAFECOM/currentprojects/project25cap/*. The forms will be available in Adobe PDF format. The supplier may complete the forms electronically or by hand. The completed forms may then be submitted via fax, e-mail, or mail to the Office for Interoperability and Compatibility P25 CAP Program Manager.

**Overview of Information Collection**

(1) *Type of Information Collection:* New information collection.

(2) *Title of the Form/Collection:* Project 25 Compliance Assessment Program.

*Agency Form Number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* DHS Science & Technology Directorate, DHS Form 10044 (04/08) and DHS Form 10059 (09/08).

(3) *Affected public who will be asked or required to respond, as well as a brief abstract:* Businesses; the data will be gathered from manufacturers of radio systems who wish to declare that their products are compliant with P25 standards for radio systems.

(4) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

a. *Estimate of the total number of respondents:* 10.

b. *An estimate of the time for an average respondent to respond:* 2.0 burden hours.

Dated: December 9, 2008.

**Kenneth D. Rogers,**

*Chief Information Officer, Science and Technology Directorate, Department of Homeland Security.*

[FR Doc. E8–29818 Filed 12–16–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

### Agency Information Collection Activities Screening Requirements for Carriers

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** 60-Day Notice and request for comments; Extension of an existing collection of information: 1651–0122.

**SUMMARY:** As part of its continuing effort to reduce paperwork and respondent burden, U.S. Customs and Border (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Screening Requirements for Carriers. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3506(c)(2)(A)).

**DATES:** Written comments should be received on or before February 17, 2009, to be assured of consideration.

**ADDRESSES:** Direct all written comments to U.S. Customs and Border Protection, *Attn.:* Tracey Denning, 1300 Pennsylvania Avenue NW., Room 3.2C, Washington, DC 20229.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to U.S. Customs and Border Protection, *Attn.:* Tracey Denning, 1300 Pennsylvania Avenue NW., Room 3.2C, Washington, DC 20229, Tel. (202) 344–1429.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3506(c)(2)(A)). The comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

*Title:* Screening Requirements for Carriers.

*OMB Number:* 1651–0122.

*Form Number:* None.

*Abstract:* The information collected is used to determine whether sufficient steps were taken by a carrier demonstrating improvement in the screening of its passengers in order for the carrier to be eligible for automatic fines mitigation.

*Current Actions:* There are no changes to the information collection. This submission is being submitted to extend the expiration date.

*Type of Review:* Extension (without change).

*Affected Public:* Businesses.

*Estimated Number of Respondents:* 65.

*Estimated Time Per Respondent:* 100 hours.

*Estimated Total Annual Burden Hours:* 6,500.

Dated: December 10, 2008.

**Tracey Denning,**

*Agency Clearance Officer, Customs and Border Protection.*

[FR Doc. E8–29908 Filed 12–16–08; 8:45 am]

**BILLING CODE 9111–14–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5273–N–01]**

### Disaster Housing Assistance Program (DHAP) for Hurricane Ike (DHAP-Ike)

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.

**ACTION:** Notice.

**SUMMARY:** This document provides notice that HUD and the Federal Emergency Management Agency (FEMA) have executed an Interagency Agreement under which HUD shall act as the servicing agency of DHAP-Ike commencing November 1, 2008. DHAP-Ike is a joint initiative undertaken by HUD and FEMA to provide monthly rental assistance, case management services, security deposit, and utility deposit assistance for certain families displaced from their homes by Hurricane Ike or Hurricane Gustav. The operating requirements for the DHAP-Ike are found in HUD Notice PIH 2008–38, issued October 14, 2008. HUD Notice PIH 2008–38 and related program information on the DHAP-Ike is available on HUD's Web site at *http://www.hud.gov/offices/pih/publications/ike.cfm.*

To be eligible for DHAP-Ike, a family must have been displaced by Hurricane Ike or Hurricane Gustav, determined eligible for DHAP-Ike assistance by FEMA and referred to HUD by FEMA. Initially there are no income eligibility requirements for DHAP-Ike assistance. However, only families with housing costs that exceed 30 percent of the family's monthly income are eligible for continued DHAP-Ike rental assistance and case management services after the earlier of July 31, 2009, or 6 months following the effective date of the Disaster Rent Subsidy Contract executed on behalf of the family.

HUD will invite public housing agencies (PHAs) that currently administer DHAP to administer DHAP-Ike in their jurisdiction based on several factors such as where the DHAP-Ike eligible families are currently residing or have indicated they wish to receive DHAP-Ike assistance.

DHAP-Ike is a temporary assistance program and will terminate with the March 2010 subsidy payment.

**FOR FURTHER INFORMATION CONTACT:** David A. Vargas, Associate Deputy Assistant Secretary for Public Housing and Voucher Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4228,

Washington, DC 20410, telephone number 202–708–2815 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:** In August and September, 2008, Hurricanes Ike and Gustav struck the United States, causing catastrophic damage to property, loss of life, and the displacement of tens of thousands of individuals from their homes and communities.

As HUD is responsible for administering the Housing Choice Voucher (HCV) Program, the nation's largest tenant-based rental subsidy program, and has also successfully implemented the Katrina Housing Assistance Payments Program (KDHAP), the Disaster Voucher Program (DVP), and DHAP, FEMA has requested that HUD design a program for eligible families affected by Hurricanes Ike and Gustav that is modeled after those four programs.

In September 2008, HUD and FEMA executed an Interagency Agreement (IAA) under which HUD shall act as the servicing agency of the DHAP-Ike. HUD will utilize its existing network of local PHAs to administer the program. These PHAs administer the HCV program and as a result have the necessary local market knowledge and expertise in assisting families through a tenant-based subsidy program. In addition, through their administration of the KDHAP, DVP, and DHAP, the PHAs are experienced in working with significant numbers of families that have been displaced by disasters.

Pursuant to FEMA's grant authority, grants will be provided to local PHAs to administer DHAP-Ike on behalf of FEMA. Under DHAP-Ike, PHAs will make rental assistance payments on behalf of eligible families to participating landlords for a period not to exceed 17 months, with all rental assistance payments ending with the March 2010 subsidy payment. In order to prepare the family for this eventuality, case management services are provided for the entire duration of DHAP-Ike. These case management services include assisting participants to identify non-disaster supported housing solutions such as other affordable housing options that may be available for income eligible families.

In addition, beginning on May 1, 2009, families will be required to pay a portion of rent of $50, which will increase by an additional $50 each subsequent month. This gradual increase in the family share will further prepare the family to assume full responsibility for their housing costs at the end of DHAP-Ike.

PHA responsibilities for DHAP-Ike include calculating the monthly rent subsidy and making monthly rent subsidy payments on behalf of participating families, determining income eligibility for continued assistance under DHAP-Ike, performing housing quality standards inspections when necessary, applying appropriate subsidy standards for families, and determining rent reasonableness for certain units. The PHA is also responsible for terminating the family's participation in the DHAP-Ike if the family fails to comply with the family obligations of the program or in accordance with DHAP-Ike operating requirements.

More detailed information about DHAP-Ike and the governing operating requirements for the program can be accessed via the HUD Web site at *http://www.hud.gov/offices/pih/publications/ike.cfm.* Any subsequent revisions or amendments to those requirements and any further supplemental information will also be made available on the above Web site.

Dated: December 9, 2008.

**Paula O. Blunt,**

*General Deputy Assistant Secretary for Public and Indian Housing.*

[FR Doc. E8–29947 Filed 12–16–08; 8:45 am]

BILLING CODE 4210–67–P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5067–N–04]**

## Extension of HUD's Implementation Guidance for Section 901 of the Emergency Supplemental Appropriations To Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, as Revised by Section 11003 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 To Include Calendar Years 2008 and 2009 Program Funds

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.

**ACTION:** Notice.

**SUMMARY:** This notice supplements three earlier notices published in the **Federal Register** that provided guidance to public housing agencies (PHAs) on implementing the authority provided to HUD by section 901 of the ''Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act, 2006'' (Pub. L. 109–148, approved December 30, 2005). This authority allows PHAs in the most heavily impacted areas of Louisiana and Mississippi affected by Hurricanes Katrina and Rita to combine Housing Choice Voucher and public housing operating and capital funds to flexibly and efficiently facilitate disaster recovery in those areas. Such authority was provided for calendar years (CYs) 2006 and 2007. This notice advises of the extension of such authority through CYs 2008 and 2009 by section 11003 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (Pub. L. 110–329, approved September 30, 2008). Eligible PHAs with a continued need for assisting families who were receiving housing assistance under the Act immediately prior to Hurricane Katrina or Rita and were displaced from their housing by the hurricanes and are interested in using authority provided under the extended section 901 authority must submit a 2008 Notice of Intent and Fungibility Plan in accordance with the July 28, 2006, October 30, 2006, and August 6, 2007 **Federal Register** notices. Further information on HUD processing of CYs 2008 and 2009 section 901 fungibility will be posted to the Office of Public and Indian Housing Web site at: *http://www.hud.gov/offices/pih/.*

**DATES:** Eligible PHAs must submit their CY 2008 Notices of Intent and Fungibility Plans no later than January 31, 2009.

**FOR FURTHER INFORMATION CONTACT:** For technical assistance and other questions concerning the Notice of Intent and section 901 Fungibility Plan, PHAs should contact their local HUD Public Housing Hub in New Orleans, Louisiana, or Jackson, Mississippi; or Bessy Kong, Deputy Assistant Secretary for Policy, Program, and Legislative Initiatives, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4116, Washington, DC 20410–5000, telephone 202–708–0614 or 202–708–0713, extension 2548 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** On July 28, 2006, at 71 FR 42996, HUD published a notice (FR–5067–N–01) entitled, ''Implementation Guidance for section 901 of the Emergency

Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006.'' Section 901 of the Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Pub. L. 109–148, approved December 30, 2005) authorizes HUD to allow PHAs to combine assistance provided under sections 9(d) and 9(e) of the United States Housing Act of 1937 (Act) and assistance provided under section 8(o) of the Act, for the purpose of facilitating the prompt, flexible and efficient use of funds provided under these sections of the Act to assist families who were receiving housing assistance under the Act immediately prior to Hurricane Katrina or Rita and were displaced from their housing by the hurricanes. Section V.A. of the July 28, 2006, notice, entitled, ''General Procedures for Combining Public Housing and Voucher Funds under section 901,'' provided instructions for PHAs interested in implementing the flexibility in funding authorized in section 901.

On October 30, 2006, at 71 FR 63340, HUD published a notice (FR–5067–N–02) that extended the period for PHAs located within the most heavily impacted areas of Louisiana and Mississippi that are subject to a declaration by the President of a major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in connection with Hurricanes Katrina or Rita to submit Notices of Intent and Fungibility Plans in accordance with the July 28, 2006, notice. In addition to extending the PHA submission deadline, the October 30, 2006, notice removed the restriction that the combined funding may not be spent for uses under the Housing Choice Voucher program.

On August 6, 2007, at 72 FR 45657, HUD published a notice (FR–5067–N–03) that extended section 901 fungibility through CY 2007 pursuant to section 4803 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act (Pub. L. 110–28, approved May 25, 2007).

Today's **Federal Register** notice revises the earlier notices to incorporate the extension of section 901 fungibility from calendar year CY 2007 to calendar years 2006, 2007, 2008, and 2009, as authorized by section 11003 of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 (Pub. L. 110–329, approved September 30, 2008).

As noted earlier in today's notice, eligible PHAs interested in combining CY 2008 funds must submit a 2008 Notice of Intent and Fungibility Plan in accordance with the July 28, 2006, notice, and subsequent **Federal Register** notices. Further information on HUD processing of CY 2008 and CY 2009 Section 901 flexibility may be found on the Office of Public and Indian Housing Web site at *http://www.hud.gov/offices/pih*.

Notices and Plans should be submitted to the following addresses and contacts, as listed in the July 28, 2006, notice: PHAs should submit one copy to the Public Housing Director of the HUD office in New Orleans, Louisiana or Jackson, Mississippi, as applicable, and the original to HUD Headquarters, Office of Public and Indian Housing, Office of Policy, Program, and Legislative Initiatives, 451 7th Street, SW., Room 4116, Washington, DC 20410–5000, Attention: Bessy Kong/Sherry McCown.

Dated: December 9, 2008.

**Paula O. Blunt,**

*General Deputy Assistant Secretary for Public and Indian Housing.*

[FR Doc. E8–29949 Filed 12–16–08; 8:45 am]

BILLING CODE 4210–67–P

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5269–N–01]**

## Waiver of Regulations Issued by HUD Restatement of Policy

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Notice.

**SUMMARY:** This notice reiterates HUD's statement of policy concerning the procedures that govern the waiver of regulations and directives issued by HUD. This policy was first announced by notice published in 1991, following enactment of the Department of Housing and Urban Development Reform Act of 1989. In 2001, HUD published a notice that clarified how these procedures are implemented during a period of Administration transition. This notice consolidates the information and procedures provided by the two notices, and updates information and terminology to reflect current HUD operations and procedures.

**FOR FURTHER INFORMATION CONTACT:** For Regulations: Camille E. Acevedo, Associate General Counsel for Legislation and Regulations, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10282, Washington, DC 20410–0500, telephone number 202–708–1793. (This is not a toll-free number.) For Directives: Dorothy Fason, Departmental Directives Management Officer, Office of Administration, Department of Housing and Urban Development, 451 7th Street, SW., Room 10139, Washington, DC 20410, telephone 202–708–3054. (This is not a toll-free number.) Persons with hearing or speech impairments may access these numbers through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Section 106 of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101–235, approved December 15, 1989) added a new section 7(q) to the Department of Housing and Urban Development Act. (*See* 42 U.S.C. 3535(q).) This provision specifies that all waivers of HUD regulations:

- Must be in writing and indicate the grounds for granting the waiver;
- May be delegated by the Secretary only to an individual of Assistant Secretary or equivalent rank, who is authorized to issue the regulation to be waived; and
- Must provide notification to the public through a notice published at least quarterly in the **Federal Register**. (*See* 42 U.S.C. 3535(q)(1) through (3).)

Section 7(q) also provides that any waiver of a provision of a HUD handbook (which is included in HUD's definition of ''directive'') must be in writing, specify the grounds for the waiver, and be indexed and made available for public inspection for a period of 3 years. (*See* 42 U.S.C. 3535(q)(4).)

Section 7(q) contains only procedural requirements with respect to waivers of regulations and handbooks. These include requirements governing the form and content of a waiver, who may grant the waiver, and public notification of the waiver. Section 7(q) made no change in the substantive grounds upon which, or the circumstances in which, HUD may grant a waiver.

### II. Statement of Policy on Waiver of Regulations and Directives

This statement sets forth HUD's policy and procedures governing the waivers of HUD regulations and directives. These procedures are consistent with the requirements of section 7(q) of the Department of Housing and Urban Development Act, as added by section 106 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3535(q)). HUD's regulation at 24 CFR 5.110 also sets forth HUD's

obligation to comply with the waiver requirements of 42 U.S.C. 3535(q).

*A. Definitions*

*As used in this Statement Policy:*

*Assistant Secretary* means an Assistant Secretary of the Department under section 4(a) of the Department of Housing and Urban Development Act (42 U.S.C. 3533(a)), or an individual of equivalent rank (as such term is defined in this section).

*Department* or HUD means the United States Department of Housing and Urban Development.

*Deputy Secretary* means the Deputy Secretary of Housing and Urban Development.

*HUD Act* means the Department of Housing and Urban Development Act (42 U.S.C. 3531 *et seq.*).

*Directive* means a handbook (including a change or supplement), notice, and any other issuance that HUD may classify as a directive.

*Individual of equivalent rank* means an individual with rank equivalent to an Assistant Secretary, such as the General Counsel, the Chief Financial Officer, the Inspector General, and the President of the Government National Mortgage Association.

*Regulation means:*

—Any material contained in Title 24, Code of Federal Regulations;

—Any notice published in the **Federal Register** announcing the availability of funds (referred to as a notice of funding availability or NOFA), or the criteria to be used to select recipients of the funds, under any program administered by HUD; and

—Any other notice published in the **Federal Register** that establishes program requirements pursuant to a statute that authorizes HUD to administer the program by **Federal Register** publication, pending issuance of effective regulations amending Title 24, Code of Federal Regulations.

*Secretary* means the Secretary of Housing and Urban Development.

*B. Waiver of Regulations*

1. *Actions Subject to Section 7(q).* Section 7(q) of the HUD Act only covers waivers of non-statutory regulatory requirements. Many HUD regulations reflect statutory requirements, and section 7(q) grants no authority to waive statutory requirements that may be codified in HUD regulations. Therefore, HUD officials must always exercise caution that a waiver of a HUD regulation is not a waiver of a statutory requirement.

Section 7(q), however, is not applicable to HUD regulations that contain, within the regulation, the authority to grant an exception to the overall requirement stated in the regulation under certain specified criteria. This type of regulation was established to provide ''built-in'' exceptions to the general regulatory requirement, thereby allowing the applicable HUD official to act on such exceptions under the exception criteria specified without undertaking the more formal regulatory waiver process. Examples of this type of regulation can be found in the following regulations:

a. 24 CFR 203.43(c)(2)

*§ 203.43 Eligibility of Miscellaneous Type Mortgages*

* * * * *

(c) The Commissioner may insure under this part, without regard to any limitation upon eligibility contained in the other provisions of this subpart, any mortgage given to refinance an existing mortgage insured under the National Housing Act. The refinancing mortgage must meet the following special requirements:

* * * * *

(2) It must have a term which does not exceed the unexpired term of the existing mortgage, *except that in any case where the Commissioner determines that an extension of the term of the mortgage will inure to the benefit of the applicable insurance fund, taking into consideration the outstanding insurance liability under the existing insured mortgage*, the term may be extended to the lesser of (i) 30 years or (ii) the unexpired term of the existing mortgage, plus 12 years; (Emphasis added.)

Section 203.43 specifies the conditions under which the Federal Housing Commissioner may grant an exception to the general condition that a refinanced mortgage must have a term that does not exceed the unexpired term of the existing mortgage.

b. 24 CFR 201.5

*§ 201.5 Waivers*

*Waiver of lender's noncompliance.* The Secretary may waive a lender's noncompliance with any provision of this part, subject to statutory limitations, when it is determined that enforcement of the regulations would impose an injustice upon a lender which has substantially complied with the regulations in good faith and refunded or credited any excess charge made, and when such waiver does not involve an increase in the Secretary's obligation beyond that which would have been involved if the lender was in full compliance with the regulations.

Section 201.5 provides a built-in waiver provision and specifies the basis upon which the waiver may be granted.

2. *Form and Content of Waivers.* Each waiver of a HUD regulation must be in writing and specify the grounds for granting the waiver.

3. *Who May Grant a Waiver?* The Secretary is the ultimate repository of the authority both to issue and to waive HUD regulations. The Deputy Secretary has been delegated concurrent authority with the Secretary to issue and waive HUD regulations. The Secretary may delegate each of these powers to HUD Assistant Secretaries or other individuals of equivalent rank, as defined in this notice, and as provided in this section. Typically, the authority to issue regulations is delegated to an Assistant Secretary, with concurrent authority delegated to the Assistant Secretary's principal deputy, generally a General Deputy Assistant Secretary.

The authority to waive a regulation may not be delegated below the Assistant Secretary or equivalent rank (e.g., an Assistant Secretary's principal deputy) unless that individual is serving as the Assistant Secretary or as other individual of equivalent rank. That is, persons formally authorized to act for the Secretary, Deputy Secretary, or an Assistant Secretary, or an individual of equivalent rank in that official's absence may exercise the waiver authority of that individual. Use of this power is limited to situations in which an official is designated as, and is performing the duties of, the absent official pursuant to a current, written order of succession signed by the appropriate official. Note: Special issues are raised by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended. The statute authorizes the Department of Transportation, as lead agency, to issue regulations. (*See* 42 U.S.C. 4633 and the implementing regulations at 49 CFR part 24.) Section 24.7 of the Department of Transportation regulations (49 CFR 24.7) authorizes the federal funding agency to waive certain non-statutory requirements of part 24. Accordingly, the authority to issue and the authority to waive are in different agencies. HUD's position is that the waiver authority of 49 CFR 24.7 is not subject to section 7(q) of the HUD Act because section 7(q) addresses only regulations that the Secretary has the authority to issue.

4. *Legal Concurrence in Waivers.* A proposed waiver of a regulation subject to section 7(q) must be concurred in by the General Counsel (or the General Counsel's designee with responsibility for the legal area involving the waiver), if the waiver would:

a. Be precedential in effect;

b. Affect in any way the competitive ''ground rules'' under which assistance is distributed to recipients;

c. Relate to litigation involving HUD or its programs; or

d. Otherwise present novel decisions or circumstances.

A proposed waiver that does not meet any of these criteria may be granted without the concurrence of the Office of General Counsel.

5. *Concurrence in Waivers of Nondiscrimination Provisions*. Any proposed waiver of a regulation subject to section 7(q) that prohibits discrimination on the basis of race, color, religion, national origin, sex, disability, age, or familial status, or that sets forth related affirmative obligations, must be concurred in by the Assistant Secretary for Fair Housing and Equal Opportunity, or the Assistant Secretary's designee.

6. *Notification to the Public*.

a. *In General*. HUD will notify the public of all waivers of regulations subject to section 7(q) that are granted by HUD through notice published in the **Federal Register**.

b. *Timing of Notice*. Each notice will be published not less frequently than quarterly, and will provide information on all waivers of regulations subject to section 7(q) since the end of the period covered by the last **Federal Register** notice containing all the waivers granted during the reporting period.

c. *Content of Notice*. The notice will contain the following information for each waiver:

i. An identification of the project or activity that is the subject of the regulatory waiver;

ii. A description of the nature of the requirement that has been waived and a specification of the provision involved, including the citation to the Code of Federal Regulations (CFR), if the provision is codified in the CFR;

iii. The name and title of the official who granted the waiver;

iv. A brief description of the grounds for granting the waiver; and

v. A statement of how more information about the waiver, a copy of any request, and the approval of the waiver may be obtained.

d. *Public Inspection of Waivers*. A record of each waiver of a HUD regulation (including the information specified in Section B.c. of this notice) is maintained by the office of the HUD official who granted the waiver, and will be made available to the public, upon request, subject to the 3-year recordkeeping period for the waiver required by section 7(q)(4)(C). As provided in Section C.4. of this notice, information about specific waivers granted should be directed to the office that granted the waiver. General information about the procedures for granting waivers of regulations may be obtained from the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500, telephone number 202–708–2084. (This is not a toll-free number.) Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

*C. Waiver of Directives*

1. *Form and Content of Waivers*. Each waiver of a provision in a HUD directive will be in writing and will specify the grounds for granting it.

2. *Who May Grant a Waiver?* The HUD officer who is authorized to issue a directive may also grant waivers of its provisions. This authority may be delegated to any officer or employee in the issuing official's organization, as well as to any officer or employee in a HUD Field or Regional Office. Any such delegation must be in writing, although a published delegation of authority is not necessary to delegate the power to waive the provisions of directives.

3. *What May be Waived?* This notice applies only to a waiver that is intended to provide a benefit to, or to remove an obstacle to participation in a HUD program by specific individuals or entities outside the Department. Waivers of provisions governing internal HUD operations, and any action establishing guidance that applies to all individuals or entities that are in similar circumstances, are not subject to the waiver requirements of this notice. Issuance of a new directive is not a waiver for purposes of this notice.

HUD officials must be alert and cognizant that waiver of a directive provision that restates or summarizes a regulation may constitute a regulatory waiver. In determining whether a directive provision is to be treated as a regulatory waiver, HUD will consider whether the waiver of the directive would also require a regulatory waiver. If so, the waiver must meet the regulatory waiver requirements set forth in this notice.

All prohibitions against discrimination on the basis of race, sex, color, national origin, religion, handicap, age, or familial status, and all related affirmative obligations that are direct derivatives of regulations, are considered regulatory prohibitions.

4. *Public Inspection of Waivers*. A record of each waiver of a HUD directive (including the grounds for granting the waiver) will be made available to the public. For more information on where and how this information may be inspected, interested members of the public are to contact the HUD office that granted the waiver. The record of the waiver will be maintained for not less than the 3-year period beginning on the date the waiver is granted.

*D. Regulatory Waiver Procedures During Period of Administration Transition*

During a period of Administration transition, HUD officials authorized to waive regulations include those persons who, by reason of a vacancy in a position requiring Senate confirmation, are designated to exercise authority of the Secretary, Deputy Secretary, Assistant Secretary, or an individual of equivalent rank under a published order of succession. HUD's orders of succession, consistent with 42 U.S.C. 3535(d), ensure that waivers of regulations will be issued only by those persons authorized to issue the regulation to be waived. Consistent with such orders of succession and the Vacancies Reform Act of 1998 (5 U.S.C. 3345–3349d), delegation of this authority, and the waiver procedures set forth in this statement of policy continue until individuals nominated by the President to offices requiring Senate confirmation are confirmed by the Senate and sworn in by the President.

Employing orders of succession and existing delegations of authority during a period of Administration transition is essential to ensure that the business of the Department is not seriously impaired by the absence of individuals occupying positions requiring Senate confirmation. HUD receives a significant number of requests for waivers of regulations and directives, and failure to respond to these requests in a timely, considered manner may have significant adverse effects on HUD grantees and undercut HUD's credibility with the public. This clarification is also consistent with the Department's April 22, 1991, statement of policy, reiterated in this notice, in which HUD noted that the only other persons who are authorized to waive a regulation are those serving in an ''acting'' capacity. Use of this power is limited to situations in which an official is designated as, and is performing the duties of, the absent official pursuant to a current, written order of succession signed by the appropriate official. HUD has in place written orders of succession to ensure an orderly flow of the authority of those vacant positions that require Senate confirmation.

Notwithstanding Section II.B.4.e. of this notice, all waivers of regulation proposed during a period of Administration transition must be concurred in by the Associate General

Counsel who serves as program counsel to the program office considering granting the waiver, and by the General Counsel or General Counsel's designee under the most recent General Counsel's order of succession. This review procedure will ensure that all waivers are consistent with the Vacancies Reform Act of 1998.

### III. Findings and Certifications

*Environmental Review.* An environmental finding under the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) is unnecessary since this notice involves internal administrative procedures that are categorically excluded under HUD regulations at 24 CFR 50.20(k). It should be noted that the actual grant of a waiver pursuant to this notice may require environmental review. If this occurs, the environmental considerations will be assessed at that time and in that context.

*Executive Order 13132, Federalism.* Executive Order 13132 (entitled ''Federalism'') prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. The statement of policy sets forth only the procedures for granting waivers of regulations and directives, and for notifying the public of the waiver. Accordingly, this statement of policy does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

**Authority:** Sections 7(d) and 7(q), Department of Housing and Urban Development Act (42 U.S.C. 3535(d) and 3535(q)).

Dated: December 9, 2008.

**Roy A. Bernardi,**

*Deputy Secretary.*

[FR Doc. E8–29813 Filed 12–16–08; 8:45 am]

BILLING CODE 4210–67–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

[FWS–R3–R–2008–N0294; 30136–1265–0000–S3]

## Big Stone, Neal Smith, Crane Meadows, Gravel Island, Green Bay, Harbor Island, Huron, and Michigan Islands National Wildlife Refuges

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of intent to prepare comprehensive conservation plans and environmental assessments; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), intend to gather information necessary to prepare comprehensive conservation plans (CCP) and associated environmental documents for the Big Stone, Neal Smith, Crane Meadows, Gravel Island, Green Bay, Harbor Island, Huron, and Michigan Islands National Wildlife Refuges (NWRs). We furnish this notice in compliance with our CCP policy to advise other agencies and the public of our intentions, and to obtain suggestions and information on the scope of issues to be considered in the planning process. In addition, we invite comments on archeological, historic, and traditional cultural sites in accordance with the National Historic Preservation Act. Special mailings, newspaper articles, Internet postings, and other media announcements will inform people of the opportunities for written comments.

**ADDRESSES:** See **SUPPLEMENTARY INFORMATION** section of this notice for specific addresses for each refuge.

You may also find information on the CCP planning process and submit comments electronically on the planning Web site *http://www.fws.gov/midwest/planning*, or you may e-mail comments to *r3planning@fws.gov*.

**FOR FURTHER INFORMATION CONTACT:** See **SUPPLEMENTARY INFORMATION** section of this notice for specific contact names and telephone numbers for each refuge.

**SUPPLEMENTARY INFORMATION:** With this notice, we initiate the CCP for the Big Stone National Wildlife Refuge, Big Stone and Lac qui Parle Counties, MN; Neal Smith National Wildlife Refuge, Jasper County, IA; Crane Meadows National Wildlife Refuge, Morrison County, MN; Gravel Island National Wildlife Refuge, Door County, WI (Lake Michigan); Green Bay National Wildlife Refuge, Door County, WI (Lake Michigan); Harbor Island National Wildlife Refuge, Chippewa County, MI (Lake Huron); Huron National Wildlife Refuge, Marquette County, MI (Lake Superior); and Michigan Islands National Wildlife Refuge, with four islands in Charlevoix County, MI (Lake Michigan), and five islands in Arenac and Alpena Counties, MI (Lake Huron).

Comments or requests for more information can be directed to the individuals listed for each refuge:

- Attention: Alice Hanley, Refuge Manager, Big Stone National Wildlife Refuge, 44843 County Road 19, Odessa, MN 56276; 320–273–2191.
- Attention: Nancy Gilbertson, Refuge Manager, Neal Smith National Wildlife Refuge, P.O. Box 399, 9981 Pacific Street, Prairie City, IA 50228; 515–994–3400.
- Attention: Paul Soler, Refuge Manager, Crane Meadows National Wildlife Refuge, 19502 Iris Road, Little Falls, MN 56345; 320–632–1575.
- Attention: Patti Meyers, Refuge Manager, Gravel Island National Wildlife Refuge (Managed by Horicon NWR), W4279 Headquarters Road, Mayville, WI 53050; 920–387–2658.
- Attention: Patti Meyers, Refuge Manager, Green Bay National Wildlife Refuge (Managed by Horicon NWR), W4279 Headquarters Road, Mayville, WI 53050; 920–387–2658.
- Attention: Tracy Casselman, Refuge Manager, Harbor Island National Wildlife Refuge (Managed by Seney NWR), 1674 Refuge Entrance Rd., Seney, MI 49883; 906–586–9851.
- Attention: Tracy Casselman, Refuge Manager, Huron National Wildlife Refuge (Managed by Seney NWR), 1674 Refuge Entrance Rd., Seney, MI 49883; 906–586–9851.
- Attention: Tracy Casselman, Refuge Manager, Michigan Islands National Wildlife Refuge (northern section of Michigan Islands management at Seney NWR), 1674 Refuge Entrance Rd., Seney, MI 49883; 906–586–9851 and (south section of Michigan Islands management at Shiawassee NWR) Attention: Steve Kahl, Refuge Manager, Michigan Islands National Wildlife Refuge, 6975 Mower Road, Saginaw, MI 48601; 989–777–5930.

### Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should know that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may 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**

*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, including each of these NWRs, 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 conservation efforts of this 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 Service will conduct comprehensive conservation planning processes that will provide opportunity for Tribal, State, and local governments; agencies; organizations; and the public to participate in issue scoping and public comment for the future management of the Big Stone NWR, Neal Smith NWR, Crane Meadows NWR, Gravel Island NWR, Green Bay NWR, Harbor Island NWR, Huron NWR, and Michigan Islands NWR. We invite anyone interested to respond to the following two questions:

1. What issues do you want to see addressed in the CCP?
2. What improvements would you recommend for the refuges?

Responding to these two questions is optional; you are not required to provide information to us. Our Planning Team developed the questions to gather information about individual issues and ideas concerning these Refuges. Comments we receive will be used as part of the planning process; however, we will not reference individual comments in our reports or directly respond to them.

We will also give the public an opportunity to provide input at open houses. You can obtain a schedule of the open house events by contacting the Refuge Managers listed in the **SUPPLEMENTARY INFORMATION** section of this notice.

The environmental review of these projects will be 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 assessments 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.

Dated: November 7, 2008.

**Charles M. Wooley,**

*Acting Regional Director, U.S. Fish and Wildlife Service, Ft. Snelling, Minnesota.*

[FR Doc. E8–29836 Filed 12–16–08; 8:45 am]

**BILLING CODE 4310–55–P**

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R1–NWRS–2008–N0310; 1265–0000–10137–S3]**

### Baker Island, Howland Island, and Jarvis Island National Wildlife Refuges, U.S. Territories

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability of the final comprehensive conservation plans and findings of no significant impact.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service) have completed Comprehensive Conservation Plans (CCPs) and Findings of No Significant Impact (FONSIs) for the Baker Island, Howland Island, and Jarvis Island National Wildlife Refuges (Refuges). The CCPs were developed to provide a foundation for the management and use of these Refuges. We are furnishing this notice to advise other agencies and the public of the availability of the CCPs and FONSIs, and the decision to implement Alternative B as described in each CCP. The Service's Regional Director for the Pacific Region selected Alternative B for managing these Refuges for the next 15 years. The Refuges are U.S. Territories in the central Pacific Ocean, located between 1,300 and 1,600 miles southwest of Honolulu, Hawai'i.

**DATES:** The CCPs and FONSIs are now available. Implementation of the CCPs may begin immediately.

**ADDRESSES:** Printed copies of the CCPs and FONSIs are available for viewing or may be obtained by visiting or writing the Pacific Remote Islands National Wildlife Refuge Complex, 300 Ala Moana Blvd., Room 5–211, Honolulu, HI 96850. These documents are also available for viewing and downloading on the Internet at *http://www.fws.gov/pacific/planning/.*

**FOR MORE INFORMATION CONTACT:** Donald Palawski, Refuge Manager, Pacific Remote Islands National Wildlife Refuge Complex, phone number (808) 792–9560.

**SUPPLEMENTARY INFORMATION:** Baker Island, Howland Island, and Jarvis Island Refuges are part of the National Wildlife Refuge System administered by the Service. The National Wildlife Refuge System Administration Act of 1966 (Refuge Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee), requires all units of the National Wildlife Refuge System to be managed in accordance with an approved CCP. A CCP provides management direction and identifies refuge goals, objectives, and strategies for achieving refuge purposes. The CCPs and FONSIs for the Refuges were prepared pursuant to the National Environmental Policy Act (NEPA), as amended, and its implementing regulations, the Refuge Administration Act, and Service policies.

The Refuges and surrounding marine waters are unincorporated territories under the sovereignty of the United States. The Refuges straddle the equator in the Central Pacific subregion of the Polynesian Region of the Pacific Basin. This subregion, the largest of the four in the Polynesian Region, is the most remote part of the tropical Pacific and includes only low-lying reef islands, atolls and submerged reefs. The dominant wildlife species on these islands includes breeding seabirds and migrant shorebirds. In the waters surrounding the Refuges there are extremely pristine and unique coral reef and deep water ecosystems that exist nowhere else in the United States.

During the CCP planning process for these Refuges many elements were considered, including wildlife management and habitat protection, off-Refuge wildlife-dependent educational opportunities, and coordination with Federal agencies and other interested groups. The Draft CCPs and associated Environmental Assessments identified and evaluated four alternatives for managing these Refuges. The Draft CCPs were available for a 45-day public review and comment period. The Service received nine comment communications, which were incorporated into, or responded to in the final CCPs. No substantive changes were required to address public comments.

Changes to the Refuges' management include a modest increase in the frequency of staff visits to monitor seabird abundance and nesting status, conducting seabird nesting restoration, conducting marine exploration and marine ecosystem monitoring, and preserving cultural resource and wilderness resource values at the Refuges. Public access to the Refuges will remain closed, and commercial fishing will continue to be prohibited within the boundaries of these Refuges.

The following key actions described in the CCPs will be implemented.

- With assistance from partners, we will conduct management activities annually at the Refuges.
- We will continue to conserve, manage, and protect native terrestrial and marine communities that are representative of remote tropical Pacific islands.
- We will develop baseline data to understand sea turtle and seabird use at these Refuges.
- We will take actions to restore breeding populations of the Polynesian storm-petrel to the Refuges by using electronic call devices to attract and establish nesting colonies.
- We will conduct management actions in a manner that maintains and preserves the wilderness character of the terrestrial and marine communities at these Refuges.
- In coordination with partners, we will use remote surveillance and monitoring techniques to ensure the Refuges' biological, cultural, and historic resources are preserved.
- The Service will develop an off-Refuge environmental education and interpretation program for the public to learn about wilderness values, cultural and historic resources, tropical island ecosystems, seabirds, and coral reefs at these and other remote Pacific island refuges.

Dated: August 12, 2008.

**David J. Wesley,**

*Acting Regional Director, Region 1, Portland, Oregon.*

**Editorial Note:** This document was received in the Office of the Federal Register on December 11, 2008.

[FR Doc. E8–29721 Filed 12–16–08; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R5–R–2008–N0190; 50133–1265–WPCP–S3]**

### Wapack National Wildlife Refuge, Hillsborough County, NH

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability: final comprehensive conservation plan and finding of no significant impact for environmental assessment.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for the environmental assessment (EA) for Wapack National Wildlife Refuge (NWR). In this final CCP, we describe how we will manage the refuge for the next 15 years.

**ADDRESSES:** You may view or obtain copies of the final CCP and FONSI by any of the following methods. You may request a hard copy or CD–ROM.

*Agency Web Site:* Download a copy of the document(s) at *http://library.fws.gov/ccps/wapack/.*

*E-mail: fw5rw_prnwr@fws.gov.* Please include ''Wapack NWR CCP'' in the subject line of the message.

*Mail:* Parker River National Wildlife Refuge, 6 Plum Island Turnpike, Newburyport, MA 01950.

*In-Person Viewing or Pickup:* Call 978–465–5753 to make an appointment during regular business hours at Parker River NWR headquarters. The final document is also available at the library listed under **SUPPLEMENTARY INFORMATION**, below.

**FOR FURTHER INFORMATION CONTACT:** Graham Taylor, Refuge Manager, Parker River NWR; phone number 978–465–5753; e-mail address: *fw5rw_prnwr@fws.gov.*

**SUPPLEMENTARY INFORMATION:**

### Introduction

With this notice, we finalize the CCP process for Wapack NWR. We started by publishing a notice of intent in the **Federal Register** (72 FR 8197; February 23, 2007). For more about the process, *see* that notice. We announced the release of the draft CCP/EA to the public and requested their comments in a notice of availability in the **Federal Register** (73 FR 15769; March 25, 2008).

Wapack NWR, at 1,625 acres, was established by donation in 1972 as the first national wildlife refuge in New Hampshire. Its purpose is for migratory birds. It is administered by the staff of the Parker River NWR, headquartered in Newburyport, Massachusetts. The refuge encompasses the 2,278-foot North Pack Monadnock Mountain in the towns of Greenfield and Temple, New Hampshire. The terms of the deed of donation require the Service to manage the refuge in a ''wilderness-like'' setting for wildlife. Specific deed restrictions prohibit motorized vehicles, hunting and fishing, trapping, or cutting trees.

Mature northern hardwood-mixed and spruce-fir forest characterizes the refuge. It provides nesting habitat for many migratory songbirds such as the black-capped chickadee, blackburnian warbler, black-throated blue warbler, hermit thrush, myrtle warbler, ovenbird, and red-eyed vireo. The refuge also supports a wide variety of other native wildlife, including deer, bear, coyote, fisher, fox, mink and weasel.

Visitors engage in wildlife observation and photography on the refuge. It is especially popular for viewing the fall migration of hawks. A 4-mile segment of the 21-mile Wapack Trail traverses the refuge, and rewards hikers with a beautiful view of the surrounding mountains. Three other trails also offer quality opportunities for viewing and photographing wildlife.

We are announcing our decision and the availability of the FONSI and final CCP for Wapack NWR in accordance with the requirements of the National Environmental Policy Act (40 CFR 1506.6(b)). We completed a thorough analysis of effects on the human environment, which we included in the draft CCP/EA.

The final CCP will guide us in managing and administering Wapack NWR for the next 15 years. Alternative B, which we described in the draft CCP/EA as the Service-preferred alternative, is the foundation for the final CCP.

### Background

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee) (Improvement Act), which amends the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to

provide refuge managers with a 15-year plan for achieving refuge purposes and contributing to the mission of the National Wildlife Refuge System, in a manner consistent with the sound principles of fish and wildlife management, conservation science, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify opportunities for wildlife-dependent recreation available to the public, including hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update each CCP at least every 15 years, in accordance with the Improvement Act.

**CCP Alternatives, Including Alternative B, the Selected Alternative**

Our draft CCP/EA (73 FR 15769) identified and addressed several issues in its chapter 1, ''The Purpose of and Need for Action.'' In that document, we developed two alternatives to respond to those issues. Alternative A represented current management. Alternative B was identified as the Service-preferred alternative for several reasons. It included an array of management actions that, in our professional judgment, worked best toward achieving the purpose of the refuge, our vision and goals for those lands, and goals in State and regional conservation plans. In our opinion, alternative B most effectively addressed the key issues.

The planning team recommended alternative B to the Regional Director as the better alternative for managing this refuge over the next 15 years. He selected it for the final CCP.

Implementing the CCP will improve our knowledge of refuge resources and start the development of a baseline biological database. We plan to inventory populations of plants and wildlife on the refuge in partnership with the U.S. Forest Service. That project will also help us identify and monitor threats to the integrity of refuge habitats.

Other projects in the CCP will enhance visitor programs by expanding our partnerships with other Federal agencies, State agencies, town departments, local conservation organizations, and individuals. Partners will assist us in maintaining trails, developing and maintaining a new trailhead parking area, and increasing our presence and visibility on the refuge and in the local community. One of our goals is to better communicate refuge opportunities, visitor and contact information, and regulations.

We will allow only compatible activities that are consistent with a ''wilderness-like'' setting and adhere to other deed restrictions. The new activities we will allow include dog-walking only on leash, recreational berry-picking, and the annual Wapack Trail Run, under the stipulations of our determination of its compatibility.

We do not propose to expand the refuge. However, we will offer our support in identifying unprotected lands of high wildlife value to partners engaged in other regional land conservation and protection. We also will offer our technical assistance in managing those lands.

**Comments**

We solicited comments on the draft CCP/EA for Wapack NWR from March 25, 2008 to May 1, 2008 (73 FR 15769). We held a public meeting in Peterborough, New Hampshire, on April 17, 2008. We evaluated all comments received during the public comment period, and included our responses to those comments in appendix F of the final CCP.

**Selected Alternative**

The Regional Director selected alternative B for implementation. The following key changes were made between draft and final plans.

- We found compatible the annual Wapack Trail Race, with certain stipulations identified in its compatibility determination (refer to CCP appendix A).
- The staff of Parker River NWR in Newburyport, Massachusetts, now administers the unstaffed Wapack NWR; it is no longer administered from Great Bay NWR.

**Public Availability of Documents**

In addition to the methods in **ADDRESSES** above, you can view or obtain documents at the Peterborough, New Hampshire, Town Library, at 2 Concord Street, Peterborough, New Hampshire, during regular library hours.

Dated: November 19, 2008.

**Thomas J. Healy,**

*Acting Regional Director, U.S. Fish and Wildlife Service, Hadley, MA 01035.*

[FR Doc. E8–29436 Filed 12–16–08; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

**[FWS–R1–ES–2008–N0288; 10120–1112–0000–F2]**

## Receipt of Application for an Enhancement of Survival Permit for the Northern Spotted Owl and the Marbled Murrelet

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability and receipt of application.

**SUMMARY:** Port Blakely Tree Farms (PBTF) has applied to the U.S. Fish and Wildlife Service (Service) for an enhancement of survival permit (Permit) pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (Act). The permit application includes a draft Safe Harbor Agreement (SHA), draft Implementing Agreement (IA), and a draft Environmental Assessment (EA). The proposed term of the Permit and the Agreement is 60 years. The Permit would authorize PBTF to carry out habitat management measures that are likely to benefit the northern spotted owl (*Strix occidentalis caurina*) and the marbled murrelet (*Brachyramphus marmoratus*), both of which are federally listed as threatened, and would allow PBTF to return their properties to agreed upon baseline conditions at the end of the Permit term. The covered area is approximately 45,306 acres (18,335 hectares) and is located in eastern Lewis and Skamania counties, Washington. In accordance with Service responsibilities pursuant to the National Environmental Policy Act (NEPA), this notice also announces the availability for public review of a draft EA developed in conjunction with the proposed SHA. We request comments from the public on the permit application, draft SHA, draft IA, and the draft EA.

**DATES:** To be fully considered, written comments from interested parties must be received on or before January 16, 2009.

**ADDRESSES:** Written comments concerning this notice should be addressed to Mark Ostwald, U.S. Fish and Wildlife Service, Western Washington Fish and Wildlife Office, 510 Desmond Drive, SE., Suite 102, Lacey, WA 98503. You may also submit written comments by electronic mail to *FW1WWO_SHAPBTF@FWS.GOV.*

**FOR FURTHER INFORMATION CONTACT:** Mark Ostwald at (360) 753–9564.

**SUPPLEMENTARY INFORMATION:**

**Availability of Documents**

Copies of the PBTF permit application, draft SHA, draft IA, and the draft EA, and other relevant documents addressing the Service's proposed issuance of the subject permit may be viewed on the internet by accessing: *http://www.fws.gov/westwafwo.* You may also request copies of the documents by contacting the Service's Western Washington Fish and Wildlife Office [*see* **FOR FURTHER INFORMATION CONTACT** above]. The Service is furnishing this notice to provide the public, and other State and Federal agencies, with an opportunity to review and comment on the Service's proposed issuance of a permit to PBTF. All comments received will become part of the public record. 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 information from public review, we cannot guarantee that we will be able to do so. All comments received from organizations, businesses, or individuals representing organizations or businesses are available for public inspection in their entirety.

**Background**

Under a SHA, participating landowners voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting species listed under the Act (16 U.S.C. 1531 *et seq.*). SHAs, and the subsequent enhancement of survival permits that are issued pursuant to section 10(a)(1)(A) of the Act, encourage private and other non-Federal property owners to implement conservation efforts for listed species by assuring the landowners that they will not be subjected to increased property use restrictions as a result of their efforts to attract listed species to their property, or to increase the numbers or distribution of listed species already on their property. Application requirements and issuance criteria for enhancement of survival permits through SHAs are found in 50 CFR 17.22. These permits allow for any necessary future incidental take of any covered species above the mutually agreed upon baseline conditions for those species in accordance with the terms of the permit and any accompanying IA. In addition to this Federal planning and permitting process, PBTF is concurrently applying to the Washington Department of Natural Resources for a Landowner Option Plan and a Cooperative Habitat Enhancement Agreement as allowed under Washington Administrative Code 222–16–100 and 222–16–105.

PBTF has submitted a draft SHA for the northern spotted owl and the marbled murrelet covering 45,306 acres (18,335 hectares) of managed forest lands within the western Cascades in Lewis and Skamania counties, Washington. The covered lands have been intensively managed and are not currently known to be occupied by either the spotted owl or the marbled murrelet. The environmental baseline will be measured in terms of dispersal habitat for spotted owls and potential nesting habitat for marbled murrelets.

Approximately 59 percent of the proposed SHA occurs within the Mineral Conservation Support Area (CSA) for spotted owls, as described in the Service's *Recovery Plan for the Northern Spotted Owl* (2008). The primary role of the Mineral CSA in this area is to provide dispersal support for spotted owls. Although the remaining 41 percent of SHA lands are not within the CSA, PBTF intends to manage all SHA lands for the purpose of providing dispersal habitat for spotted owls .

There are no known spotted owls nesting on Port Blakely lands. However, spotted owls have historically nested on adjacent Federal lands and the 1.8-mile (2.9-kilometer) radius circles around those sites that are used for evaluating potential habitat availability for spotted owls extend onto PBTF lands. Because of this, PBTF conducted habitat evaluations of their properties to determine the amount of suitable spotted owl habitat present. Habitat surveys determined that there is not any high quality habitat, as defined in the Service's *Recovery Plan for the Northern Spotted Owl.* Because 59 percent of PBTF lands fall within a CSA intended to provide for spotted owl dispersal, the baseline for the SHA is defined in terms of spotted owl dispersal habitat. The baseline estimate for the SHA is 8,360 acres (3,383 hectares) of spotted owl dispersal habitat, of which 4,083 acres (1,652 hectares) occurs within the CSA and 4,277 acres (1,731 hectares) occurs outside of the CSA on PBTF land.

The Service's *Recovery Plan for the Marbled Murrelet* (1997) divides the range of the marbled murrelet within the continental United States into six Conservation Zones. The zone delineations assist the Service in the design of management actions and evaluation of impacts to the species at different scales. Approximately 50 percent of the proposed SHA lands occur within Puget Sound Conservation Zone 1, which extends inland 50 miles from eastern Puget Sound . The PBTF lands covered under the proposed SHA do not contain large patches of old forest with which nesting marbled murrelets are most commonly associated. A previous landowner surveyed a portion of the areas proposed for coverage under the SHA for marbled murrelet occupancy from 1998 to 2003 and did not locate any occupied sites. The most relevant metric to describe marbled murrelet nesting habitat is the abundance of nesting platforms, however, PBTF does not have this information in their existing forest inventory. For that reason, PBTF opted to identify stands greater than 7 acres (3 hectares) in size and greater than 81 years old as potential marbled murrelet nesting habitat for purposes of establishing the SHA baseline for this species. Using this habitat definition, there are 498 acres (202 hectares) of potential nesting habitat for the marbled murrelet on covered lands under the proposed SHA.

PBTF has worked closely with the Service to develop their proposed SHA and the voluntary conservation measures that are expected to provide a net conservation benefit to the northern spotted owl and the marbled murrelet. The Service anticipates the SHA would result in benefits to these species by committing PBTF to: (1) An average harvest rotation of 60 years versus the industry standard of 45 years; (2) a wildlife tree and snag management program; (3) marking a sample of snags and defective trees to be used in studies for effectiveness of snag creation methods; (4) identification and long-term retention of special management areas; and, (5) identification and long-term retention of special set-aside areas to provide a greater amount of older forest habitat within the covered area than would occur under current forest practices rules. By not operating within these special set-aside areas for the term of the SHA, stands will mature to an age of 136 to 173 years and will have the potential to provide foraging and nesting areas for spotted owls and nesting areas for murrelets.

The snag management program, through both protection of existing snags and creation of snags, and the extended average rotation age of 60 years, are intended to improve spotted owl dispersal habitat by providing more habitat for prey species and, ultimately, dispersing spotted owls. These young forests are often deficient in snags that provide habitat for small mammals that are the owl's prey. It is anticipated that protecting existing snags, and creating

snags in combination with the extended rotation age of 60 years, will improve spotted owl dispersal habitat in this CSA and outside of the CSA. Marbled murrelets are expected to receive benefits through the identification of Special Management Areas and Special Set Asides as these areas will be allowed to develop into more structurally diverse forest with an increased chance of containing suitable nesting platforms over the life of the Permit. Spotted owls will also benefit from improved habitat conditions in these areas.

While SHAs are often categorically excluded under NEPA, for this situation an EA was determined to best integrate Federal and State public review processes. As described above, PBTF is applying to the Washington Department of Natural Resources for a Landowner Option Plan and a Cooperative Habitat Enhancement Agreement for both the spotted owl and the marbled murrelet. The draft EA evaluates the potential impacts to the environment from the no-action alternative and the proposed SHA.

This notice is provided pursuant to section 10(c) of the Act and NEPA regulations (40 CFR 1506.6). The Service will evaluate the Permit application, associated documents, and comments submitted thereon to determine whether the draft EA, and the proposed SHA and Permit application meet the requirements of NEPA regulations and section 10(a) of the Act, respectively. If it is determined that the requirements are met, the SHA will be finalized and signed, and the Permit will be issued to the Applicant for incidental take of the covered species. The final NEPA and permit determinations will not be completed until after the end of the 30-day comment period, and will fully consider all public comments received during the comment period.

Dated: October 17, 2008.

**David J. Wesley,**

*Deputy Regional Director, Region 1, U.S. Fish and Wildlife Service, Portland, Oregon.*

[FR Doc. E8–29899 Filed 12–16–08; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[F–36732, F–36733, F–36735, F–36736, F–36737, F–36741, F–40200, F–40201; AK–964–1410–KC–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 the surface and subsurface estates in certain lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Doyon, Limited. The lands are in the vicinity of Wiseman, Alaska, and are located in:

**Fairbanks Meridian, Alaska**

T. 33 N., R. 7 W.,
Secs. 4 to 9, inclusive;
Secs. 16 to 21, inclusive;
Secs. 28 to 33, inclusive.
Containing approximately 11,477 acres.

T. 34 N., R. 7 W.,
Secs. 1 to 21, inclusive;
Secs. 28 to 33, inclusive.
Containing approximately 17,153 acres.

T. 35 N., R. 7 W.,
Secs. 19 to 36, inclusive.
Containing approximately 11,425 acres.
Aggregating approximately 40,055 acres.
Notice of the decision will also be published four times in the Fairbanks Daily News-Miner.

**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 January 16, 2009 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.

**Hillary Woods,**

*Land Law Examiner, Land Transfer Adjudication I.*

[FR Doc. E8–29895 Filed 12–16–08; 8:45 am]

**BILLING CODE 4310–JA–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[F–21901–50, F–21901–51, F–21901–53, F–21901–76, F–21901–77, F–21901–79, F–21901–80, F–21901–81, F–21901–82, F–21901–83, F–21904–59, F–21904–60, F–21906–01, F–21906–04; AK–964–1410–KC–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 the surface and subsurface estates in certain lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Doyon, Limited. The lands are in the vicinity of Wiseman, Alaska, and are located in:

**Fairbanks Meridian, Alaska**

T. 29 N., R. 7 W.,
Secs. 1 to 18, inclusive.
Containing approximately 11,489 acres.

T. 30 N., R. 7 W.,
Secs. 1, 2, and 3;
Secs. 10 to 15, inclusive;
Secs. 19 to 36, inclusive.
Containing approximately 17,228 acres.

T. 32 N., R. 7 W.,
Secs. 1 to 18, inclusive.
Containing approximately 11,364 acres.

T. 30 N., R. 8 W.,
Secs. 4 to 9, inclusive; Secs. 16, 17, and 18.
Containing approximately 5,687 acres.

T. 31 N., R. 8 W.,
Secs. 5, 19, and 30.
Containing approximately 1,551 acres.

T. 32 N., R. 8 W.,
Secs. 1 to 36, inclusive.
Containing approximately 22,749 acres.

T. 33 N., R. 8 W.,
Secs. 1 to 36, inclusive.
Containing approximately 22,997 acres.

T. 29 N., R. 9 W.,
Secs. 1 to 22, inclusive;
Secs. 27 to 33, inclusive.
Containing approximately 18,519 acres.

T. 30 N., R. 9 W.,
Secs. 1 to 36, inclusive.
Containing approximately 22,840 acres.

T. 32 N., R. 9 W.,
Secs. 1 to 36, inclusive.
Containing approximately 22,749 acres.

T. 29 N., R. 10 W.,
Secs. 1 to 36, inclusive.
Containing approximately 22,999 acres.
Aggregating approximately 180,172 acres.
Notice of the decision will also be published four times in the Fairbanks Daily News-Miner.

**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 January 16, 2009, 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.

**Hillary Woods,**

*Land Law Examiner, Land Transfer Adjudication I.*

[FR Doc. E8–29896 Filed 12–16–08; 8:45 am]

**BILLING CODE 4310–JA–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[UTU 2679]**

### Public Land Order No. 7720; Partial Revocation and Modification of Public Land Order No. 4291; Utah

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public Land Order.

**SUMMARY:** This order revokes a Public Land Order insofar as it affects 50 acres of National Forest System land withdrawn from mining on behalf of the Department of Agriculture to protect the Splash Dam Recreation Area and also opens that land to mining. This order also modifies the same Public Land Order to correct errors in the legal land descriptions for the Grandview and Spirit Lake Recreation Areas.

**DATES:** *Effective Date:* January 16, 2009.

**FOR FURTHER INFORMATION CONTACT:** Rhonda Flynn, BLM Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101–1345, 801–539–4132.

**SUPPLEMENTARY INFORMATION:** The Forest Service has determined that the Splash Dam Recreation Area land no longer needs to be withdrawn and has requested the revocation. The legal land description for the Grandview Recreation Area was incorrectly stated and the Spirit Lake Recreation Area was unsurveyed when Public Land Order No. 4291 was issued.

**Order**

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

1. Public Land Order No. 4291 (32 FR 14155 (1967)), which withdrew National Forest System lands from appropriation under the mining laws in aid of programs of the Department of Agriculture, is hereby revoked insofar as it affects the following described lands:

**Ashley National Forest**

*Uintah Special Meridian*

Splash Dam Recreation Area

T. 2 N., R. 8 W.,
Sec. 18, S½SE¼SW¼ and SW¼SW¼SE¼;
Sec. 19, N½NE¼NW¼.

The area described contains 50 acres in Duchesne County.

2. The legal description for those lands remaining withdrawn by Public Land Order No. 4291 (32 FR 14155 (1967)), is hereby modified to read as follows:

**Ashley National Forest**

*(a) Spirit Lake Recreation Area*

Salt Lake Meridian

T. 1 N., R. 17 E.,
Sec. 3, SW¼SW¼SE¼;
Sec. 10, W½NW¼NE¼, NW¼SW¼NE¼, E½NE¼NW¼, SE¼SW¼NW¼, and SE¼NW¼.

The area described contains 110 acres in Daggett and Summit Counties.

*(b) Grandview Recreation Area*

Uintah Special Meridian

T. 2 N., R. 8 W.,
Sec. 17, W½NW¼SW¼;
Sec. 18, SE¼NE¼SE¼.

The area described contains 30 acres in Duchesne County.

3. At 10 a.m. on January 16, 2009, the lands described in Paragraph 1 of this order shall be opened to location and entry under the United States mining laws, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. Appropriation of land described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (2000), shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Dated: November 14, 2008.

**C. Stephen Allred,**

*Assistant Secretary—Land and Minerals Management.*

[FR Doc. E8–29907 Filed 12–16–08; 8:45 am]

**BILLING CODE 3410–11–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[COC 28313]**

### Public Land Order No. 7718; Partial Revocation of Public Land Order No. 725; Colorado

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public Land Order.

**SUMMARY:** This order partially revokes a Public Land Order insofar as it affects approximately 75 acres of National Forest System land withdrawn from all forms of appropriation under the public lands laws, including the mining laws and reserved for use by the Forest Service as the Rollinsville Ranger Station within the Roosevelt National Forest. This order also opens the land to sale under the authority of Public Law No. 109–54.

**DATES:** *Effective Date:* January 16, 2009.

**FOR FURTHER INFORMATION CONTACT:** John D. Beck, BLM Colorado State Office, 2850 Youngfield Street, Lakewood, Colorado 80215–7093, 303–239–3882.

**SUPPLEMENTARY INFORMATION:** This action makes the land available for sale under the authority of the Forest Service Facility Realignment and Enhancement Act of 2005 (Pub. L. No. 109–54).

**Order**

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

1. Public Land Order No. 725 (16 FR 5444 (1951)), which withdrew National Forest System lands from appropriation under the public land laws, including the mining laws and reserved them for use by the Forest Service as administrative sites, recreation areas, or for other public purposes, is hereby revoked only insofar as it affects the following described land:

**Roosevelt National Forest**

*Sixth Principal Meridian*

Rollinsville Ranger Station

T. 1 S., R. 73 W.,
Sec. 35, lot 13, SE¼NE¼NW¼ of lot 14, NE¼SE¼NW¼ of lot 17, and lots 18 and 19.

The area described contains approximately 75 acres in Boulder County.

2. Subject to valid existing rights, the land described in Paragraph 1 is hereby opened to sale in accordance with the Forest Service Facility Realignment and Enhancement Act of 2005 (Pub. L. No. 109–54).

Dated: November 20, 2008.

**C. Stephen Allred,**

*Assistant Secretary—Land and Minerals Management.*

[FR Doc. E8–29905 Filed 12–16–08; 8:45 am]

BILLING CODE 3410–11–P

## NATIONAL COUNCIL ON DISABILITY

### Sunshine Act Meetings

**TYPE:** Quarterly Meeting.

**DATES AND TIMES:**
January 12, 2009, 8:30 a.m.–3 p.m.
January 13, 2009, 8:30 a.m.–5 p.m.
January 14, 2009, 8:30 a.m.–5 p.m.

**LOCATION:** Chaparral Suites Resort, 5001 N. Scottsdale Road, Scottsdale, AZ.

**STATUS:**
January 12, 2009, 8:30 a.m.–5 p.m.—Open.
January 13, 2009, 4:00 p.m.–5 p.m.—Open.
January 14, 2009, 8:00 a.m.–8:30 a.m.—Closed Executive Session.
January 14, 2009, 8:30 a.m.–5 p.m.—Open.

**AGENDA:** Public Comment Sessions; Emergency Preparedness Panel; and Employment; Healthcare; Reports from the Chairperson, Council Members, and the Executive Director; Strategic Planning; Unfinished Business; New Business; Announcements; Adjournment.

**SUNSHINE ACT MEETING CONTACT:** Mark S. Quigley, Director of External Affairs, NCD, 1331 F Street, NW., Suite 850, Washington, DC 20004; 202–272–2004 (voice), 202–272–2074 (TTY), 202–272–2022 (fax).

**AGENCY MISSION:** NCD is an independent federal agency and is composed of 15 members appointed by the President, by and with the advice and consent of the Senate. NCD provides advice to the President, Congress, and executive branch agencies promoting policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability; and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society.

**ACCOMMODATIONS:** Those needing reasonable accommodations should notify NCD immediately.

Dated: December 8, 2008.

**Michael C. Collins,**

*Executive Director.*

[FR Doc. E8–30102 Filed 12–15–08; 4:15 pm]

BILLING CODE 6820–MA–P

## NEIGHBORHOOD REINVESTMENT CORPORATION

### Neighborworks® America; Regular Board of Directors Meeting; Sunshine Act

**TIME & DATE:** 2 p.m., Tuesday, December 16, 2008.

**PLACE:** 1325 G Street NW, Suite 800, Boardroom, Washington, DC 20005.

**STATUS:** Open.

**CONTACT PERSON FOR MORE INFORMATION:** Erica Hall, Assistant Corporate Secretary. (202) 220–2376; *ehall@nw.org.*

**AGENDA:**
I. Call to Order.
II. Approval of the Minutes.
III. Summary Report of the Audit Committee.
IV. Summary Report of the Finance, Budget and Program Committee.
V. Summary Report of the Finance, Budget and Program Committee.
VI. Resolution.
VII. Financial Report (Unaudited).
VIII. Corporate Scorecard.
IX. Chief Executive Officer's Quarterly Management Report.
X. Adjournment.

**Erica Hall,**

*Assistant Corporate Secretary.*

[FR Doc. E8–30032 Filed 12–15–08; 11:15 am]

BILLING CODE 7570–02–P

## NUCLEAR REGULATORY COMMISSION

### Sunshine Federal Register Notice

**AGENCY HOLDING THE MEETINGS:** Nuclear Regulatory Commission.

**DATES:** Weeks of December 15, 22, 29, 2008; January 5, 12, 19, 2009.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and Closed.

**Week of December 15, 2008**

*Monday, December 15, 2008*

1 p.m.
Briefing on Protection of the NRC Information Technology Infrastructure and Related Topics (Public Meeting followed by a Closed portion—Ex. 2).

The open portion of this meeting will be webcast live at the Web address—*http://www.nrc.gov*:

*Wednesday, December 17, 2008*

2 p.m. Briefing on Threat Environment Assessment (Closed—Ex. 1).

**Week of December 22, 2008—Tentative**

There are no meetings scheduled for the week of December 22, 2008.

**Week of December 29, 2008—Tentative**

There are no meetings scheduled for the week of December 29, 2008.

**Week of January 5, 2009—Tentative**

There are no meetings scheduled for the week of January 5, 2009.

**Week of January 12, 2009—Tentative**

There are no meetings scheduled for the week of January 12, 2009.

**Week of January 19, 2009—Tentative**

There are no meetings scheduled for the week of January 19, 2009.

* * * * *

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.

* * * * *

**Additional Information**

Affirmation of ''Final Rule—Power Reactor Security Requirements (RIN 3150–AG63),'' tentatively scheduled on Tuesday, December 9, 2008, was postponed and will be rescheduled.

* * * * *

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 *rohn.brown@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 *darlene.wright@nrc.gov*.

December 11, 2008.

**R. Michelle Schroll,**

*Office of the Secretary.*

[FR Doc. E8–30041 Filed 12–15–08; 11:15 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Notice of Availability of the Final Interim Staff Guidance DC/COL–ISG–08 on the Necessary Content of Plant-Specific Technical Specifications for a Combined License

**AGENCY:** Nuclear Regulatory Commission (NRC).

**ACTION:** Notice of availability.

**SUMMARY:** The NRC is issuing its Final Interim Staff Guidance (ISG) DC/COL–ISG–08 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML083310259). The purpose of this ISG is to change the NRC staff position on the necessary content of plant-specific technical specifications (PTS) when a combined license (COL) is issued. This ISG clarifies the staff guidance contained in Regulatory Guide (RG) 1.206, ''Combined License Applications for Nuclear Power Plants,'' Section C.III.4.3, ''Combined License Information Items That Cannot Be Resolved Before the Issuance of a License,'' and replaces the related guidance in NUREG–0800, ''Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants,'' Chapter 16.0, ''Technical Specifications,'' Revision 2, dated March 2007, regarding the content of PTS to support issuing a COL. The NRC staff issues DC/COL–ISGs to facilitate timely implementation of the current staff guidance and to facilitate activities associated with the review of applications for standard design certifications (DCs) and COLs by the Office of New Reactors. The NRC staff will also incorporate the approved DC/COL–ISG–08 into the next revisions of RG 1.206 and the Standard Review Plan 16.0, and any related guidance documents.

*Disposition:* On October 8, 2008, the staff issued the proposed ISG ''Interim Staff Guidance on the Necessary Content of Plant-Specific Technical Specifications for a Combined License,'' (DC/COL–ISG–008) (ADAMS Accession No. ML082520707) to solicit public and industry comment. The staff did not receive any comments on the draft ISG. Therefore, the ISG is now being issued for use.

**ADDRESSES:** The NRC maintains an ADAMS, which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by e-mail at *pdr.resource@nrc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael L. Marshall, Technical Specification Branch, Division of Construction, Inspection, & Operational Programs, Office of the New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone 301–415–0539 or e-mail at *michael.marshall@nrc.gov.*

**SUPPLEMENTARY INFORMATION:** The agency posts its issued staff guidance in the agency external Web page (*http://www.nrc.gov/reading-rm/doc-collections/isg/*).

Dated at Rockville, Maryland, this 9th day of December 2008.

For the Nuclear Regulatory Commission.

**William D. Reckley,**

*Chief, Rulemaking and Guidance Development Branch, Division of New Reactor Licensing, Office of New Reactors.*

[FR Doc. E8–29906 Filed 12–16–08; 8:45 am]

**BILLING CODE 7590–01–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. CP2009–16; Order No. 145]**

### International Mail Contract

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** This document announces a recently-filed Postal Service notice of a new international mail contract. It addresses procedural steps associated with this filing.

**DATES:** Comments due December 19, 2008.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Background

On December 9, 2008, the Postal Service filed a notice announcing that it has entered into an additional Global Expedited Package Services 1 (GEPS 1) contract.[1] GEPS 1 provides volume-based incentives for mailers that send large volumes of Express Mail International (EMI) and/or Priority Mail International (PMI). The Postal Service believes the instant contract is functionally equivalent to previously submitted GEPS agreements, and supported by the Governors' Decision filed in Docket No. CP2008–5.[2] *Id* at 1–2. It further notes that in Order No. 86, which established GEPS 1 as a product, the Commission held that additional contracts may be included as part of the GEPS 1 product if they meet the requirements of 39 U.S.C. 3633 and if they are functionally equivalent to the initial GEPS 1 contract filed in Docket No. CP2008–5.[3] *Id.* at 1.

*The instant contract.* The Postal Service filed the instant contract pursuant to 39 CFR 3015.5. In addition, the Postal Service contends that the contract is in accordance with Order No. 86. It submitted the contract and supporting material under seal, and attached a redacted copy of the certified statement required by 39 CFR 3015.5(c)(2) to the Notice. *Id.* at 1–2.

The Notice addresses reasons why the instant GEPS 1 contract fits within the Mail Classification Schedule language for GEPS 1, explains expiration terms, and discusses the Postal Service's

[1] Notice of United States Postal Service Filing of Functionally Equivalent Global Expedited Package Services 1 Negotiated Service Agreement, December 9, 2008 (Notice).

[2] *See* Docket No. CP2008–5, Decision of the Governors of the United States Postal Service on the Establishment of Prices and Classifications for Global Expedited Package Services Contracts (Governors' Decision No. 08–7), May 6, 2008, and United States Postal Service Notice of Filing Redacted Copy of Governors' Decision No. 08–7, July 23, 2008.

[3] *See* PRC Order No. 86, Order Concerning Global Expedited Package Services Contracts, June 27, 2008, at 7 (Order No. 86).

interest in confidential treatment for the contract and related material.[4] *Id.* at 2–3. It also provides the Postal Service's rationale for concluding that the instant contract is functionally equivalent to the initial contract filed in Docket No. CP2008–5. The Postal Service requests that this contract be included within the GEPS 1 product. *Id.* at 3–5.

**II. Notice of Filing**

The Commission establishes Docket No. CP2009–16 for consideration of matters related to the contract identified in the Postal Service's Notice.

Interested persons may submit comments on whether the Postal Service's contract is consistent with the policies of 39 U.S.C. 3632, 3633, or 3642. Comments are due no later than December 19, 2008. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Jeremy L. Simmons to serve as Public Representative in the captioned filing.

*It is Ordered:*

1. The Commission establishes Docket No. CP2009–16 for consideration of the matters raised in this docket.

2. Pursuant to 39 U.S.C. 505, Jeremy L. Simmons is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than December 19, 2008.

4. The Secretary shall arrange for the publication of this Order in the **Federal Register**.

By the Commission.

**Steven W. Williams,**

*Secretary*

[FR Doc. E8–29833 Filed 12–16–08; 8:45 am]

BILLING CODE 7710–FW–P

[4] Contract expiration is tied to one year after the Postal Service notifies the customer that all necessary approvals and reviews have been obtained. *Id.* at 2.

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, December 18, 2008 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), (8), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Casey, as duty officer, voted to consider the items listed for the Closed Meeting in closed session.

The subject matter of the Closed Meeting scheduled for Thursday, December 18, 2008 will be:

Formal orders of investigation;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings of an enforcement nature;

Resolution of litigation claims;

A regulatory matter regarding financial institution;

Adjudicatory matters; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: December 11, 2008.

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–29849 Filed 12–16–08; 8:45 am]

BILLING CODE 8011–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[File No. 500–1]**

### National Lampoon, Inc., and Advatech Corporation; Order of Suspension of Trading

December 15, 2008.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of the issuers listed below.

*National Lampoon, Inc.* is incorporated in Delaware and headquartered in Los Angeles, California. The company's common stock is listed on the NYSE Alternext under the ticker symbol ''NLN.''

*Advatech Corporation* is incorporated in Florida and headquartered in West Palm Beach, Florida. The company's common stock trades on the grey market under the symbol ''ADVA.''

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed companies is suspended for the period commencing at 9:30 a.m. EST, December 15, 2008, and terminating at 11:59 p.m. EST, on December 29, 2008.

By the Commission.

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. E8–30082 Filed 12–15–08; 4:15 pm]

BILLING CODE 8011–01–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59073; File No. SR–CBOE–2008–122]**

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by Chicago Board Options Exchange, Incorporated Regarding Fees for the CBOE Stock Exchange

December 10, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 28, 2008, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. 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**

Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') proposes to modify its fees applicable to the CBOE Stock Exchange (''CBSX''). The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at the Commission.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The CBSX Fees Schedule lists the fees applicable to trading on CBSX. Those fees include transaction fees, which are based on whether the executing member is ''taking'' liquidity or ''making'' liquidity in connection with the transaction. The CBSX Fees Schedule also sets forth market quality bid/ask standards called Liquidity Provider Guidelines (''LPGs''). If the LPGs are met 90% of the time each day, then all CBSX Designated Primary Market-Makers [3] (''CBSX DPMs'') and CBSX Remote Market-Makers [4] (''CBSX RMMs'') receive enhanced maker rebates as set forth in the CBSX Fees Schedule. Specifically, CBSX RMMs that meet LPGs receive a maker rebate of $0.0027 per share, while CBSX DPMs that meet LPGs receive a maker rebate of $0.0029 per share. This filing proposes to make four changes to the CBSX fee schedule.

First, the filing establishes a uniform qualifying Market-Maker maker rebate of $0.0027 per share that would apply to all CBSX Market-Makers [5] when the LPGs are met. Second, the filing proposes to lower the general maker rebate from $0.0026 to $0.0025 per share. Third, the filing proposes to adopt fees for stock orders that are executed pursuant to CBOE's Automated Improvement Mechanism and Solicitation Auction Mechanism (Rules 6.74A.07 and 6.74B.01). These CBOE rules govern crossing orders pursuant to electronic auctions. Recently, CBOE adopted changes to those rules to allow those mechanisms to process complex orders (including stock-option orders). This filing proposes to establish a $0.0005 per share fee for these stock executions subject to a $1 minimum and $25 maximum charge. Fourth, the filing proposes to establish a fee for shares routed to other markets in connection with the execution of a CBSX Cross and Sweep order. The fee would be $0.0040 per share. Cross and Sweep orders (See CBSX Rule 51.8(r)) allow users to cross orders on CBSX at prices outside of the NBBO while the CBSX system contemporaneously sweeps all protected quotes on other markets and all better priced interest on CBSX in connection with the cross.

The proposed changes will take effect on December 1, 2008.

2. Statutory Basis

The proposed rule change is consistent with section 6(b) of the Securities Exchange Act of 1934 (''Act''),[6] in general, and furthers the objectives of section 6(b)(4) [7] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members and other persons using its facilities.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of 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 foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to section 19(b)(3)(A) of the Act [8] and subparagraph (f)(2) of Rule 19b–4 [9] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–122 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–122. 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, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the 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–CBOE–2008–122 and should be submitted on or before January 7, 2009.

[3] *See* CBOE Rule 50.3(4).

[4] *See* CBOE Rule 50.3(2).

[5] *See* CBOE Rule 50.3(1).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–29903 Filed 12–16–08; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59088; File No. SR–DTC–2008–13]**

## Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by The Depository Trust Company Relating to Eliminating the SRO Requirement as a Condition of DTC-Eligibility for Securities That Are Eligible for Resale Under Rule 144A Under the Securities Act of 1933

December 11, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on October 9, 2008, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by DTC. 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

DTC proposes to eliminate the SRO Requirement, as defined below, as a condition of DTC-eligibility for securities that are eligible for resale under Rule 144A (''Rule 144A Securities'') under the Securities Act of 1933 (''Securities Act'').[2]

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC 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. DTC 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*

In April 1990, the Commission adopted Rule 144A under the Securities Act.[3] This rule provides a safe-harbor from the registration requirements of the Securities Act for resales to qualified institutional buyers (''QIBs'') of certain restricted securities that when issued were not of the same class as securities listed on a national securities exchange registered under the Act. Rule 144A(d)(2)[4] requires that the seller or any person acting on its behalf take reasonable steps to ensure that the purchaser is aware that the seller may rely on the safe-harbor provided by Rule 144A.

In 1993, the Commission approved a DTC rule filing whereby DTC would make Rule 144A securities eligible for deposit, book-entry delivery, and other depository services provided, in part, that DTC was required to ''condition the eligibility of the Rule 144A Securities (other than Investment Grade Securities) on initial and continued inclusion of those securities in an SRO Rule 144A System, such as the NASD's PORTAL Market System.''[5] This condition is referred to herein as the ''SRO Requirement.'' The SRO Requirement contemplated that an SRO Rule 144A System would include comprehensive safeguards to facilitate the SRO's ability to detect violations of Rule 144A. However, the only SRO Rule 144A System that was developed was the NASD's PORTAL Market System (''PORTAL'') and not only did PORTAL not develop as anticipated but also it did not include the safeguards contemplated by the DTC rule filing and Commission order of 1993.[6] In light of the above, DTC believes that the SRO Requirement is no longer necessary or appropriate.

DTC believes that eliminating the SRO Requirement will result in a uniform procedure for making Rule 144A Securities DTC-eligible whether or not they were classified as investment grade securities. Under the proposed rule change, issuers and participants would continue to be responsible for determining that their deposit of Rule 144A Securities with DTC and their transactions in Rule 144A Securities through the facilities of DTC are in compliance with existing DTC rules and the federal securities laws, such as:

(i) *Rule 2, Section 8, of DTC's rules:* ''In connection with their use of the Corporation's [DTC's] services, Participants and Pledgees must comply with all applicable laws, including all applicable laws relating to securities, taxation and money laundering.''

(ii) *DTC's ''Operational Arrangements (Necessary for an Issue to Become and Remain Eligible for DTC Services)'' relating to BEO issues being made eligible for DTC services:* ''Issuer recognizes that DTC does not in any way undertake to, and shall not have any responsibility to, monitor or ascertain the compliance of any transactions in the Securities with the following, as amended from time to time: (1) Any exemptions from registration under the Securities Act of 1933; (2) the Investment Company Act of 1940; (3) the Employee Retirement Income Security Act of 1974; (4) the Internal Revenue Code of 1986; (5) any rules of any self-regulatory organizations (as defined under the Securities Exchange Act of 1934); or (6) any other local, state, federal, or foreign laws or regulations there under.''[7] This and other representations made by issuers to DTC pursuant to the DTC Operational Arrangements are mirrored in the Letter of Representations that DTC receives from issuers in connection with their deposits of BEO issues with DTC.

(iii) When a Rule 144A Security is made DTC eligible, the issuer will continue to be required to execute a copy of the rider to the Letter of Representation in the form it appears today except that the reference to the SRO Requirement will be deleted.

DTC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations there under because eliminating the unnecessary SRO Requirement will remove an impediment to the perfection of the

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 230.144A.

[3] *Supra* note 2.

[4] 17 CFR 230.144A(d)(2).

[5] Securities Exchange Release No. 33327 (Dec. 13, 1993), 58 FR 67878 (Dec. 22, 1993) [File No. SR–DTC–90–06]. ''Investment Grade Securities'' are defined in this release as nonconvertible debt securities and nonconvertible preferred stock which are in one of the top four categories by a nationally recognized statistical rating organization.

[6] Securities Exchange Release No. 56172 (Jul. 31, 2007), 72 FR 44196 (Aug. 7, 2007) [File No. SR–NASDAQ–2006–65].

[7] In 1994, in an order clarifying certain language in the Rule 144A Approval Order, the Commission concurred in the position taken by DTC that ''Rule 5 [of DTC's rules] does not require DTC to determine whether securities, when deposited at DTC, may be transferred lawfully by book-entry in light of the Federal securities law.'' Order Approving Proposed Rule Change Relating to a Clarification of Rule 5, Securities Exchange Act Release No. 33672, 56 SEC Docket 315 (Feb. 23, 1994) (''Rule 5 Clarification Order''). DTC Rule 5 was amended to delete any implication that DTC was under any statutory or contractual obligation to determine whether securities deposited with DTC could be legally transferred by book-entry.

mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

DTC does not believe that the proposed rule change will have any impact or impose any burden on competition.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments relating to the proposed rule change have not yet been solicited or received. DTC will notify the Commission of any written comments received by DTC.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within thirty-five 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 ninety 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 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 No. SR–DTC–2008–13 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–DTC–2008–13. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. to 3 p.m. Copies of such filing also will be available for inspection and copying at DTC's principal office and on DTC's Web site at *http://www.dtcc.com/legal/rule_filings/dtc/2008.php*. 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–DTC–2008–13 and should be submitted on or before January 7, 2009.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[8]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–29900 Filed 12–16–08; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59072; File No. SR–ISE–2008–92]**

## Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change as Modified by Amendment No. 1 Thereto Relating to Cancellation Fees

December 10, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 28, 2008, 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, II, and III below, which Items have been prepared by the ISE. On December 9, 2008, the ISE filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The ISE is proposing to amend its Schedule of Fees regarding its cancellation fee. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, 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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The 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 Change*

1. Purpose

The purpose of this proposed rule change is to amend the ISE's cancellation fee. The Exchange currently has a cancellation fee of $2.00 that applies to Electronic Access Members (''EAMs'') that cancelled at least 500 orders in a month, for each order cancellation in excess of the total number of orders such member executed that month. Further, all orders from the same clearing EAM executed in the same underlying symbol at the same price within a 30 second period are aggregated and counted as one executed order for purposes of this fee. This fee is currently charged only to customer orders; broker-dealer orders, including non-member market maker (FARMM) orders, are excluded from this fee.

Historically, some customers sought to avoid the cancellation fee by executing large quantities of small orders in inexpensive, out of the money options to offset their cancellation

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

activity in actively traded, at the money strikes where they conduct the majority of their profitable business. In response, the Exchange adopted a 30 second aggregation window when calculating the fee, wherein all orders executed by the same clearing customer of a Member firm, in the same underlying symbol and at the same price within 30 seconds are aggregated and counted as one execution.[3] While adopting the 30 second window reduced the incentive for these customers to enter multiple orders in rapid succession at the same price and, at that time, in the same series,[4] cancelled orders continued to be an issue. Additionally, the recent downturn in the market has resulted in thousands of out of the money options across hundreds of symbols, creating new opportunities for some customers to enter small orders at different price levels during the 30 second time period, allowing for more cancellation activity in at the money strikes.

Recognizing that order cancels and trades often happen in large numbers, the purpose of this fee is to focus on activity that is truly excessive and uses bandwidth and system capacity while fairly allocating costs among Members. The Exchange has made efforts in the past to recover system capacity and bandwidth costs relative to the level of cancel and order entry activity by periodically raising its cancellation fee.[5] Despite these efforts, the level of canceled orders continues to remain high, being offset by small order activity in deep out of the money options. This in turn has further increased capacity and bandwidth demands. As a result, ISE's receipt of cancel fees has been reduced to a level where they no longer represent a fair share of the Exchange's capacity costs.

In order to ease system congestion caused by cancelled orders, the Exchange proposes to amend the manner by which it calculates its current cancel fee by extending the current 30 second window to 300 seconds. ISE believes that extending the aggregation window to five minutes will result in a reduction in the number of orders that are sent to the Exchange to create offsetting trades.

The Exchange believes this proposed fee change is justified to address the level of cancellation activity and its effect on system congestion. This proposed fee change will be operative on December 1, 2008.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(4) that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, the Exchange believes amending the 30 second window to 300 seconds is necessary to address the current level of cancellation activity and its effect on system congestion.

*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. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(2)[7] thereunder. At any time within 60 days of the filing of the proposed rule change the Commission may summarily abrogate such proposed rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[8]

## 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–ISE–2008–92 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2008–92. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the ISE. 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–2008–92 and should be submitted on or before January 7, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–29902 Filed 12–16–08; 8:45 am]

**BILLING CODE 8011–01–P**

[3] *See* Securities Exchange Act Release No. 53862 (May 24, 2006), 71 FR 31244 (June 1, 2006).

[4] Earlier this year, in SR–ISE–2008–81, ISE amended the manner in which it calculates the fee by aggregating orders in the same underlying symbol in place of aggregating orders in the same series. *See* Securities Exchange Act Release No. 58898 (November 4, 2008), 73 FR 67238 (November 13, 2008).

[5] *See* Securities Exchange Act Release Nos. 54321 (August 15, 2006), 71 FR 49496 (August 23, 2006); 55422 (March 8, 2007), 72 FR 12645 (March 16, 2007); 57467 (March 11, 2008), 73 FR 14291 (March 17, 2008); and 58692 (September 30, 2008), 73 FR 59006 (October 8, 2008).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 19b–4(f)(2).

[8] For purposes of calculating the sixty-day abrogation period, the Commission considers the period to commence on December 9, 2008, the date on which the Exchange filed Amendment No. 1.

[9] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59077; File No. SR–NYSE–2008–127]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Amending Exchange Rule 104T To Make a Technical Amendment To Delete Language Relating to Orders Received by NYSE Systems and DMM Yielding; Clarifying the Duration of the Provisions of Rule 104T; Making Technical Amendments to Rule 98 and Rule 123E To Update Rule References for DMM Net Capital Requirements; Rescinding Paragraph (g) of Rule 123; and Making Conforming Changes to Certain Exchange Rules To Replace the Term ''Specialist'' with ''DMM''

December 10, 2008.

Pursuant to section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 8, 2008, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 proposes to: (i) Amend Exchange Rule 104T to make a technical amendment to delete language relating to orders received by NYSE systems and DMM yielding; (ii) clarify the duration of the provisions of Rule 104T; (iii) make technical amendments to Rule 98 and Rule 123E to update rule references for DMM net capital requirements; (iv) rescind paragraph (g) of Rule 123; and (v) make conforming changes to certain Exchange rules to replace the term ''specialist'' with ''DMM.''

The text of the proposed rule change is available at *http://www.nyse.com*, NYSE's principal office, and the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

### 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 self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') is proposing to: (i) Amend Exchange Rule 104T to make a technical amendment to delete language relating to orders received by NYSE systems and DMM yielding that was inadvertently not removed in the filing to create its New Market Model; [4] (ii) clarify the duration of the provisions of Rule 104T; (iii) make technical amendments to Rule 98 and Rule 123E to update rule references for DMM net capital requirements; (iv) rescind paragraph (g) of Rule 123; and (v) make conforming changes to certain Exchange rules to replace the term ''specialist'' with ''DMM.''

Background

On October 24, 2008, the Commission approved the operation of a pilot for the Exchange's New Market Model. As part of this new model the functions formerly carried out by specialists on the Exchange were replaced by a new market participant, known as a Designated Market Maker (''DMM''). While there are some similarities in the manner in which DMMs operate, there are some major differences as well. For example, DMMs continue to be assigned individual NYSE-listed securities as they were under the specialist system, and have an affirmative obligation with respect to maintaining a fair and orderly market for trading those assigned securities. Unlike the specialist system, each DMM also has a minimum quoting requirement [5] in its assigned securities but no longer has a negative obligation.

The implementation of these changes required the Exchange to amend its previous rule governing specialist conduct, former NYSE Rule 104 (Dealings by Specialists). As approved, the New Market Model will be phased [6] into the Exchange's marketplace to allow for the careful monitoring of technological and trading pattern changes that are the core of its operation. The Exchange therefore created transitional NYSE Rule 104T in order to govern DMM conduct during the first phase of the pilot.

Proposed Amendments to Rule 104T

In the New Market Model filing, the Exchange indicated that it anticipated that Phase 1 would be completed in five weeks while Phase 2 of the pilot would be completely implemented no later than ten weeks after the approval of that filing. The preliminary note to Rule 104T states that the rule is operative from the time of its approval by the Commission until five weeks after such approval, *i.e.*, until the completion of Phase 1. This was meant to address the two phases of the pilot, wherein Phase 1 would be operative for those first five weeks (*i.e.*, by November 28, 2008) and Phase 2 would begin thereafter. Consistent with this schedule, the Exchange completed the installation of all Phase 1 technology on November 17,

[4] *See* Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46) (approving certain rules to operate as a pilot scheduled to end October 1, 2009.)

[5] DMMs will be required to maintain displayed bids and offers at the National Best Bid or Offer (''NBBO'') for a certain percentage of the trading day in assigned securities. Specifically, with respect to maintaining a continuous two-sided quote with reasonable size, DMMs must maintain a bid or offer at the NBBO (''inside'') for securities in which the DMM is registered at a prescribed level based on the average daily volume of the security. Securities that have a consolidated average daily volume of less than one million shares per calendar month are defined as Less Active Securities and securities that have a consolidated average daily volume of equal to or greater than one million shares per calendar month are defined as More Active Securities.

For Less Active Securities, a DMM unit must maintain a bid or an offer at the NBBO for at least 10% of the trading day during a calendar month. For More Active Securities, a DMM unit must maintain a bid or an offer at the NBBO for at least 5% or more of the trading day during a calendar month. DMMs will be expected to satisfy the quoting requirement for both volume categories in their assigned securities.

[6] Pursuant to the implementation schedule, no later than five weeks after Commission approval, DMMs will still receive information about orders that are at or between the Exchange quote. DMMs must continue to abide by their affirmative obligations, meeting his or her requirements to maintain displayed bids and offers at the NBBO and re-enter liquidity pursuant to NYSE Rule 104T (''Phase 1''). After the fifth week of the operation of the Pilot, Phase 1 will be completed and NYSE Rule 104T will cease operation. Once NYSE Rule 104T ceases operation, DMMs will be subject to new NYSE Rule 104 (Dealings and Responsibilities of DMMs) (''Phase 2'').

2008 and is progressively installing the Phase 2 technology. It was always understood that those securities operating without Phase 2 technology must still be subject to the provisions of Rule 104T; however, the preliminary note of Rule 104T inaccurately describes its schedule of operation. The Exchange therefore seeks to amend the preliminary note of NYSE Rule 104T to state that it will cease operation no later than ten weeks after the approval of SR–NYSE–2008–46, the New Market Model which will allow for the progressive installation of the Phase 2 technology.

The Exchange further seeks to amend NYSE Rule 104T to remove legacy language that requires the DMM to yield his or her trading interest. Specifically, NYSE Rule 104T Supplementary Material .10 subparagraph (10) requires the DMM to yield his or her trading interest that has been expressed orally to later arriving system orders capable of trading in the transaction that was consummated on the basis of the oral interest expressed by the DMM. The requirement to yield in legacy Rule 104 was a function of the specialist's negative obligation and should have been removed in the New Market Model filing. Moreover, this particular section of the rule also refers to Convert and Parity Orders (''CAP'') that were rescinded as valid order types on the Exchange pursuant to the New Market Model filing. As such, the Exchange proposes to rescind the provisions of NYSE Rule 104T Supplementary Material .10 subparagraph (10) in its entirety.

Proposed Amendments to Rules 98 and 123E

The Exchange further proposes through this rule filing to make correct cross references contained in NYSE Rules 98 and Rule 123E. In particular, the requirements for DMM unit net capital were previously part of NYSE Rule 104.21 but were relocated to NYSE Rule 103.20(b) as part of the New Market Model filing. NYSE Rules 98(c)(2)(D) and Rule 123E(f)(i) still referenced the previous NYSE Rule 104.21 for the market maker's net capital requirements. Accordingly, the Exchange proposes to amend NYSE Rule 98(c)(2)(D) and Rule 123E(f)(i) to change the rule reference from NYSE Rule 104.21 to NYSE Rule 103.20.

Rescission of Paragraph (g) of Rule 123

Rule 123 (Records of Orders) contains various record keeping requirements for members and member organizations. Paragraph (g) requires that a record be kept of any request made to a specialist to yield to a customer order pursuant to Rule 104.10(5)(i)(a)(I)(d). The Exchange proposes to rescind this requirement since DMMs trade on parity with all other interest in the Exchange market, and is no longer required to yield to customer orders.

Conforming Changes to NYSE Rules

Finally, the Exchange proposes to amend the NYSE Rules listed in the table below to substitute the word ''specialist'' with ''DMM,'' or ''DMM Unit'' as appropriate to conform these rules to the operation of the New Market Model. Also reflected in the chart below is the Exchange's proposal to add the terms ''market maker'' and ''market making'' to NYSE Rule 431 in order to reflect the current DMM operating on the NYSE.

| Rule | Section | Substitution or addition |
|---|---|---|
| 2A (Jurisdiction) | (c) | ''specialist'' changed to ''DMM''. |
| 15 (Pre-Opening Indications) | (b) | ''specialist'' changed to ''DMM''. |
| 48 (Exemptive Relief—Extreme Market Volatility Condition). | (b)(2) | ''specialist'' changed to ''DMM''. |
| *70 (Execution of Floor Broker Interest)* | .25(a)(vii) and (viii) | ''specialist'' changed to ''DMM'' ''DMM'' and ''DMM Unit''. |
| 111 (Reports of Executions) | (b) | ''specialist'' changed to ''DMM''. |
| 124 (Odd-Lot Orders) | (f) | ''specialist'' changed to ''DMM''. |
| 325 (Capital Requirements Member Organizations) | (c)(2) | ''specialist'' changed to ''DMM''. |
| 431 (Margin Requirements) | (f)(2)(M)(iv)(10)(F) | ''market maker'' and ''market making''. |
| 440G (Transactions in Stocks and Warrants for the Accounts of Members, Principal Executives and Member Organizations). | .10(7)(h) | ''specialist'' changed to ''DMM''. |
| 900 Off-Hours Trading: Applicability and Definitions | (b)(iii) | ''specialist'' changed to ''DMM''. |

2. Statutory Basis

The bases under the Securities Exchange Act of 1934 (the ''1934 Act'') for this proposed rule change are the requirements under section 6(b)(5) that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that the instant proposal is consistent with the above principals [sic] in that it conforms the rule language to the approved New Market model which the Exchange anticipates will enhance the liquidity in the market and foster increased competition among Exchange market participants thus providing Exchange customers with additional opportunities for price improvement.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

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 foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms, does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act [7] and Rule 19b–4(f)(6) thereunder.[8]

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing.[9] However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. NYSE requested that the Commission waive the 30-day operative delay, as specified in Rule 19b–4(f)(6)(iii),[10] which would make the rule change effective and operative upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will conform the rule text to what was previously approved by the Commission in a prior Exchange proposed rule change, and make clarifications technical to those rules.[11] Waiving the operative delay will ensure that the rule text of the Exchange is accurate and will avoid potential confusion by eliminating technical errors.[12] Accordingly, the Commission designates the proposed rule change as operative upon filing with the Commission.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[13]

## 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–NYSE–2008–127 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2008–127. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. 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–2008–127 and should be submitted on or before January 7, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8–29901 Filed 12–16–08; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to give the Commission 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 filing of the proposed rule change, or such shorter time as designated by the Commission. NYSE has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] *See supra* note 4.

[12] 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).

[13] 15 U.S.C. 78s(b)(3)(C).

[14] 17 CFR 200.30–3(a)(12).

## SMALL BUSINESS ADMINISTRATION

### Reporting and Recordkeeping Requirements Under OMB Review

**AGENCY:** Small Business Administration.

**ACTION:** Notice of Reporting Requirements Submitted for OMB Review.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

**DATES:** Submit comments on or before January 16, 2009. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

*Copies:* Request for clearance (OMB 83–1), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer.

**ADDRESSES:** Address all comments concerning this notice to: *Agency Clearance Officer*, Jacqueline White, Small Business Administration, 409 3rd Street, SW., 5th Floor, Washington, DC 20416; and *OMB Reviewer*, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Jacqueline White, Agency Clearance Officer, (202) 205–7044.

**SUPPLEMENTARY INFORMATION:**

*Title:* Gulf Coast Relief Financing Pilot Information Collection.

*SBA Form Numbers:* 2276A, B, C, 2281, 2262.

*Frequency:* On occasion.

*Description of Respondents:* Applications for an SBA Loan.

*Responses:* 120.

*Annual Burden:* 180.

**Jacqueline White,**

*Chief, Administrative Information Branch.*

[FR Doc. E8–29893 Filed 12–16–08; 8:45 am]

BILLING CODE 8025–01–P

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Notice of Final Federal Agency Actions on Proposed Highway in Utah

**AGENCIES:** Federal Highway Administration (FHWA), USDOT.

**ACTION:** Notice of Limitation on Claims for Judicial Review of Actions by Army Corps of Engineers, (USACE), Department of Defense, (DOD).

**SUMMARY:** This notice announces actions taken by the USACE that are final

within the meaning of 23 U.S.C.139(*l*)(1). The actions relate to a proposed highway project, I–15 Corridor, from the South Payson Interchange in Utah County, to the 12300 South Interchange in Salt Lake County, State of Utah. Those actions grant licenses, permits, and approvals for the project.

**DATES:** By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C.139(*l*)(1). A claim seeking judicial review of the Federal agency actions that are covered by this notice will be barred unless the claim is filed on or before June 15, 2009. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

**FOR FURTHER INFORMATION CONTACT:** For FHWA: Mr. Carlos C. Machado, MBA, Major Project Manager, Federal Highway Administration, 2520 West 4700 South, Suite 9A, Salt Lake City, Utah 84118–1880; Telephone: (801) 963–0078 ext. 231; e-mail: *carlos.machado@fhwa.dot.gov.* The FHWA Utah Division Office's normal business hours are 7:30 a.m. to 4:30 p.m. (Mountain Time). For USACE: Mr. Jason A. Gipson, Chief, Nevada-Utah Regulatory Branch, Corps of Engineers, 533 West 2600 South, Suite 150, Bountiful, Utah 84010; Telephone: (801) 295–8380 ext. 14; e-mail: *jason.a.gipson@usace.army.mil.* The USACE Utah Regulatory Office's normal business hours are 7:30 a.m. to 4:30 p.m. (Mountain Time). For the Utah Department of Transportation (UDOT): Mr. Merrell Jolley, P.E., 658 North 1500 West, Orem, Utah 84057; Telephone: (801) 222–3406; e-mail: *merrelljolley@utah.gov*. The UDOT's normal business hours are Monday through Thursday, 7:30 a.m. to 5:30 p.m. (M. Time).

**SUPPLEMENTARY INFORMATION:** On Wednesday, November 5, 2008, the FHWA published a ''Notice of Final Federal Agency Actions on Proposed Highway in Utah'' in the **Federal Register** at Volume 73, No. 125, page 36503, for the following highway project in the State of Utah: I–15 from the South Payson Interchange in Utah County, to the 12300 South Interchange in Salt Lake County, a total of 43 miles. The project includes widening the I–15 mainline, and reconstruction or improvement at all interchanges. It also includes a new interchange at North Lehi. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Impact Statement (FEIS) for the project, approved on June 9, 2008, in the FHWA Record of Decision (ROD) issued on August 15, 2008, and in other documents in the FHWA project files. The FEIS, ROD, and other project records are available by contacting the FHWA or the UDOT at the addresses provided above. The FHWA FEIS and ROD can be viewed and downloaded from the project Web site at *http://www.udot.utah.gov/i15core/* or viewed at public libraries in the project area.

This notice applies to all Federal agencies' final actions taken after the issuance date of the FHWA **Federal Register** notice described above. The laws under which actions were taken include, but are not limited to:

1. General: National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].

2. Air: Clean Air Act [42 U.S.C. 7401–7671(q)].

3. Land: Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. Wildlife: Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536]; Marine Mammal Protection Act [16 U.S.C. 1361]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)]; Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. Historic and Cultural Resources: Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.* ]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–470(ll)]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. Social and Economic: Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. Wetlands and Water Resources: Clean Water Act (Section 404, Section 401, Section 319) [33 U.S.C. 1251–1377]; Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act, [16 U.S.C. 3921, 3931]; Wetlands Mitigation [23 U.S.C. 103(b)(6)(M) and 133(b)(11)]; Flood Disaster Protection Act, 42 U.S.C. 4001–4128.

8. Executive Orders: E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

**Authority:** 23 U.S.C. 139(*l*)(1).

Issued on: November 20, 2008.

**Walter C. Waidelich, Jr.,**

*Division Administrator, Salt Lake City.*

[FR Doc. E8–29991 Filed 12–16–08; 8:45 am]

**BILLING CODE 4910–RY–P**

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## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

### Release of Waybill Data

The Surface Transportation Board has received a request from Michael Behe representing FRN, LLC (WB604–7–11/17/08) for permission to use certain data from the Board's 2007 Carload Waybill Sample. A copy of this request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

*Contact:* Scott Decker, (202) 245–0330.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. E8–29850 Filed 12–16–08; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

### Release of Waybill Data

The Surface Transportation Board has received a request from Baker & Miller PLLC on behalf of the Kansas City Southern (WB595–6–11/26/08) for permission to use certain data from the Board's 2007 Carload Waybill Sample. A copy of the requests may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

*Contact:* Scott Decker, (202) 245–0330.

**Kulunie L. Cannon,**

*Clearance Clerk.*

[FR Doc. E8–29889 Filed 12–16–08; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

December 11, 2008.

The Department of the Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11020, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before January 16, 2009 to be assured of consideration.

### Office of Domestic Finance

*OMB Number:* 1505–0189.

*Type of Review:* Extension.

*Title:* Treasury International Capital Form BQ–3, ''Report of Maturities of Selected Liabilities of Depository Institutions, Brokers, and Dealers to Foreigners''.

*Form:* BQ–3.

*Description:* Form BQ–3 is required by law and is designed to collect timely information on international portfolio capital movements, including maturities of selected U.S. dollar and foreign currency liabilities of depository institutions, bank and financial holding companies, brokers and dealers to foreigners. This information is necessary in the computation of the U.S. balance of payments accounts and the U.S. international investment position, and in the formulation of U.S. international financial and monetary policies.

*Respondents:* Businesses and other for-profit institutions.

*Estimated Total Reporting Burden:* 1,568 hours.

*OMB Number:* 1505–0018.

*Type of Review:* Extension.

*Title:* Treasury International Capital Form BL–2, ''Report of Customers' U.S. Dollar Liabilities to Foreigners''.

*Form:* BL–2.

*Description:* Form BL–2 is required by law and is designed to collect timely information on international portfolio capital movements, including U.S. dollar liabilities of customers of depository institutions, bank and financial holding companies, brokers and dealers vis-a-vis foreigners. The information is necessary in the computation of the U.S. balance of payments accounts and the U.S. international investment position, and in the formulation of U.S. international financial and monetary policies.

*Respondents:* Businesses and other for-profit institutions.

*Estimated Total Reporting Burden:* 8,928 hours.

*OMB Number:* 1505–0020.

*Type of Review:* Extension.

*Title:* Treasury International Capital Form BQ–2, ''Part 1—Report of Foreign Currency Liabilities and Claims of Depository Institutions, Brokers and Dealers.''

*Description:* Form BQ–2 is required by law and is designed to collect timely information on international portfolio capital movements, including liabilities and claims of depository institutions, bank and financial holding companies, brokers and dealers, and their customers' liabilities vis-à-vis foreigners, that are denominated in foreign currencies. This information is necessary in the computation of the U.S. balance of payments accounts and the U.S. international investment position, and in the formulation of U.S. international financial and monetary policies.

*Form:* BQ–2.

*Respondents:* Businesses and other for-profit institutions.

*Estimated Total Reporting Burden:* 3,630 hours.

*OMB Number:* 1505–0024.

*Type of Review:* Extension.

*Title:* Treasury International Capital (TIC) Form CQ–1 ''Report of Financial Liabilities to, and Financial Claims on, Foreign Residents'' and Form CQ–2 ''Report of Commercial Liabilities.

*Description:* Forms CQ–1 and CQ–2 are required by law to collect timely information on international portfolio capital movements, including data on financial and commercial liabilities to, and claims on, unaffiliated foreigners and certain affiliated foreigners held by non-banking enterprises in the U.S. This information is necessary in the computation of the U.S. balance of payments accounts and the U.S. international investment position, and in the formulation of U.S. international financial and monetary policies.

*Forms:* CQ–1, CQ–2.

*Respondents:* Businesses and other for-profit institutions.

*Estimated Total Reporting Burden:* 5,408 hours.

*OMB Number:* 1505–0149.

*Type of Review:* Extension.

*Title:* 31 CFR Part 128, Reporting of International Capital and Foreign Currency Transactions and Positions.

*Description:* 31 CFR Part 128 establishes general guidelines for reporting on U.S. claims on, and liabilities to foreigners; on transactions in securities with foreigners; and on monetary reserve of the U.S. It also establishes guidelines for reporting on the foreign currency of U.S. persons. It includes a recordkeeping requirement in section 128.5.

*Respondents:* Businesses and other for-profit institutions.

*Estimated Total Reporting Burden:* 4,950 hours.

*OMB Number:* 1505–0017.

*Type of Review:* Extension.

*Title:* Treasury International Capital Form BC, ''Report of U.S. Dollar Claims of Depository Institutions, Brokers and Dealers on Foreigners''.

*Description:* Form BC is required by law and is designated to collect timely information on international portfolio capital movements, including own U.S. dollar claims of depository institutions, bank and financial holding companies, brokers and dealers vis-à-vis foreigners. The information is necessary in the computation of the U.S. balance of payments accounts and the U.S. international investment position, and in the formulation of U.S. international financial and monetary policies.

*Respondents:* Businesses and other for-profit institutions.

*Estimated Total Reporting Burden:* 33,804 hours.

*OMB Number:* 1505–0019.

*Type of Review:* Extension.

*Title:* Treasury International Capital Form BL–1, ''Report of U.S. Dollar Liabilities of Depository Institutions, Brokers and Dealers to Foreigners''.

*Description:* Form BL–1 is required by law and is designed to collect timely information on international portfolio capital movements, including U.S. dollar liabilities of depository institutions, bank and financial holding companies, brokers and dealers vis-à-vis foreigners. The information is necessary in the computation of the U.S. balance of payments accounts and the U.S. international investment position, and in the formulation of U.S. international financial and monetary policies.

*Form:* BL–1.

*Respondents:* Businesses and other for-profit institutions.

*Estimated Total Reporting Burden:* 29,562 hours.

*OMB Number:* 1505–0016.

*Type of Review:* Extension.

Title: Treasury International Capital Form BQ–1, ''Report of Customers' U.S. Dollar Claims on Foreigners''.

*Description:* Form BQ–1 is required by law and is designed to collect timely information on international portfolio capital movements, including U.S. dollar claims of customers of depository institutions, bank and financial holding companies, brokers and dealers vis-à-vis foreigners. The information is necessary in the computation of the U.S. balance of payments accounts and the U.S. international investment position, and in the formulation of U.S. international financial and monetary policies.

*Form:* BQ–1.

*Respondents:* Businesses and other for-profit institutions.

*Estimated Total Reporting Burden:* 882 hours.

*Clearance Officer:* Dwight Wolkow, Treasury Office of Domestic Finance, RM 5205 MT, 1500 Pennsylvania Avenue, Washington, DC 20220, (202) 622–7448.

*OMB Reviewer:* Nick Fraser, (202) 395–5887, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Robert Dahl,**

*Treasury PRA Clearance Officer.*

[FR Doc. E8–29925 Filed 12–16–08; 8:45 am]

**BILLING CODE 4810–25–P**

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## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### Voluntary Dissolution

**AGENCY:** Office of Thrift Supervision (OTS), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The proposed information collection request (ICR) described below has been submitted to the Office of Management and Budget (OMB) for review and approval, as required by the Paperwork Reduction Act of 1995. OTS is soliciting public comments on the proposal.

**DATES:** Submit written comments on or before January 16, 2009. A copy of this ICR, with applicable supporting documentation, can be obtained from RegInfo.gov at *http://www.reginfo.gov/public/do/PRAMain.*

**ADDRESSES:** Send comments, referring to the collection by title of the proposal or by OMB approval number, to OMB and OTS at these addresses: Office of Information and Regulatory Affairs, Attention: Desk Officer for OTS, U.S. Office of Management and Budget, 725—17th Street, NW., Room 10235, Washington, DC 20503, or by fax to (202) 395–6974; and Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, by fax to (202) 906–6518, or by e-mail to *infocollection.comments@ots.treas.gov*. OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov*. In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755.

**FOR FURTHER INFORMATION CONTACT:** For further information or to obtain a copy of the submission to OMB, please contact Ira L. Mills at, *ira.mills@ots.treas.gov* (202) 906–6531, or facsimile number (202) 906–6518, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:** OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

*Title of Proposal:* Voluntary Dissolution.

*OMB Number:* 1550–0066.

*Form Number:* N/A.

*Description:* Pursuant to 12 CFR 546.4, a Federal savings association's board of directors may propose a plan for dissolution of the association by submitting a statement listing the reasons and a plan of dissolution to the OTS. A plan of dissolution may be denied or recommendations to the plan may be made by OTS if it believes the plan is inadvisable and not in the best interests of all concerned.

Notice letters are sent to each depositor of the institution's intent to dissolve.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 3.

*Estimated Number of Responses:* 3.

*Estimated Burden Hours per Response:* 80 hours for Institutions; 10 minutes for third party requirements.

*Estimated Frequency of Response:* Other; as applied for.

*Estimated Total Burden:* 3,350 hours.

*Clearance Officer:* Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: December 11, 2008.

**Deborah Dakin,**

*Senior Deputy Chief Counsel, Regulations and Legislation Division.*

[FR Doc. E8–29834 Filed 12–16–08; 8:45 am]

**BILLING CODE 6720–01–P**

Federal Register

Wednesday,
December 17, 2008

# Part II

# Department of Agriculture

**Rural Utilities Service**
**Rural Housing Service**
**Rural Business-Cooperative Service**

**7 CFR Parts 1779, 3575, 4279 et al.**
**Rural Development Guaranteed Loans; Interim Rule**

**DEPARTMENT OF AGRICULTURE**

**Rural Utilities Service**

**7 CFR Part 1779**

**Rural Housing Service**

**7 CFR Part 3575**

**Rural Business-Cooperative Service**

**Rural Utilities Service**

**7 CFR Parts 4279 and 4280**

**Rural Business-Cooperative Service**

**Rural Housing Service**

**Rural Utilities Service**

**7 CFR Part 5001**

**RIN 0570–AA65**

## Rural Development Guaranteed Loans

**AGENCIES:** Rural Business-Cooperative Service, Rural Housing Service, Rural Utilities Service, USDA.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This interim rule establishes a unified guaranteed loan platform for the enhanced delivery of four existing Rural Development guaranteed loan programs—Community Facility; Water and Waste Disposal; Business and Industry; and Renewable Energy Systems and Energy Efficiency Improvement Projects. This interim rule eliminates the existing loan guarantee regulations for these four programs and consolidates them under a new, single part. In addition to consolidating these four programs, this interim rule incorporates provisions that will enable the Agency to better manage the risk associated with making and servicing guaranteed loans and that will reduce the cost of operating the guaranteed loan programs.

**DATES:** This interim rule is effective January 16, 2009. Comments must be received on or before February 17, 2009.

**ADDRESSES:** You may submit comments to this rule by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.
- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

All written comments will be available for public inspection during regular work hours at the 300 7th Street, SW., 7th Floor address listed above.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael Foore, Rural Development, Business and Cooperative Programs, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 3201, Washington, DC 20250–3201; e-mail: *Michael.Foore@wdc.usda.gov*; telephone (202) 690–4730.

**SUPPLEMENTARY INFORMATION:**

### Executive Order 12866

This interim rule has been determined to be significant and was reviewed by the Office of Management and Budget in conformance with Executive Order 12866. The Agency conducted a qualitative benefit cost analysis to fulfill the requirements of Executive Order 12866. Based on the results of this qualitative analysis of the benefits and costs of the interim rule, the Agency has concluded that the net effect of the rule will be beneficial in part due to improved underwriting. Copies of the benefit cost analysis may be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250–0742 or by calling (202) 692–0043.

### Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) of 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, Rural Development generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires Rural Development to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule. This interim rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

### Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, ''Environmental Program.'' Rural Development has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment, and in accordance with the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 *et seq.*, an Environmental Impact Statement is not required. Loan applications will be reviewed individually to determine compliance with NEPA.

### Executive Order 12988, Civil Justice Reform

This interim rule has been reviewed under Executive Order 12988, Civil Justice Reform. In accordance with this rule:

(1) All State and local laws and regulations that are in conflict with this rule will be preempted;

(2) No retroactive effect will be given this rule; and

(3) Administrative proceedings in accordance with the regulations of the Department of Agriculture National Appeals Division (7 CFR part 11) must be exhausted before bringing suit in court challenging action taken under this rule unless those regulations specifically allow bringing suit at an earlier time.

### Executive Order 13132, Federalism

It has been determined, under Executive Order 13132, Federalism, that this interim rule does not have sufficient federalism implications to warrant the preparation of a Federal Assessment. The provisions contained in the interim rule will not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

### Regulatory Flexibility Act

This interim rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Rural Development has determined that this rule will not have a significant economic impact on a substantial number of small entities.

Rural Development made this determination based on the fact that this regulation only impacts those who choose to participate in the program. Small entity applicants will not be impacted to a greater extent than large entity applicants.

**Executive Order 12372, Intergovernmental Review of Federal Programs**

Rural Development Guaranteed Loans are subject to the Provisions of Executive Order 12372, which require intergovernmental consultation with State and local officials. Rural Development conducts intergovernmental consultation in the manner delineated in RD Instruction 1940–J, ''Intergovernmental Review of Rural Development Programs and Activities,'' available in any Rural Development office, on the Internet at *http://rurdev.usda.gov.regs*, and in 7 CFR part 3015, subpart V.

**Executive Order 13175, Consultation and Coordination With Indian Tribal Governments**

This executive order imposes requirements on Rural Development in the development of regulatory policies that have tribal implications or preempt tribal laws. Rural Development has determined that the interim rule does not have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and the Indian tribes. Thus, this interim rule is not subject to the requirements of Executive Order 13175.

**Programs Affected**

The Catalog of Federal Domestic Assistance Program numbers assigned to this program are: 10.760, Water and Waste Disposal Systems for Rural Communities; 10.766, Community Facilities Loans and Grants; 10.768, Business and Industry Loans; and 10.775, Renewable Energy Systems and Energy Efficiency Improvements Program.

**Paperwork Reduction Act**

Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR part 1320), the information collection provisions associated with this interim rule have been submitted to the Office of Management and Budget (OMB) for approval as a new collection and assigned OMB number 0570–0054. In the publication of the proposed rule on September 14, 2007, the Agency solicited comments on the estimated burden. The Agency received one public comment letter in response to this solicitation. This information collection requirement will not become effective until approved by OMB. Upon approval of this information collection, the Agency will publish a notice in the **Federal Register**.

*Title:* Rural Development Guaranteed Loans.

*OMB Number:* 0570–0054 (assigned)

*Type of Request:* New collection.

*Expiration Date:* Three years from the date of approval.

*Abstract:* The majority of information being collected is associated with lender applications and its associated requirements for lender entities seeking to participate in the program and with loan guarantee applications. The types of information collected for lender applications include, but is not limited to, basic data about the lending entity and a summary of the lending entity's loan origination and servicing policies and procedures as well as, as applicable, its lending history and experience and its relationship with its regulator.

The type of information collected with the guarantee application depends on whether it is being submitted by an approved lender or a preferred lender. Approved lender guarantee applications require more information to be submitted than a guarantee application from a preferred lender. Guarantee applications from approved lenders must contain the lender's analysis and credit evaluation, environmental information, technical reports, energy audits or assessments, appraisals if available, business plan, feasibility study, credit reports, and financial statements. An Affirmative Fair Housing Marketing Plan is required where applicable.

Guarantee applications from preferred lenders must contain information sufficient for the Agency to confirm project and borrower eligibility, a copy of the lender's loan evaluation and analysis, internal loan approval documents, and environmental information.

Information is also collected when the loan is being approved (e.g., conditional commitment, lender's agreement). Once the loan is in place, information is collected during the servicing of the loan. For example, loan status reports, including information on loans that are in default, and borrower financial reports are provided to the Agency by the lender. Additional information is collected when changes occur during the life of the loan (e.g., mergers, subordinations, transfers and assumption).

The estimated information collection burden has increased by approximately $357,500, from $2,933,520 estimated for the proposed rule to $3,290,998 estimated for the interim rule. The majority of this increase is attributable to two changes. One change is the addition of the requirement for other lending entities (i.e., those that are not regulated or supervised) to undergo an examination acceptable to the Agency in order to participate in the program. This change, made in response to public comment, will help the Agency manage institutional risk. The second change is the removal of the low documentation application for guarantee. This was also eliminated in response to public comment and further helps the Agency manage institutional risk by requiring approved lenders to submit more information on each guaranteed loan requested. Together, these two changes account for approximately 90 percent of the increase in costs.

Other changes are accounted for by such changes as requiring additional notifications (e.g., loan classifications, changes in a lender's policies and procedures), additional guarantee application requirements (for Community Facility and Water and Waste Disposal guaranteed loans), and submittal of borrower financial reports. These changes further help the Agency mitigate the risk associated with the guaranteed loans it approves.

**E-Government Act Compliance**

Rural Development is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

*I. Overview*

This interim rule implements a unified guaranteed loan platform for the delivery of four guaranteed loan programs. The guaranteed loan programs included in the interim rule are Community Facilities, Water and Waste Disposal Facilities, Business and Industry, and the Rural Energy for America Program (previously known as the Renewable Energy System and Energy Efficiency Improvements program). Provisions common to each of the four programs are found in subpart A of the rule. Provisions specific to an individual program are found in subpart B of the rule. The unified guaranteed loan platform will allow USDA Rural Development to simplify, improve, and enhance the delivery of these four guaranteed loan programs across their service areas.

*II. Background*

By statutory authority, USDA Rural Development is the leading Federal advocate for rural America, administering a multitude of programs, ranging from housing and community facilities to infrastructure and business development. Its mission is to increase economic opportunity and improve the quality of life in rural communities by providing the leadership, infrastructure, venture capital, and technical support that enables rural communities to prosper and adapt to new technologies, products, and markets.

To achieve its mission, USDA Rural Development provides financial support (including direct loans, grants, and loan guarantees) and technical assistance to help enhance the quality of life and provide the foundation for economic development in rural areas. USDA Rural Development has used the four guaranteed loan programs included in this interim rule, as well as other guaranteed loan programs, to achieve Rural Development's mission. The regulations that are being combined under the interim rule have developed over time and, in some aspects, independently of each other. Issues have developed when looking at all four program regulations as a whole as well as individually. This was stated in the proposed rule published on September 14, 2007, **Federal Register** (72 FR 52618). The four issue areas identified by Rural Development are:

*Inefficiencies*. Many of the same lenders and, in some cases, borrowers, seek loan guarantees under more than one of these four programs. Thus, the same entities are required to learn multiple programs. This is inefficient and costly to the lenders and makes the programs less attractive to lenders. Currently, when new programs are implemented, a whole new regulation is developed that, in many respects, addresses or adopts many of the same requirements. Time and effort are wasted in readdressing issues during the development of new program regulations leading to inefficient rulemaking and a delay in program implementation.

*Inflexibility*. Maintaining four separate sets of basic requirements creates certain inflexibilities. For example, with each program administered under separate regulations, any change to basic requirements calls for multiple concurrences. Similarly, adding a new program requires the addition of a new set of basic requirements, as these are not currently shared.

*Use of Agency Resources*. Agency personnel spend a large amount of time performing process-related tasks that are not necessarily productive in making loan guarantees available to more lenders and, in turn, to more borrowers. These tasks are often inefficient and could be better managed by the private sector at the lender level. Further, these tasks are applied equally regardless of the relative level of risk of the associated loans. In sum, the current delivery of these four programs is not making the best use of Agency resources.

*Risk Management*. In making and managing a portfolio of loan guarantees, consideration must be given to project risk, institutional risk, Agency loss exposure, and internal operational risk.

Project risk refers to the ability of a project to repay its debt. The current process relies on the lender's evaluation of the project and then the Agency's review of the lender's analysis. The types of information required to be assessed under each of the programs by the lender may vary. Currently, the Agency lacks definitive parameters to evaluate project risk and is inconsistent in its evaluation of risk across State Offices. The lack of definitive parameters might create more risk. It allows projects to be funded based on completed processes as opposed to set evaluation criteria. This can result in funding more risky projects that may come at the expense of less risky projects over time because of limited program funds.

Institutional risk refers to the quality of the lender seeking the loan guarantee. Some lenders simply do a better job at managing their portfolios and thereby have a lower rate of defaults. The current system does little to pre-qualify lenders; that is, the criteria for a lender to originate a loan with the Agency are insufficient.

Agency loss exposure refers to the Agency's risk for potential loss in any one project in terms of the percent of guarantee and the size of the loan. Currently, Agency loss exposure is managed by putting limits on the percent of guarantee relative to the size of the loan, by having collateral requirements, and, for some of the programs, by limiting the size of the loan. While these limits are the primary mechanism for managing Agency loss exposure, the current programs could do more to manage this risk.

Agency operational risk refers to internal weaknesses inherent in administering multiple programs using a variety of regulations that require unique sets of processes and procedures.

Rural Development is addressing the issues associated with these four guaranteed loan programs through this unified guaranteed loan platform. This platform addresses the inefficiencies in maintaining separate regulations, better manages the risks associated with their delivery, significantly reduces inconsistencies in the implementation of these four programs across State offices, improves underwriting for loan guarantees, and reduces operational risk. By implementing a defined set of criteria to assess lender performance, Rural Development improves its management of lenders participating in these programs.

*III. Discussion of the Interim Rule*

USDA Rural Development is issuing this regulation as an interim rule, with an effective date January 16, 2009. All provisions of this regulation are adopted on an interim final basis, are subject to a 60-day comment period, and will remain in effect until the Agency adopts a final rule.

*IV. Changes to the Rule*

This section presents changes to the proposed rule. Most of the changes were the result of the Agency's consideration of public comments to the proposed rule. Some changes, however, are being made in response to the provisions of the 2008 Farm Bill. The changes to the proposed rule are presented by section. Unless otherwise indicated, rule citations refer to those in the interim rule.

Highlighted Changes

There were several portions of the rule that drew numerous comments. The following list highlights some of the changes made to the rule. These changes are also presented in the section specific change portion that follows this list.

- Cash equity as a minimum financial criterion has been replaced with a debt-to-tangible net worth ratio criterion.
- Low application documentation provisions have been deleted.
- Preferred lender status now applies only to the Business and Industry program and the requirements for becoming a preferred lender have changed. The Agency may administratively allow other programs to have preferred lender status at some date in the future and, in this event, would publish a **Federal Register** Notice to this effect.
- The requirement that a lender comply with either its lending policies and procedures or those in the rule, whichever is more stringent, has been modified by the addition of the phrase

''unless otherwise approved by the Agency.''

• Lenders are not required to submit copies of their policies and procedures, but are instead to submit a written summary of their policies and procedures when submitting an application.

• The proposed provision that ''The guaranteed portion will be paid first and given preference and priority over the unguaranteed portion'' has been replaced with ''the unguaranteed portion of the loan will neither be paid first nor given any preference or priority over the guaranteed portion.''

**Section Specific Changes**

*Subpart A—General Provisions*

Purpose and Scope (§ 5001.1)

This section has been revised in two ways.

First. Paragraph (a) of this section adds that the provisions of this part apply only to those guaranteed loan programs that are included in subpart B. This clarifies the scope of the part.

Second. The Agency added paragraph (b) to clarify the relationship between the provisions in subpart A and those in subpart B. By including this paragraph, the Agency was able to remove from the rest of the rule such clauses as ''unless otherwise specified in subpart B.''

Definitions (§ 5001.2)

The Agency made numerous changes to the definitions section of the rule, including redefining certain terms, adding new definitions, and deleting several definitions. The following identify each affected term.

*Applicant.* This definition was deleted.

*Approved lender.* This definition was added to clarify responsibilities.

*Borrower.* This definition was redefined, in two ways, in order to clarify who constitutes a borrower and to identify in the rule which requirements apply to the borrower or to the lender or to both.

First. The word ''entity'' was replaced with ''person'' and the phrase ''or seeks to borrow'' was added after ''The person that borrows.''

Second. The definition for ''person'' was added.

*Business plan.* This definition was clarified by replacing the word ''applicant'' with ''borrower.''

*Conditional commitment.* The Agency added ''of commitment'' after ''The Agency-approved form'' and replaced ''it'' with ''the lender.''

*Conflicts of interest.* This definition was removed. The Agency has made revisions elsewhere in the rule such that the Agency does not believe that this term needs to be defined in the rule. Instead, the Agency will provide guidance on this term in the handbook to the rule.

*Cooperative organization.* This definition was expanded to include ''any entity that is legally chartered as a cooperative.'' This was done to correct an oversight in the proposed rule that would have excluded ''true'' cooperatives.

*Day.* This definition was added for clarity.

*Debt coverage ratio.* This definition was revised in response to comments to make the term more in keeping with normal banking practice.

*Essential community facility.* This definition was redefined in three ways:

First. At the beginning of the definition, the Agency added ''(including machinery, and/or equipment)'' after ''The physical structure'' and before ''financed'' to help illustrate what physical structure includes.

Second. The sentence ''Not include a project that benefits a single individual or group of single individuals as opposed to a class within a community'' was replaced with ''Benefit the community at large.'' The Agency believes that this change better identifies the Agency's intent. (paragraph (3))

Third. The phrase ''Be located in a rural area'' was removed. The Agency moved this phrase to subpart B for the Community Facilities program, where the Agency believes it is more appropriate.

*Existing businesses.* The second sentence of this definition has been rewritten to further define certain types of changes that constitute existing businesses.

*Feasibility study.* This definition was revised to state that the analysis is ''by a qualified consultant.''

*High impact business.* Significant revisions to this definition clarify what businesses constitute a ''high impact'' business.

*Immediate family.* This definition adds reference to ''or adoption,'' to individuals living within the same household, and to domestic partners. The definition now reads ''Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, domestic partner, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.''

*Lender.* This definition was redefined to clarify the relationship between an entity that is seeking to participate (lending entity) and one that has been approved (lender).

*Lender's agreement.* This definition was revised to refer to it as a form.

*Lending entity.* This definition was added to clarify the applicability of the rule's requirements.

*Loan note guarantee.* This definition was revised to refer to it as a form.

*Material change.* This definition replaces the definition for ''substantive change'' and is used to provide consistency with the rule.

*Monetary default.* This definition was added to clarify when certain requirements in the rule apply to ''monetary defaults'' or to defaults in general.

*Negligent loan origination.* This definition was revised by changing ''at the time of the loan'' to ''at the time the loan is made.'' This clarifies how this aspect of negligent loan origination will be evaluated by the Agency. (paragraph (2))

*Negligent loan servicing.* The phrase ''with its current servicing policies and procedures'' was replaced with ''with its servicing policies and procedures in use by the lender at the time the loan is made.'' This clarifies how this aspect of negligent loan servicing will be evaluated by the Agency. (paragraph (2))

*Other lending entity.* This definition was added to clarify the provisions of the rule.

*Permanent working capital.* This definition was deleted. Instead, as shown below, the Agency is defining ''working capital.'' This change was made to clarify the Agency's intent and to make the Agency's intent clearer to the commercial lending community.

*Person.* This definition was revised to include public bodies, which will ensure such entities as Tribes are included.

*Post-application.* There were two changes to this definition.

First. The word ''applicant'' was replaced with ''borrower'' to clarify that it is the borrower's eligibility being determined and not the lender's eligibility.

Second. The phrase ''to score the application'' was removed because it is no longer needed under the rule.

*Pre-application.* This definition was added to clarify what constitutes a pre-application.

*Preferred lender.* This definition was added to clarify who is subject to the preferred lender provisions of the rule.

*Preliminary architectural report.* This definition was added as a conforming change to the rule.

*Preliminary engineering report.* Reference to the RUS bulletins was removed. These will be addressed in the handbook to the rule.

*Promissory note.* This definition was revised to remove the phrase ''or on demand'' from the end of the first sentence because guaranteeing a demand note can create a balloon payment.

*Qualified consultant.* This definition was added because the rule now has provisions that require the use of a ''qualified consultant.''

*Regulated or supervised lender.* This definition was revised by removing the word ''credit'' and by replacing the word ''and'' with ''or'' in two places to ensure that the sentence was not interpreted as requiring both conditions.

*Renewable biomass.* This definition was added because the revision to the definition of ''renewable energy'' uses the term. This definition is from the 2008 Farm Bill.

*Renewable energy.* This definition was revised based on the definition in the 2008 Farm Bill.

*Rural or rural area.* This definition was revised to clarify what constitutes rural or rural areas. In addition, a paragraph was added for determining which census blocks in an urbanized area are not in a rural area.

*Startup business.* This definition was completely revised in response to comments to clarify the types of business that would constitute startup businesses.

*State.* This definition was clarified to indicate that ''any of the 50 States'' referred to those ''of the United States.''

*Substantive change.* This definition was removed and replaced by the definition ''material change.''

*Tangible net worth.* This definition was added because it is now used in the financial metric criteria used to determine project eligibility.

*Unincorporated area.* This definition was deleted because it is no longer needed as the result of changes to the definition of ''rural or rural area.''

*Working capital.* This definition was added to the rule to replace ''permanent working capital.'' It is defined as ''Current assets available to support a business' operations and growth. Working capital is calculated as current assets less current liabilities.''

Finally, paragraph (b), ''abbreviations'' was removed because it is no longer needed for the rule.

Agency Authorities (§ 5001.3)

*Exception authority (§ 5001.3(a)).* The Agency revised paragraph (a)(1) in this section by replacing ''applicant'' with ''lender'' to clarify that it is both the lender's eligibility and the borrower's eligibility that cannot be excepted.

*Review or appeal rights (§ 5001.3(b)).* The words ''Review or'' were added to the heading. The definition was revised by removing reference to ''the appropriate Agency official that oversees the program in question'' so that a person seeking review would seek such review from the National Appeals Division in accordance with the Division's regulation.

Oversight and Monitoring (§ 5001.4)

Paragraph (a) was modified to clarify that the lender is required to cooperate fully with the Agency in the Agency's oversight and monitoring of lenders.

Paragraph (b)(1) was corrected by replacing the word ''lender'' with ''borrower'' so that it now reads ''any material change in the general financial condition of the borrower.''

Paragraph (b)(2) was revised to indicate that monthly default reports are required for loans that are in monetary default. At proposal, this provision referred to a loan that goes into default, without specifying what kind of default.

Paragraph (b)(3) was modified in two ways:

First. Notifications are required within 15 calendar days rather than 5 days as was proposed.

Second. Notifications are now being required for loans made under this part that receive any downgrade in their classification.

Paragraph (b)(4) was added to require, from a lender who receives a final loss payment, an annual report on the lender's collection activities for each unsatisfied account for 3 years following payment of the final loss claim. This requirement was added to help the Agency manage and mitigate risk inherent in delivering and administering this program.

Project Eligibility (§ 5001.6)

Numerous changes were made to this section.

First. The introductory text was modified to indicate that the requirements in this section apply to both borrower and project elements.

Second. A new paragraph (a) replaces paragraphs (a) and (b) in the proposed rule. Paragraph (a) references the reader to the project requirements specified in subpart B. Because the requirements in subpart B address the two requirements identified in proposed paragraphs (a) and (b), the Agency removed these two proposed paragraphs from this section.

Third. Paragraph (b), which corresponds to paragraph (c) in the proposed rule, addresses the financial metric criteria. Changes incorporated in this paragraph are:

- The rule clarifies that these financial metric criteria are based on the borrower and not on the individual project;
- The Agency has added that these financial metric criteria are to be calculated from ''the realistic information in the pro forma statements or borrower financial statements * * * of a typically operating year after the project is completed and stabilized;'' and
- The Agency has replaced the proposed cash equity criterion with a debt-to-tangible net worth ratio criterion.

Unauthorized Projects and Purposes (§ 5001.7)

Paragraph (b) has been revised to refer to only golf courses and similar recreational facilities. The references to racetracks, water parks, and ski slopes found in the proposed rule have been relocated to subpart B in the Community Facilities provisions. However, the Agency has added additional underwriting criteria that allows the Agency to require higher underwriting standards for projects that are deemed more risky, such as racetracks and water parks.

Paragraph (c), which addresses businesses deriving more than 10% of its annual gross revenue from gambling activity, has been modified by allowing State-authorized proceeds and, for public bodies and for not-for-profit approved projects only, any other funds derived from gambling proceeds, as approved by the Agency, to be excluded from this calculation.

Paragraph (e) was reorganized to make clear that ''made by other Federal agencies'' applies to loans and not to lines of credits or lease payment. The introductory text to paragraph (e) was revised to read ''Any guarantee of a:'' rather than ''Any:''.

Proposed paragraph (g), which addressed facilities used primarily for the purpose of housing Federal and State agencies, was removed from subpart A in the rule and is addressed, instead, in subpart B for Community Facilities.

Paragraph (h) addresses any business deriving income from illegal drugs, drug paraphernalia, and other illegal product or activity. At proposal, this paragraph used the phrase ''deriving income from the sale of illegal drugs.'' The Agency removed the phrase ''the sale of'' as it is unnecessary and potentially too restrictive.

Paragraph (i) was rephrased to clarify that payment to the borrower for the rental of equipment or machinery owned by the borrower is an unauthorized purpose.

Paragraph (j) was revised from ''The payment of a judgment'' to ''The payment of either a Federal judgment or a debt owed to the United States, excluding other Federal loans.''

Paragraph (k) was revised to read ''Any project that creates, directly or indirectly, a conflict of interest or an appearance of a conflict of interest.'' At proposal, this provision read ''Any project resulting in a conflict of interest.''

Borrower Eligibility (§ 5001.8)

Paragraph (a)(1)(i) was modified to make clear that citizens of the U.S. include citizens of the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, and American Samoa.

Paragraph (a)(1)(ii) was modified to address the clarification made in paragraph (a)(1)(i) of this section and to add ''or controlled'' after ''Entities other than individuals must be at least 51% owned.''

Paragraph (b) was revised to include the provision that a borrower would be ineligible if any owner with more than 20 percent ownership interest in the borrower was also found to be ineligible using the same criteria provided for the borrower itself.

Participation Eligibility Requirements (§ 5001.9)

The Agency has made numerous and significant changes to this section, which was titled Lender Eligibility and Designation in the proposed rule.

A new paragraph (a) was added that identifies three requirements applicable to all lending entities (at proposal, the term used was lenders) that wish to participate in this program. These three requirements are:

- Submittal of a written summary of their loan origination and servicing policies and procedures. Under the proposed rule, all lending entities would have been required to submit copies of these policies and procedures (see also § 5001.9(b)(1)(ii), (b)(2), and (c)(2)(i)).
- Maintenance of internal audit and management control systems to evaluate and monitor the overall quality of their loan origination and servicing activities. This was not part of the proposed rule.
- Not being otherwise debarred or suspended by the Federal government. This was part of the proposed rule.

Paragraph (b), which corresponds to paragraph (a) under this section in the proposed rule, includes revisions for regulated or supervised lending entities that do not have an outstanding Agency guaranteed loan with the Agency (referred to at proposal as not having an existing portfolio) and for regulated or supervised lending entities that have at least one outstanding Agency guaranteed loan. The interim rule makes clear that the determination of whether a lending entity has an outstanding Agency guaranteed loan is based on the date on which the interim rule is effective.

For regulated and supervised lending entities that do not have outstanding guaranteed loans, the interim rule makes clear as to whom the lending entity is to submit the lender application (§ 5001.9(b)(1)(i)). At proposal, the rule did not make clear to whom a federally chartered lending entity would submit the lender application.

The interim rule requires regulated and supervised lending entities that do not have outstanding guaranteed loans to submit information on their lending history and experience with their lender application (§ 5001.9(b)(1)(iii)). This was not part of the proposed rule. The Agency believes that this requirement will allow the Agency to further reduce institutional risk.

Lastly, for these lending entities, the interim rule identifies the process under which the Agency will determine whether or not to approve the lender application (§ 5001.9(b)(1)(iv)). At proposal, this process was not addressed other than to make reference to the requirement that the lending entity be in good standing with its regulator.

For regulated or supervised lending entities that have at least one outstanding Agency guaranteed loan, the interim rule makes clear the process under which the Agency will approve such lenders (§ 5001.9(b)(2)(i) and (ii)).

In paragraph (b)(4), the Agency has expanded the requirements for approved regulated or supervised lenders to maintain their approved status (proposed § 5001.9(a)(3)) to include the provision that if a lender fails to maintain its status as a lender or has no outstanding loans with the Agency for two consecutive years, it must reapply under this section for lender approval.

The Agency has also modified the requirements for other lending entities (referred to as ''other lenders'' in the proposed rule) to participate in this program. The Agency has added the requirement that other lending entities must have undergone an examination acceptable to the Agency in order to be eligible for submitting a lender application for approval (§ 5001.9(c)(1)(iv)). The Agency added this criterion in response to public comments and its assessment that such an examination will assist the Agency in mitigating institutional risk. The results of this examination are to be submitted with the lender application (§ 5001.9(c)(2)(viii)).

Paragraph 5001.9(c)(2) was modified to indicate that certificates of good standing must be obtained from the States in which the other lending entity is licensed and intends to conduct business; at proposal, this provision did not include the ''is licensed'' aspect of the provision.

Paragraph 5001.9(c)(3) makes clearer the process that the Agency will use in reviewing other lending entity applications for lender approval, which is very similar to what was proposed.

Paragraph 5001.9(c)(5), which addresses maintenance of approved status for approved other lenders, adds the requirement (as for regulated or supervised lenders) that if the lender fails to maintain its status as a lender or has no outstanding loans with the Agency for two consecutive years, it must reapply under this section for lender approval.

Lastly, the Agency has revised the requirements associated with preferred lenders. Under the interim rule, preferred lender status will apply only to lenders participating in the Business and Industry guaranteed loan program. The Agency may administratively allow other programs to have preferred lender status at some date in the future and, in this event, would publish a **Federal Register** Notice to this effect. Under the proposed rule, any approved lender could apply for preferred lender status. In making this change, the Agency has dropped in its entirety proposed § 5001.9(c), Lender designation.

Paragraph (d) of this section addresses all of the requirements associated with preferred lenders. The proposed rule (§ 5001.9(c)(1)(i) through (c)(1)(iii)) identified three criteria—current level of experience, number of losses (which varied depending on how long the lender was making commercial loans), and instances of Federal government negligent loan origination or servicing. The interim rule identifies seven criteria to be met to become a preferred lender:

- Lender loss rate not in excess of a maximum ''preferred lender'' loss rate;
- A minimum of 10 guaranteed Business and Industry loans, unless otherwise provided for in a notice in the **Federal Register**;
- Consistent practice of submitting guaranteed loan applications with accurate information supporting a sound loan proposal;
- No more than one instance of Federal government loan origination or servicing where a loss has been paid;

• Not be under any regulatory enforcement action;

• Demonstrated high standards of professional competence; and

• Adequate lender facilities to conduct its Agency business at a high level of performance.

The Agency will publish in the **Federal Register** notices that identify the maximum preferred lender loss rate and minimum number of guaranteed Business and Industry loans to qualify for preferred lender status when there are changes in these rates or numbers.

Paragraph (d)(2) requires the lender to identify the States in which the lender is seeking preferred status and to identify those branch offices for which it is seeking preferred lender status. Under the proposed rule, a lender approved as a preferred lender would have preferred lender status in each State.

Paragraph (d)(3) allows the lender to have preferred lender status for a period not to exceed 4 years and requires the lender to submit material to retain preferred status once the 4 years (or other applicable time period) has expired. At proposal, there was no timeframe associated with preferred lender status.

Paragraph (d)(4) identifies the situations under which a lender may lose its preferred status. The interim rule contains more specifics than found in the proposed rule and applies the criteria under which a lender can lose its preferred lender status regardless of how long the lender has been making commercial loans.

Guarantee Application Process (§ 5001.11)

The Agency has made two changes to this section.

First. The Agency has clarified § 5001.11(b)(2) by defining what is meant by ''those areas'' in the paragraph where it states, in part, ''the Agency may require the lender to obtain additional assistance in those areas where the lender does not have the requisite expertise to originate or service the loan.''

Second. The Agency has added a new paragraph (c) in which the Agency will approve (subject to the availability of funds) or reject complete applications from preferred lenders within 10 working days after their receipt. This processing timeframe will not begin until all information required to make an approval decision, including a completed environmental review, is received by the Agency.

Application for Loan Guarantee Content (§ 5001.12)

The Agency has made significant changes to this section in the interim rule.

First. The rule no longer differentiates between full documentation applications and low documentation applications. Instead, all approved lenders submit applications that contain information that is very similar to what would have been required under the proposed rule's ''full documentation'' applications. The interim rule does not contain a low documentation application provision and, as such, no longer requires a ''determination of documentation level'' provision as provided in the proposed rule (proposed § 5001.12(c)).

Second. The interim rule provides requirements for guarantee loan applications from preferred lenders. While guarantee loan applications from preferred lenders require less documentation than those from approved lenders, they are not referred to as ''low documentation'' applications in the interim rule, but as ''preferred lender'' loan guarantee applications.

The loan guarantee application requirements for approved lenders are the same as those found in the proposed rule for full documentation applications, with the following exceptions:

• A copy of Form 10–K is no longer required to be submitted for companies listed on major stock exchanges (proposed § 5001.12(a)(5)).

• The proposed loan agreement between the lender and the borrower is no longer required to be submitted (proposed § 5001.12(a)(6)).

• Appraisals acceptable to the Agency are to be submitted if available. If they are not available at the time the application is submitted, complete appraisals must be submitted to the Agency before loan closing. At proposal, this requirement stated ''Appraisals (as specified in § 5001.16(c))'' (proposed § 5001.12(a)(8)).

• In newly designated § 5001.12(a)(8), the ''for for-profit'' qualifier for nursing homes has been removed (proposed § 5001.12(a)(11)).

• In newly designated § 5001.12(a)(9), the word ''prospective'' was removed because it is no longer needed (proposed § 5001.12.(a)(13)).

• Proposed § 5001.12(a)(12) for preliminary engineering report was relocated to subpart B for the water and waste disposal facility program.

• Proposed § 5001.12(a)(14) requiring the most recent audited financial statements if the guaranteed loan is $1 million or more is significantly revised. In the interim rule, this paragraph (§ 5001.12(a)(10)) requires borrowers that have been in existence for one or more years seeking a guaranteed loan of $3 million or more to submit their most recent audited financial statements, unless alternative financial statements are authorized by the Agency. For borrowers that have been in existence for one or more years seeking a guaranteed loan of less than $3 million, the interim rule requires such borrowers to submit either the most recent audited or Agency-acceptable financial statements of the borrower. Lastly, for borrowers that have been in existence for less than one year, the interim rule requires the submittal of ''the most recent Agency-authorized financial statements of the borrower regardless of the amount of the guaranteed loan request.'' Paragraph 5001.12(a)(10)(iii) allows the Agency to request additional financial statements and related information depending on the complexity of the project.

• Finally, newly designated § 5001.12(a)(11) has been added to provide the Agency the flexibility to request any additional information determined by the Agency as necessary to evaluate the application.

The provisions for guaranteed loan applications for preferred lenders are found in § 5001.12(b), and are new to the rule. Preferred lenders are required to submit:

• A copy of Form RD 5001–3, ''Application for Loan Guarantee'';

• Information sufficient for the Agency to confirm project and borrower eligibility;

• A copy of lender's loan evaluation and analysis;

• An internal loan approval document showing approval by in-house appropriate office/committee; and

• Environmental information required by the Agency to conduct its environmental reviews (as specified in § 5001.16(h)).

Lender Responsibilities—General (§ 5001.15)

The interim rule contains three additional requirements applicable to all lenders participating in this program to help further mitigate institutional risk. These requirements are:

• Notifying the Agency of any changes to its loan origination and servicing policies and procedures provided under § 5001.9(a). For any changes to the lender's loan origination and servicing policies and procedures that are inconsistent with the requirements of this part, the lender must notify the Agency in writing and

receive written Agency approval prior to applying the changes to loan guarantees under this part.

• Compiling and maintaining in its files a complete application for each guaranteed loan for at least one year after the final loss has been paid.

• Maintaining internal audit and management control systems to evaluate and monitor the overall quality of its loan origination and servicing activities.

Lender Responsibilities—Origination (§ 5001.16)

The Agency has made a number of changes to this section. One editorial change throughout the section was the replacement of the words ''prospective borrower'' with ''borrower'' (e.g., § 5001.16(b)(2)(i)).

*General (§ 5001.16(a)).* In the introductory text to § 5001.16(a), the Agency made two substantive changes.

First. The Agency revised the first sentence to read: ''The lender is responsible for originating all loans in accordance with its loan origination policies and procedures at the time the loan is made and with the requirements of this part.'' The text in the proposed rule did not include ''at the time the loan is made.'' The revised sentence also replaces the phrase ''current written policies and procedures'' with ''loan origination policies and procedures.''

Second. The Agency revised the second sentence to read: ''Where a lender's loan origination policies and procedures address a corresponding requirement in this part, the lender must comply with whichever is more stringent, unless otherwise approved by the Agency.'' The text in the proposed rule did not include the phrase ''unless otherwise approved by the Agency.'' This added phrase is cross-referenced as necessary in other places within the interim rule (e.g., § 5001.16(b)). The inclusion of this phrase allows the Agency and the lender to work together and to consider each loan application on a case-by-case basis.

The Agency has also added a requirement (§ 5001.16(a)(2)) for the lender to provide the Agency the lender's classification of the loan no later than 90 days after loan closing.

*Appraisals (§ 5001.16(c)).* The Agency made three changes to the introductory text to this paragraph and one change to § 5001.16(c)(2).

In the introductory text, the Agency included chattel collateral appraisals, which were not addressed in the proposed rule. In addition, the Agency dropped reference to specific sections within the Uniform Standards of Professional Appraisal Practices (USPAP) standards, as these were unnecessary to continue to include in the rule. Lastly, the Agency added the provision that complete appraisals must be submitted to the Agency before loan closing.

In § 5001.16(c)(2), the Agency added that the potential effect of environmental hazards on the market value of the collateral are to be ''determined in accordance with the appropriate ASTM Real Estate Assessment and Management environmental standards.''

*Personal, partnership, and corporate guarantees (§ 5001.16(d)).* The heading has been revised to include ''partnership.'' In addition, here and elsewhere in the rule, the Agency revised the phrase ''personal or corporate guarantees'' (and similar phrases) to ''personal, partnership, or corporate guarantees.''

The proposed rule was not clearly written as which personal, partnership, and corporate guarantees could be used to secure a loan. A new paragraph (d)(1) has been added to make clear that secured, unconditional personal, partnership, and corporate guarantees may be used to determine the security of the loan, but that unsecured, unconditional personal, partnership, and corporate guarantees will not be considered in determining whether a loan is adequately secured for loan making purposes.

Re-designated paragraph (d)(2) addresses Agency-approved, unsecured personal, partnership, and corporate guarantees and incorporates the provision found in the proposed rule under proposed § 5001.16(d)(1) and (d)(2). Concerning exceptions to the requirement for personal guarantees, the Agency replaced ''concurred by the Agency approval official'' with ''approved by the Agency.''

Lastly, a new paragraph (d)(3) was added to address the requirement for guarantors to execute an Agency-approved unconditional guarantee (which was required in the proposed rule). The interim rule adds three provisions to explain how amounts paid by the Agency will constitute a Federal debt and the handling of interest charges. These provisions are:

• Any amounts paid by the Agency on account of liabilities of an Agency guaranteed loan borrower will constitute a Federal debt owed to the Agency by the guaranteed loan borrower. In such case, the Agency may use all remedies available to it, including offset under the Debt Collection Improvement Act of 1996, to collect the debt from the borrower.

• Any amounts paid by the Agency pursuant to a claim by a guaranteed program lender will constitute a Federal debt owed to the Agency by a third-party guarantor of the loan, to the extent of the amount of the third-party guarantee. In such case, the Agency may use all remedies available to it, including offset under the Debt Collection Improvement Act of 1996, to collect the debt from the third-party guarantor.

• In all instances under the above paragraphs, interest charges will be assessed in accordance with 7 CFR 1951.133.

*Design requirements (§ 5001.16(e)).* The Agency made two substantive changes to this paragraph.

First. The phrase ''or other Agency-approved code'' was added to the end of the first sentence.

Second. In the second sentence the word ''original'' was replaced with the word ''approved.''

*Compliance with other Federal Laws (§ 5001.16(g)).* The Agency removed the last sentence in the proposed rule text, because it is not applicable to guaranteed loans.

*Conflicts of interest (§ 5001.16(i)).* The Agency added the phrase ''and appearances of conflicts of interest'' to the end of this paragraph, which should have been included in the proposed rule.

*Surety (§ 5001.16(j)).* The Agency added this paragraph to the rule. Under this paragraph, surety will be required in cases when the guarantee will be issued prior to completion of construction unless the contractor will receive a lump sum payment at the end of work. In addition, surety is to be made a part of the contract, if the applicant requests it or if the contractor requests partial payments for construction work. Finally a latent defects bond may be required to cover the work in instances where no surety is provided and the project involves pre-commercial technology, first of its type in the U.S., or new designs without sufficient operating hours to prove their merit.

Lender's Responsibilities—Servicing (§ 5001.17)

*General (§ 5001.17(a)).* Consistent with the revision made to § 5001.16(a), the Agency revised the second sentence to read ''Where a lender's loan servicing policies and procedures address a corresponding requirement in this part, the lender must comply with whichever is more stringent, unless otherwise approved by the Agency.'' The text in the proposed rule did not include the phrase ''unless otherwise approved by

the Agency.'' This added phrase is cross-referenced as necessary in other places within the interim rule (e.g., § 5001.17(b)). The inclusion of this phrase allows the Agency and the lender to work together and to consider each loan application on a case-by-case basis.

The revised sentence also replaces ''current written policies and procedures'' with ''loan servicing policies and procedures.''

*Certification (§ 5001.17(b)).* The phrase ''current written'' was removed from this paragraph and a cross-reference to the exception to the ''whichever is more stringent'' requirement in paragraph (a) of this section was added.

*Audits (§ 5001.17(c)).* This is a new provision, which requires lenders, when applicable, to audit a borrower in accordance with Office of Management and Budget requirements.

*Financial reports (§ 5001.17(d)).* This is a new provision addressing when lenders are to submit financial reports of the borrower. The requirements differ depending on whether or not the lender is a regulated or supervised lender. Specifically, these requirements are:

- For regulated or supervised lenders, the information that would be contained in financial reports required by the appropriate regulatory institution. Unless otherwise provided in the Conditional Commitment, such information must be submitted at the same time it should be made available to the appropriate regulatory institution.
- For lenders who are not regulated or supervised, financial reports as required in the Conditional Commitment.

*Collateral inspection and release (§ 5001.17(e)).* As proposed (§ 5001.17(c)), the Agency would have been allowed to require the lender to obtain prior Agency approval of any release of collateral and to require an appraisal on the remaining collateral in cases in which the Agency determined that it may be adversely affected by the release. Because the proposed rule did not clearly indicate when such appraisals would be required, the Agency has revised this provision to state that:

- It will require prior approval of the release of collateral except in two instances—where the proceeds are used to pay down debt in order of lien priority, or to acquire replacement equipment, or where the release of collateral is made under the abundance of collateral provision of an applicable security agreement (*e.g.*, a blanket security agreement); and
- Appraisals on the collateral being released will be required on all transactions exceeding $250,000.

The Agency has also revised this paragraph by adding the phrase ''unless otherwise approved by the Agency in writing'' to the end of the last sentence and deleting ''In all cases'' from the beginning of the last sentence, which now reads in full ''The sale or release of collateral must be based on an arm's length transaction, unless otherwise approved by the Agency in writing.''

*Processing transfers and assumptions (§ 5001.17(f)(2)).* As proposed (§ 5001.17(d)(2)), this paragraph would have allowed the lender to release the transferor (including any guarantor) from liability without Agency approval. The Agency has revised this provision to now require such releases to be subject to Agency approval.

The Agency also added conditions under which the transferor (including any guarantor) may be released from liability (§ 5001.17(f)(2)(iii)).

*Mergers (§ 5001.17(g)).* As proposed (§ 5001.17(e)), the Agency would have been allowed to withdraw the guarantee when a borrower participates in a merger. This provision has been revised entirely. In the interim rule, all borrower mergers require prior approval by the Agency and the lender. Further, if a borrower merges without Agency approval, the lender must accelerate the loan unless subsequently agreed to in writing by the Agency.

*Subordination of lien position (§ 5001.17(h)).* The Agency has made several revisions to the Agency's concurrence as follows:

- The proposed rule required that the Agency's financial interest be enhanced. This has been changed to the subordination being in the Agency's best financial interest.
- The proposed rule required that the collateral will remain adequate to secure the loan. This has been removed from the interim rule.
- The proposed rule limited a subordination to a revolving line of credit to no more than one year. This has been changed to read ''the subordination of line of credit does not extend the term of the line of credit and in no event exceeds more than three years.''

*Repurchases from holder(s) (§ 5001.17(i)).* The Agency has made two changes to the introductory text to this paragraph.

First. The first sentence was revised to refer to ''monetary default'' rather than ''default'' so that the first sentence now reads, in part, ''the Agency to repurchase the unpaid guarantee portion of the loan in the case of borrower monetary default or failure of the lender to pay the holder its pro-rata share.''

Second. In the beginning of the second sentence the word ''or'' is replaced with ''and'' to read: ''When the lender and the Agency determine that repurchase is necessary to adequately service the loan, the holder must sell the guaranteed portion to the requesting entity.'' This edit was made in order to ensure that the Agency always participates in this decision.

The Agency added to this section a new paragraph (i)(2) addressing provisions regarding repurchase by lender for servicing.

Within the provisions for repurchases by the Agency (§ 5001.17(i)(3)), ''unless provided for in the Assignment Guarantee Agreement'' was deleted from the end of the sentence ''The lender may not charge the Agency any fees.'' In addition, language was added addressing the calculation of the amount of the repurchase and the length of accruing interest that will be covered (§ 5001.17(i)(3)(iii)).

*Additional expenditures and loans (§ 5001.17(j)).* The Agency made two edits to this provision. The words ''will not'' were replaced by the word ''may'' and the phrase ''unless the expenditure or loan will violate one or more of the loan covenants of the borrower's loan agreement'' was added at the end of the paragraph.

*Lender failure (§ 5001.17(k)).* The Agency added the phrase ''or ceases servicing the loan,'' in the first sentence to read: ''In the event a lending institution fails or ceases servicing the loan, the Agency will provide instruction to the successor entity on a case-by-case basis.''

*Delinquent loans (§ 5001.17(l)).* The phrase ''coordinate with the Agency and the borrower to'' was removed so that the second sentence reads: ''If a borrower is delinquent more than 30 days, the lender must implement appropriate curative actions to resolve the problem.''

*Protective advances (§ 5001.17(m)).* The Agency added four additional conditions associated with protective advances. These additional conditions are:

- Protective advances must constitute an indebtedness of the borrower to the lender and be secured by the security instruments. (§ 5001.17(m)(4))
- Upon Agency approval, protective advances can be used to pay Federal tax liens and other Federal debt. (§ 5001.17(m)(5))
- Protective advances and interest thereon at the note rate will be guaranteed at the same percentage of

loss as provided in the Loan Note Guarantee. (§ 5001.17(m)(6))

• The maximum loss to be paid by the Agency will be determined according to the procedures specified in § 5001.17(p)(1) regardless of any protective advances made. (§ 5001.17(m)(7))

*Liquidation (§ 5001.17(n)).* The Agency has made several modifications to this paragraph.

First. In the introductory text, the phrase ''and the Agency will then liquidate the loan'' was added to the end of the paragraph to read: ''The Agency reserves the right to unilaterally conclude that liquidation is necessary and require the lender to assign the security instruments to the Agency and the Agency will then liquidate the loan.''

Second. The Agency has added the provisions that it will approve or disapprove the plan within 30 days and that, upon approval of the liquidation plan by the Agency, the lender may implement the plan. (§ 5001.17(n)(1)(i)).

Third. A new paragraph (n)(1)(ii) has been added that addresses liquidation appraisals. This paragraph requires liquidation appraisals to be a part of the liquidation planning process. It further states that they are not required for liquidation plan approval, provided they are obtained prior to the completion of the liquidation. Lastly, this paragraph states that, if the outstanding principal loan balance including accrued interest is more than $200,000, the lender will obtain an independent appraisal report on all collateral securing the loan, which will reflect the current market value and potential liquidation value.

Fourth. A new paragraph (n)(1)(iii) has been added containing provisions for appraisal costs. Under this new paragraph, any independent appraiser's fee will be shared equally by the Agency and the lender. In addition, if an environmental site assessment in accordance with the appropriate ASTM Real Estate Assessment and Management environmental standards of the property is necessary in connection with liquidation, the cost will be shared equally between the Agency and the lender.

Fifth. A new paragraph (n)(1)(iv) has been added containing provisions for rent. Under this new paragraph, any net rental or other income that has been received by the lender from collateral will be applied on the guaranteed loan debt.

*Loss calculations and payment (§ 5001.17(p)).* The Agency has substantially rewritten the introductory paragraph to this section detailing how estimated losses and final losses are calculated. The Agency also made several other revisions to this paragraph.

First. A new paragraph (p)(1) has been added to address maximum loss. The proposed rule (§ 5001.17(n)) stated in the introductory text that ''The maximum loss allowed is the lower of the percent of loss guarantee times the foregoing or the sum of principal advances and accrued interest. The amount due the lender is adjusted to take into account protective advances and accrued interest. The amount due the lender is adjusted to take into account protective advances and interest.'' The interim rule has revised the calculation of maximum loss to be in-line with current Business and Industry provisions.

Second. The Agency added to this section a new paragraph (p)(2)(iv) stating that, upon payment of an estimated loss to the lender, interest accrual on the defaulted loan will be discontinued.

Third. In § 5001.17(p)(5)(i), the Agency has revised this paragraph to indicate that ''any loss will be based on the collateral value at the time the collateral is liquidated'' rather than, as proposed, ''at the time the lender obtains title.''

Fourth. In § 5001.17(p)(5)(ii), the Agency has revised this paragraph to include that the lender ''must submit an estimated loss claim when liquidation is expected to exceed 90 days.'' At proposal, this paragraph read ''it may request an estimated loss payment by submitting an estimate of loss that will occur in connection with liquidation of the loan.''

Fifth. In § 5001.17(p)(6), the Agency has replaced the proposed text (§ 5001.17(n)(4)) that stated ''The lender shall submit with each loss claim the current version of its written policies and procedures for origination and servicing'' with ''In response to a loss claim, the Agency may request and the lender must provide the Agency with a copy of the applicable loan origination and servicing policies and procedures in place for the loan.''

Sixth. A new paragraph (§ 5001.17(p)(7)) has been added addressing final loss. This new paragraph states: When the Agency finds the final report of loss to be proper in all respects, it will approve the final loss. If the loss is less than the estimated loss payment, the lender will reimburse the Agency for the overpayment plus interest at the note rate from the date of the estimated loss payment.

Basic Guarantee and Loan Provisions

General (§ 5001.30)

The Agency made three revisions to provisions within this section.

First. Paragraph (b)(1) was revised so that the last sentence reads: ''The unguaranteed portion of the loan will neither be paid first nor given any preference or priority over the guaranteed portion.'' This means, for example, that in the case of a 1 million dollar loan where the Agency's participation is $800,000 and the lender's share is $200,000, each will be repaid pari passu; that is for each dollar repaid, the Agency would receive 80 cents and the lender 20 cents. This change addresses one of the major concerns expressed by commenters. At proposal, this sentence read: ''The guaranteed portion will be paid first and given preference and priority over the unguaranteed portion.''

Second. Paragraph (c)(1) was revised so that the last sentence reads: ''Any claim against a Loan Note Guarantee or Assignment Guarantee Agreement that is attached to, or relating to, a note that provides for payment of interest on interest will be reduced to remove the interest on interest.'' At proposal, this provision read: ''any Loan Note Guarantee or Assignment Guarantee Agreement attached to, or relating to, a note which provides for payment of interest on interest is void.''

Third. Paragraph (c)(2) was revised so that the sentence that began ''Any losses occasioned will not be enforceable by the lender to the extent'' now states ''Any losses occasioned by the lender will not be enforceable to the extent''.

Guaranteed Loan Requirements (§ 5001.31)

The Agency has made changes to interest rates, renewal fees, and lender fees, as described below.

*Interest rates (§ 5001.31(a)).* In the introductory text, the last sentence of the paragraph was removed. This sentence had stated: ''When combined fixed and variable rates are used, the lender will provide the Agency with the overall effective interest rate for the entire loan.''

*Negotiated rates (§ 5001.31(a)(1)).* The Agency has added to the end of this paragraph ''and will be subject to Agency concurrence'' so that this paragraph now reads ''Interest rates, interest rate caps, and incremental adjustment limitations will be negotiated between the lender and the borrower and will be subject to concurrence by the Agency.''

*Interest rate changes (§ 5001.31(b)(1)(i)).* The Agency has

qualified the need to approve any change in the interest by adding ''unless the only change is to the base rate of a variable interest rate.''

*Increases (§ 5001.31(b)(3)).* The Agency has revised this paragraph in identifying when increases in the interest rate are not permitted. At proposal, this paragraph read: ''Increases in interest rates are not permitted except when the increase results from normal fluctuations in approved variable interest rates, or the increase returns the rate to the rate prior to the temporary reduction.'' In the interim rule, this paragraph now reads: ''Increases in interest rates are not permitted beyond what is provided in the loan documents. Increases from a variable interest rate to a higher interest rate that is a fixed rate are allowed, subject to concurrence by the Agency.''

*Guarantee fee (§ 5001.31(g)(1)).* The payment of the guarantee fee was changed from ''at the time the Guarantee is issued'' to ''the time the lender requests the Loan Note Guarantee.''

*Renewal fee (§ 5001.31(g)(2)).* As proposed, the annual renewal fee would have been assessed annually based on a fixed fee rate established ''at the beginning of the loan.'' The Agency has revised this phrase to read: ''at the time the loan is obligated.''

*Lender fees (§ 5001.31(h)).* The Agency has added text to indicate that late payment fees can be part of the lender fees that lenders may levy. The revised text reads, in part, ''The lender may levy reasonable, routine, and customary charges and fees, including late payment fees, for the guaranteed loan.''

The Agency has also identified default charges and additional interest expenses as two additional expenses that will not be covered by the Loan Note Guarantee.

Conditional Commitment (§ 5001.32)

The Agency has identified two specific conditions to which the lender must certify in the Conditional Commitment (§ 5001.32(a)(1) and (2)). These two conditions are:

(1) The lender will monitor construction in accordance with approved plans and specifications, and

(2) Project funds will be used only for Agency-approved project costs.

Conditions Precedent to Issuance of Loan Note Guarantee (§ 5001.33)

The Agency has substantially revised this section. Except for certification for insurance obtained by the borrower, the entire section has been revamped and greatly expanded by including in the rule 17 specific conditions (§ 5001.33(a)) to which the lender must certify prior to the Agency's issuance of the Loan Note Guarantee under § 5001.34. Subject areas addressed by the 17 conditions in § 5001.33(a) are:

- Changes in the lender's loan conditions and requirement since issuance of the Conditional Commitment;
- Planned property acquisitions;
- Insurance;
- Truth-in-lending and equal credit opportunity requirements;
- Closing and security instruments;
- Title to the collateral;
- Disbursement of working capital;
- Personal, partnership, or corporate guarantees;
- Requirements of the Conditional Commitment;
- Lien priorities;
- Disbursement of loan proceeds;
- Material changes during period between Conditional Commitment and issuance of the Loan Note Guarantee;
- Financial interest in the borrower;
- Loan agreement content;
- Anti-Lobby Act (18 U.S.C. 1913);
- Title to rights-of-ways and easements and title opinion or insurance; and
- Maintaining the minimum financial criteria under which a loan application has been submitted, including those financial criteria contained in the Conditional Commitment, through the issuance of the Loan Note Guarantee. If these financial criteria are not maintained, the application will be ineligible.

In addition, a new paragraph (b) has been added, which requires the lender to provide an explanation satisfactory to the Agency if the lender is unable to provide any of these certifications.

Issuance of the Guarantee (§ 5001.34)

A new paragraph (a), Loan agreement, has been added, which requires the lender to provide a copy of the loan agreement between the lender and the borrower to the Agency prior to loan closing.

The Agency has moved the proposed requirement to provide the lender's certification and guarantee fee from proposed § 5001.34(a) into § 5001.34(b) and requires their provision at the time the lender requests the Loan Note Guarantee (rather than at loan closing as was proposed). Reference to the secondary market sale document has been dropped.

Paragraph (c) essentially is the same as proposed § 5001.34(b), with the reference to the issuance of the Assignment Guarantee Agreement dropped in the interim rule.

Reorganizations (§ 5001.36)

The Agency has made changes to paragraphs (a) and (b) of this section.

*Change in borrower prior to closing (§ 5001.36(a)).* As proposed, the last sentence in this paragraph read: ''Once the Conditional Commitment for Guarantee is issued, no substitution of borrower(s) or change in the form of legal entity will be approved, except that a change in the legal entity may be approved when the original borrower is replaced with substantially the same individuals or officers with the same interest as originally approved.'' The Agency has replaced the ''exception'' clause with ''unless Agency approval, in writing, is obtained'' so that this sentence now reads: ''Once the Conditional Commitment is issued, no substitution of borrower(s) or change in the form of legal entity will be approved, unless Agency approval, in writing, is obtained.''

*Transfer of lender prior to issuance of the Loan Note Guarantee (§ 5001.36(b)).* The Agency has reorganized this paragraph and has made a few edits to it. One change to note is the clarification that when the transfer is from a preferred lender to an approved lender, the approved lender submits an application that conforms to the requirements for an approved lender application for guarantee as found in § 5001.12(a).

Sale or Assignment of Guaranteed Loan (§ 5001.37)

*General (§ 5001.37(a)).* The Agency revised the requirement for lender retention. At proposal, the lender would have been required to maintain ''sufficient interest to perform its duties under this part.'' In the interim rule, this has been revised to read that the lender must ''retain a minimum of 5% of the total loan amount in its portfolio. The amount required to be retained must be of the unguaranteed portion of the loan and cannot be participated.''

The Agency also modified paragraph (a)(5) by:

(1) Removing ''at, or'', and

(2) Replacing ''market'' with ''sell'' and ''in default'' with ''in monetary default'' so that the paragraph now reads: ''If the lender desires to sell all or part of the guaranteed portion of the loan subsequent to loan closing, the loan must not be in monetary default.''

Lastly, the Agency removed proposed paragraph (a)(6), which addresses lender retention. This paragraph is no longer needed as a result of the other changes made in the interim rule.

*Servicing fee (§ 5001.37(b)).* The Agency revised this paragraph to read:

''The lender cannot charge the Agency a servicing fee and no such fees are covered under the guarantee.'' At proposal, the paragraph was titled ''Termination of lender servicing fee,'' and read: ''The lender's servicing fee will stop when the Agency purchases the guaranteed portion of the loan from the secondary market. No such servicing fee may be charged to the Agency and all loan payments and collateral proceeds received will be applied first to the guaranteed loan.'' Provisions in this paragraph were revised in § 5001.37(b) or carried over and revised in new paragraph, § 5001.37(c), as discussed below.

*Distribution of proceeds (§ 5001.37(c))*. The Agency added a separate paragraph to address the distribution of proceeds. As proposed, all loan payments and collateral proceeds received would have been applied first to the guaranteed loan. Instead, under the interim rule, all loan payments and collateral proceeds received will be applied to the guaranteed and unguaranteed portions of the loan on a pro rata basis.

*Subpart B—Program Specific Provisions*

Community Facilities Program (§ 5001.101)

*Eligible projects (§ 5001.101(a))*. The Agency has added ''except as provided in paragraph (a)(6) of this section'' to the end of the introductory text of paragraph (a). In addition, the Agency revised the requirements associated with refinancing (paragraph (a)(1)(vii) of this section) and added leasehold interest as a new eligible project (paragraph (a)(1)(viii) of this section).

As proposed, the eligible project was ''refinancing any loan,'' and provided that ''Except for the refinancing of Agency direct loans, refinancing of other loans will be limited to a minority portion of the guaranteed loan.'' In the interim rule, this eligible purpose is now titled ''refinancing debt (excluding working capital debt, operating or other debt whose repayment is scheduled to take place in one year or less)'' and includes three specific conditions to be met:

- The debts being refinanced are less than 50% of the total loan;
- The debts were incurred for the facility or service being financed or any part thereof (such as interim financing, construction expenses, etc.); and
- Arrangements cannot be made with the creditors to extend or modify the terms of the debts so that a sound basis will exist for making a loan.

The Agency, as noted above, has added ''leasehold interest'' as an eligible project and identifies several conditions, at a minimum, that must be met. These conditions are:

- The length of lease must be greater than or equal to loan term;
- There are no reverter clauses in the lease; and
- There are no restrictive clauses that would impair the use or value of the property as security for the loan.

The Agency has added a new paragraph (a)(5) to this section, which requires the project to primarily serve a rural area.

The Agency has revised the demonstration of community support (paragraph (a)(6)) to indicate that community support can be used in lieu of the debt-to-tangible net worth ratio and the loan-to-value ratio requirements for in subpart A. This is a conforming change.

*Unauthorized projects and purposes (§ 5001.101(b))*. Proposed paragraphs (b)(1) and (b)(6) were removed because they were duplicative of subpart A provisions.

The Agency added a new paragraph (b)(5), which identifies racetracks, water parks, and ski slopes as unauthorized projects and purposes. At proposal, these projects were identified in subpart A as unauthorized projects and purposes.

*Borrower eligibility (§ 5001.101(c))*. The Agency added introductory text to this paragraph, added a new paragraph (c)(1) to clearly specify the eligible borrowers, and revised paragraph (c)(2) to identify the YMCA, YWCA, Girl Scouts, and Boy Scouts as eligible organizations. At proposal, this paragraph only made reference to the later organizations.

*Additional application documentation provisions (§ 5001.101(d))*. The Agency has added four additional documentation requirements—organizational documents of the borrower, a complete list of governing board members of the borrower, a copy of the management and other legal documents between the borrower and the proposed management company, and a preliminary architectural report.

*Additional application processing requirements—appraisals (§ 5001.101(e))*. This is a new paragraph to the rule. This paragraph states: ''When a loan's collateral appraises at a level less than 100% of the loan amount, the Agency will consider community support in evaluating the application for guarantee.''

*Additional origination responsibilities—leasehold interest (§ 5001.101(f))*. This is a new paragraph to the rule. This paragraph states: ''Subject to approval by the Agency, a leasehold interest may be used as collateral for loans under this section provided the leasehold interest meets each of the conditions specified in paragraphs (a)(1)(viii)(A) through (C) of this section.'' The cross-referenced paragraphs refer to the requirements for leasehold interest to be an eligible project.

*Additional servicing responsibilities—financial reports (§ 5001.101(g))*. This is a new paragraph, which states: ''Annual financial reports required shall conform to 7 CFR part 3052.''

*Additional guarantee- and loan-related requirements (§ 5001.101(h))*. With the elimination of the low documentation and the preferred lender provisions for this program, the maximum percent guarantee for all projects under this section is now 90%. At proposal, a lower maximum percent guarantee (80%) was identified for lenders without preferred lending status who submit low documentation applications.

Water and Waste Disposal Facilities Program (§ 5001.102)

*Project eligibility (§ 5001.102(a))*. The Agency has revised the introductory text of paragraph (a) inserting ''except as provided in paragraph (a)(4) of this section'' to the end of the introductory text.

Paragraph (a)(1)(i) was revised from ''a water or wastewater facility'' to now read ''a water, waste disposal, solid waste disposal, or storm water facility.''

As for the Community Facilities program, the Agency has added a new paragraph (a)(3) to this section, which requires the project to primarily serve a rural area.

Also, as for the Community Facilities program, the Agency has revised the demonstration of community support (paragraph (a)(4) of this section) to indicate that community support can be used in lieu of the debt-to-tangible net worth ratio and the loan-to-value ratio requirements for in subpart A. This is a conforming change.

*Unauthorized projects and purposes (§ 5001.102(b))*. Proposed paragraph (b)(2) was removed because it was duplicative of a subpart A provision.

The Agency clarified paragraphs (b)(5) and (b)(8) by replacing the word ''applicant'' with ''borrower.''

The Agency added a new unauthorized project/purpose in paragraph (b)(6), which states: ''Any project where an individual, or membership of another organization sponsors the creation of a nonprofit organization with the intent to control negotiations for employment or

contracts that provide financial benefit to the sponsoring organization, affiliate organization, or a subsidiary organization of the sponsoring individuals or organization.''

The Agency also removed proposed paragraph (b)(8), which addressed the payment of a judgment which would disqualify a borrower for a loan under proposed § 5001.102(c)(2), because changes elsewhere in the interim rule made this paragraph duplicative and thus no longer necessary.

*Additional lender approval requirements (§ 5001.102(d))*. This paragraph was added and states: ''The examination required under § 5001.9(c)(1)(iv) may be conducted by the Agency or a qualified consultant.'' This allows for the Agency to conduct the examination, whereas the referenced paragraph requires the examination to be conducted by a qualified consultant.

*Additional application documentation provisions (§ 5001.102(e))*. In paragraph (e)(1), the Agency rephrased ''qualified independent consultant'' to ''qualified consultant,'' because the term defined is ''qualified consultant'' and, as defined, includes the concept of ''independent.''

As for the Community Facilities program, the Agency has added three additional documentation requirements—organizational documents of the borrower, a complete list of governing board members of the borrower, and a copy of the management and other legal documents between the borrower and the proposed management company.

The Agency removed proposed § 5001.102(d)(3), which addressed financial reports, because the requirement for financial reports is addressed in subpart A in the rule.

The Agency added a new paragraph, § 5001.(e)(6), requiring lenders to submit intergovernmental consultation comments in accordance with 7 CFR part 3015, subpart V, of this title.

*Additional servicing responsibilities—financial reports (§ 5001.102(f))*. As for the Community Facilities program, this is a new paragraph, which states: ''Annual financial reports required shall conform to 7 CFR part 3052.''

*Additional guarantee- and loan-related requirements (§ 5001.102(g))*. With the elimination of the low documentation and the preferred lender provisions for this program, the maximum percent guarantee for all projects under this section is now 90%. At proposal, a lower maximum percent guarantee (80%) was identified for lenders without preferred lending status who submit low documentation applications.

Business and Industry Loan Program (§ 5001.103)

*Definitions (§ 5001.103(a))*. The Agency added two new definitions specific to this program in response to the 2008 Farm Bill. These definitions are for locally or regionally produced agricultural food product and for underserved community.

*Project eligibility (§ 5001.103(b))*. The Agency made several changes in this paragraph.

First. The Agency added the requirement that a project be located in a rural area (§ 5001.103(b)(1)).

Second. The Agency removed the word ''permanent'' so that § 5001.103(b)(2)(iv) now refers to working capital rather than to permanent working capital.

Third. The Agency revised the conditions under which refinancing would be an acceptable use of Agency funds. At proposal (§ 5001.103(a)(1)(x)), the provision for refinancing any loan read: ''Except for the refinancing of Agency direct loans, refinancing of other loans will be limited to a minority portion of the guaranteed loan.'' In the interim rule, this provision (§ 5001.103(b)(2)(x)) reads: ''refinancing any loan when the Agency determines that the project is viable and equal or better rates or terms are offered. Same lender debt refinancing will be additionally required to be less than 50% of the new loan amount unless the amount of the loan to be refinanced is already Federally guaranteed. Subordinated owner debt is not eligible.''

Fourth. The Agency moved the word ''complete'' from in front of ''pre-application'' and placed it in front of ''application'' in § 5001.103(b)(2)(xi).

Fifth. The Agency clarified that, while Business and Industry guarantee loan funds can be used for ''professional services,'' they cannot be used for either packager fees or broker fees (see § 5001.103(b)(2)(xii)).

Sixth. The Agency modified the conditions associated with tourist and recreation facilities, including hotel, motels, and bed and breakfast establishments (§ 5001.103(b)(2)(xiii)) by adding ''when the owner's living quarters is not included in the guaranteed loan'' at the end of the paragraph. This change also makes this provision consistent with the change to § 5001.103(c)(1).

Seventh. The Agency modified § 5001.103(b)(2)(xv) by replacing ''with certain restrictions'' with ''with Agency-approved restrictions'' so that this paragraph reads: ''housing development sites with Agency-approved restrictions.''

Eighth. The Agency added five additional uses and purposes for which guaranteed loan funds could be used as follows:

- Mixed use commercial and residential buildings on a pro-rata basis (residential real estate use portion not eligible);
- Operating lines of credit that are part of an overall guaranteed loan financing package under this section and that are used for certain payments (see § 5001.103(b)(2)(xix));
- Leasehold improvements, provided the underlying lease meets the requirements specified in § 5001.101(a)(1)(viii);
- The purchase of preferred stock or similar equity issued by a cooperative organization or a fund that invests primarily in cooperative organizations, if the guarantee significantly benefits one or more entities eligible for assistance for the purposes described in paragraph (d) of this section; and
- Establish and facilitate enterprises that process, distribute, aggregate, store, and market locally or regionally produced agricultural food products to support community development and farm and ranch income.

The provision to allow lines of credit as an authorized use of loan funds, as noted above, is only available for the Business and Industry loan guarantee program at this time.

Ninth. Lastly, the Agency removed proposed § 5001.103(a)(1)(xviii), assisting cooperative organizations, because such organizations are eligible borrowers and thus this provision is not required in this part of the section.

*Unauthorized projects and purposes (§ 5001.103(c))*. The Agency made changes to several paragraphs.

First. The Agency clarified the end of § 5001.103(c)(1). At proposal, this provision read: ''Businesses housed in private homes, except when the pro-rata value of the owner's living quarters is deleted from the value of the project.'' The rule changes this to now read: ''Businesses housed in private homes, except when the pro-rata value of the owner's living quarters is not included in the guaranteed loan.''

Second. The Agency recast how § 5001.103(c)(2) reads, but did not change its effect. At proposal, this provision (§ 5001.103(b)(2)) read: ''Projects in excess of $1 million that would likely result in the transfer of jobs from one area to another and increase direct employment by more than 50 employees.'' In the rule, this now reads: ''Any project that does not meet the requirements of paragraphs (d)(2), (d)(3), and (d)(4) in 7 U.S.C.,

§ 1932.'' This same change was made later in this section to § 5001.103(g)(2).

Third. The Agency removed from the rule proposed § 5001.103(b)(3).

Fourth. The Agency revised § 5001.103(c)(4) to address distributions or payment to immediate family members and employee-owned cooperatives. At proposal, § 5001.103(b)(5) read: ''Distribution or payment to an individual owner, partner, stockholder, or beneficiary of the borrower or a close relative of such an individual when such individual will retain any portion of the ownership of the borrower.'' In the rule, this provision now reads: ''Distribution or payment to an individual owner, partner, stockholder, or beneficiary of the borrower or the immediate family of such an individual when such individual will retain any portion of the ownership of the borrower, unless the Agency has determined that the distribution or payment is a part of the transfer of ownership within: (i) The immediate family; or (ii) an Employee-owned Cooperative.

Fifth. The Agency added a new paragraph (c)(5), addressing loan guarantees to lending institutions, investment institutions, and insurance companies.

Sixth. The Agency removed proposed § 5001.103(b)(6), assistance to Government employees, because this is adequately covered by conflict of interest prohibitions.

Seventh. The Agency added a new paragraph (c)(9) addressing loan funds may not be used to support inherently religious activities.

*Borrower eligibility (§ 5001.103(d)).* The Agency added a new paragraph (d)(1)(v), which makes cooperative organizations housed in an urban area eligible provided certain rural benefits and requirements are met.

*Additional borrower requirements (§ 5001.103(e)).* This is a new paragraph added as a result of the 2008 Farm Bill. This provision adds a requirement for borrowers with projects that establish and facilitate enterprises that process, distribute, aggregate, store, and market locally or regionally produced agricultural food products to support community development and farm and ranch income.

*Additional application process requirements (§ 5001.103(f)).* Two changes were made under this paragraph.

First. Proposed § 5001.103(d) would have obligated funds using a priority scoring system if funds were insufficient to cover all applications pending approval. The Agency would also have established a scoring priority system each year for publication in the **Federal Register**. In the interim rule, the Agency has replaced this method for determining which applications pending approval would be funded (when there are insufficient funds to cover all applications pending approval) based on the date and time a complete application is received, with first priority going to those complete applications received first.

Second. In response to the 2008 Farm Bill, a new paragraph has been added (§ 5001.103(f)(2)) in which the Agency in making or guaranteeing a loan for projects that establish and facilitate enterprises that process, distribute, aggregate, store, and market locally or regionally produced agricultural food products to support community development and farm and ranch income will give priority to projects that have components benefiting underserved communities.

*Additional application documentation provisions (§ 5001.103(g)).* The Agency added two new provisions to this paragraph.

First. The Agency added a new paragraph (g)(1)(iii) addressing the requirement for intergovernmental consultation comments to be submitted in accordance with 7 CFR part 3015, subpart V, of this title.

Second. The Agency added a new paragraph (g)(2) addressing simplified applications. This paragraph allows lenders to submit applications in accordance with § 5001.12(b) for loan guarantees of $400,000 or less.

*Additional origination responsibilities (§ 5001.103(h)).* The Agency has added four paragraphs concerning additional origination responsibilities and removed one proposed paragraph as described below.

First. The Agency added paragraph (h)(1) on financial statements to this section. This paragraph requires consolidated financial statements for variable interest entities in accordance with the Financial Accounting Standards Board financial interpretation 46, Consolidation of Variable Interest Entities, and eliminating intercompany transactions.

Second. The Agency added paragraph (h)(2)(ii) on leasehold interest as collateral to this section. This paragraph allows the use of leasehold interest as collateral subject to approval by the Agency provided the leasehold interest meets the requirements specified in § 5001.101(a)(1)(viii).

Third. The Agency has added paragraph (h)(2)(iii) for the discounting of collateral to this section. This paragraph identifies requirements to be followed when discounting collateral for this program. These requirements are specified in paragraphs (h)(2)(iii)(A) through (E) of this section.

Fourth. The Agency added paragraph (h)(3) on payment and performance bonds to this section. This paragraph requires a payment and performance bond sufficient to mitigate Agency risk if the project is never completed.

Fifth. The Agency removed proposed § 5001.103(e)(1), which addressed audited financial statements, because the rule now contains the financial statements requirements in subpart A for all of the programs included in the rule. Thus, this proposed paragraph is not required in this section.

*Additional servicing requirements (§ 5001.103(i)).* The Agency added this paragraph, which addresses repurchases. This paragraph states: ''Repurchased loans may be sold without recourse to third-party private investors.''

*Additional guarantee- and loan-related requirements (§ 5001.103(j)).* The Agency added two new paragraphs and revised three proposed paragraphs as described below.

First. The Agency added paragraph (j)(1) addressing marginal or substandard loans to this section. This paragraph states: ''It is not intended that the guarantee authority will be used for marginal or substandard loans or for the relief of lenders having such loans.''

Second. The Agency added paragraph (j)(3) addressing five conditions for lines of credit, which are found in paragraphs (j)(3)(i) through (v) of this section.

Third. The Agency has added a condition under which it may issue the Loan Note Guarantee prior to all planned property acquisition having been completed and all development having been substantially completed in accordance with plans and specification. This provision is found in paragraph (j)(4) of this section.

Fourth. The Agency revised paragraph (j)(5) (paragraph (g)(3) at proposal) to specify that the funding limits are to be applied on a per borrower basis. At proposal, individual borrowers could have obtained guaranteed loans totaling more than $25 million (or $40 million, if a cooperative). In addition, the Agency removed reference to ''under this section'' in paragraphs (j)(3), (j)(3)(i), and (j)(3)(ii). Lastly, the Agency added a provision under which the maximum principal amount of $40 million may be made to cooperative organizations. As proposed, the $40 million limit would apply to rural projects processing value added commodities (proposed § 5001.103(g)(3)). In the interim rule, this maximum amount can now be

applied to a project that ''significantly benefits one or more entities eligible for assistance for the purposes described in paragraph (d) of this section.'' This provision was added as required by the 2008 Farm Bill.

Fifth. Because low documentation applications were dropped from the rule, the Agency has simplified the maximum loan guarantee percentages, which now apply equally to both approved and preferred lenders. There have been no changes to the maximum percent guarantees and loan amounts.

Rural Energy for America Program (§ 5001.104)

*Project eligibility (§ 5001.104(a)).* The Agency has added the requirement that the project be located in a rural area in order to be eligible (§ 5001.104(a)(3)). The Agency also revised paragraph (a)(1) by removing the word ''project'' from the end of the paragraph, so that it now reads, in part, ''or to make energy efficiency improvements.'' The Agency has added a provision (§ 5001.104(a)(4)) that would enable a project to include the refinancing of any loan when the Agency determines that the project is viable and equal or better rates or terms are offered provided that the debt being refinanced will be less than 50% of the new loan amount.

*Additional application process requirements—obligation of funds (§ 5001.104(c)).* As for the Business and Industry program, proposed § 5001.104(c) would have obligated funds using a priority scoring system if funds were insufficient to cover all applications pending approval. The Agency would also have established a scoring priority system each year for publication in the **Federal Register**. In the interim rule, the Agency has replaced this method for determining which applications pending approval would be funded (when there are insufficient funds to cover all applications pending approval) based on the date and time a complete application is received, with first priority going to those complete applications received first.

*Additional application documentation provisions (§ 5001.104(d)).* The Agency made several modifications to this paragraph as described below.

First. The Agency made two changes to the technical report requirement (§ 5001.104(d)(2)):

- The $200,000 threshold in the interim rule is to be based on total eligible project costs, whereas at proposal this threshold was based on the size of the loan guarantee being sought.
- In the interim rule, the lender is to submit the technical report ''to the Department of Energy (DOE) for review unless otherwise stated in a **Federal Register** Notice.'' This replaces the proposal language that discussed, in part, approval by the DOE and the submittal of a DOE technical report.

Second. For energy assessments and audits (§ 5001.104(d)(3)), the interim rule makes clear that the lender is to submit energy assessments and audits to the Agency for review. This direction was not included in the proposed rule.

Third. The Agency has clarified that the feasibility study is required for renewable energy system projects, and not for all projects, as would have been the case under the proposed rule, seeking a loan guarantee greater than $200,000 (§ 5001.104(d)(4)).

Fourth. The Agency added a new paragraph (d)(5) addressing the requirement for intergovernmental consultation comments to be submitted in accordance with 7 CFR part 3015, subpart V, of this title.

*Additional origination responsibilities (§ 5001.104(e)).* The Agency has added this paragraph, which contains three requirements. These three requirements parallel those in the Business and Industry program.

First. The Agency added a paragraph on financial statements (paragraph (e)(1) of this section). This paragraph requires consolidated financial statements for variable interest entities in accordance with the Financial Accounting Standards Board financial interpretation 46, Consolidation of Variable Interest Entities, and eliminating intercompany transactions.

Second. The Agency added a paragraph on discounting collateral (paragraph (e)(2) of this section). This paragraph requires the discounting collateral for this program in accordance with the provision found in § 5001.103(h)(2)(iii).

Third. The Agency added a paragraph on payment and performance bonds (§ 5001.104(e)(3)). This paragraph requires a payment and performance bond sufficient to mitigate Agency risk if the project is never completed.

*Additional guarantee- and loan-related requirements (§ 5001.104(g)).* The Agency has made a number of revisions to this paragraph, several of which were made in response to requirements in the 2008 Farm Bill. These revisions are described below.

First. The Agency clarified in paragraph (g)(1) that the lender must certify to the conditions specified in the paragraph.

Second. In response to the 2008 Farm Bill, the Agency added to this section paragraph (g)(2)(i), which establishes the maximum loan amount under this program at $25,000,000 and applies this limit on a per borrower basis.

Third. In response to the 2008 Farm Bill, the Agency added to this section paragraph (g)(2)(ii), which lays out seven criteria that the Agency will take into account in determining the amount of a loan guarantee under this section (see paragraphs (g)(2)(ii)(A) through (G) of this section).

Fourth. In response to the 2008 Farm Bill, the limit on matching funds has been raised from 50% to 75% (see paragraph (g)(3) of this section).

Fifth. The Agency clarified that, while professional service fees are considered part of eligible project costs, packager fees and broker fees are not eligible project costs (see paragraph (g)(3)(v) of this section).

Sixth. The Agency replaced ''permanent working capital'' with ''working capital'' in the list of eligible project costs (see paragraph (g)(3)(x) of this section).

**Discussion of Comments**

The proposed rule was published in the **Federal Register** on September 14, 2007 (72 FR 52618), with a 60-day comment period that ended November, 13, 2008. Comments were received from 55 commenters, yielding over 800 individual comments on the proposed rule, which have been grouped into similar comments. Commenters included Rural Development personnel, attorneys, financial institutions, trade groups, lender associations, and individuals. Most of the comments that the Agency judged to have merit have resulted in changes in the rule. There are also responses to many of the comments where the Agency has indicated that it will provide additional guidance in the handbook to the rule. The Agency sincerely appreciates the time and effort of all commenters. Responses to the comments on the proposed rule are discussed below.

**General**

*Comment:* Nine commenters stated that they ''commend'' or ''support'' USDA in proposing a unified guaranteed loan platform for its existing guaranteed loan programs.

*Response:* The Agency appreciates the commenters' support of the proposed platform.

*Comment:* In expressing their general opposition to the proposed rule, nine commenters stated that, if adopted as proposed, the rule would be the final step in getting the Agency out of the guaranty loan business and its mandate to create and preserve American jobs,

because the Agency will have no lenders left participating in its programs.

One commenter noted that the proposed rule is much more restrictive than the current regulations and that, if this rule is implemented, the Agency will lose the support of the lenders, particularly because of the requirement that lenders use the more restrictive of lender's loan policy or program regulations.

*Response:* The Agency has made revisions to the rule in response to specific comments that address the general concerns of these commenters. For example, the rule does not require lending entities that wish to participate in the guaranteed loan programs included in this rule to submit copies of their loan origination policies and procedures, but instead a summary of those policies and procedures. As another example, the Agency reinstituted the current policy that the unguaranteed portion of the loan will neither be paid first nor given any preference or priority over the guaranteed portion.

The Agency disagrees with the commenter that the requirement for a lender to comply with its own policies and procedures where those are more stringent than those in the rule will result in a lender being more or less inclined to participate in the loan guaranteed programs included in this rule. Where a rule provision is more stringent than a lender's particular corresponding loan origination or servicing policy or procedure, the Agency understands that such a lender may be more inclined not to participate. However, the Agency believes that in such instances it is necessary to require compliance with the rule's more stringent policy or procedure, unless otherwise approved by the Agency, in order to manage risk.

*Comment:* One commenter stated that, as proposed, the requirements are too burdensome and serve no practical utility in eliminating project risk, borrower risk, or loan guaranty risk. This commenter also stated that, as proposed, the rule serves no practical utility to the Agency in making rural development guaranteed loan decisions, and increases the Agency's administration of the program rather than concentrating on rural economic development.

*Response:* The Agency agrees with the commenter that the proposed rule had provisions that were unnecessarily burdensome and perhaps provided limited benefits. The Agency has revised the rule to incorporate many suggestions made by commenters. Under the interim rule, the Agency is requesting the minimum amount of information necessary to suitably evaluate risk. For example, rather than requesting copies of a lender's policies and procedures, the Agency is requesting that the lender provide a summary of its policies and procedures. In addition, the Agency is implementing a preferred lender program for Business and Industry guaranteed loans that further reduces lender burden and Agency staff time on such loan applications. Further, the preferred lender program in the rule has more tangible benefits to the lender. With these and other changes made throughout the rule, the Agency does not believe that the provisions of the rule will impose undue financial hardship or unattainable eligibility requirements for lending entities wishing to participate in the loan guaranteed programs included in this rule.

Lastly, the Agency's goal is to better manage and reduce the risks discussed in the rule, not eliminate them as suggested by the commenter, from current program practices. To this end, the Agency believes that the rule achieves this goal.

*Comment:* One commenter stated that the Agency's Rural Development loan programs included in the proposed rule have a mission to create jobs and stimulate rural economies. According to the commenter, most of the proposed rule would impose undue financial hardship or unattainable eligibility requirements, making them ineligible projects.

*Response:* The Agency does not believe that the provisions will impose undue financial hardship or unattainable eligibility requirements. In addition, in response to specific comments that suggest reduction of unnecessary financial hardships and eligibility requirements, the Agency has made appropriate adjustments to the rule. For example, the Agency has revised the definition of debt coverage ratio to reflect its calculation on the basis of a typical year for the project. This reduces the eligibility issue for startup businesses and those that might experience hardships during economic downturns. The Agency has also removed the proposed equity requirement and replaced it with debt-to-tangible net worth ratio, a more useful and practical eligibility requirement.

*Comment:* One commenter stated that he did not see an improvement with offering a unified guarantee loan platform, especially from the lenders' perspective. In the commenter's opinion, the complaint of inconsistency from the Agency is overblown by a very few lenders who cross state lines and program lines. According to the commenter, having the guaranteed loan program regulations located in one series (7 CFR part 5001) will be handy for Agency staff but doubts that the lending community will really care or appreciate the effort.

*Response:* The Agency believes that having these guaranteed loan programs under one series (i.e., 7 CFR part 5001) will be useful to both Agency staff and lenders. It is the Agency's experience that there are a number of lenders currently participating in these guaranteed loan programs that cross state lines. This rule would expand the number of programs that these lenders can offer. Thus, the Agency believes there are tangible benefits to this platform that lenders will appreciate.

*Comment:* One commenter stated that the proposed rule fails to address what the commenter characterized as a ''lender- and borrower-unfriendly atmosphere (us against them)''.

Another commenter stated that the Agency should look at financial institutions as partners in a worthwhile endeavor, and that the proposed changes will seriously diminish that partnership and will drive lenders away from the program.

*Response:* The goal of the rule is to strengthen the partnership between the Agency and its lenders and borrower partners by streamlining the regulatory requirements of the guaranteed loan programs included in the rule. In addition, in preparing the rule, the Agency has accepted numerous comments from program stakeholders to further strengthen this relationship.

*Comment:* One commenter stated that the Business and Industry program must leverage the skill and delivery systems that already exist within the commercial bank lending community of this country and that the key is to develop a sound and measurable approval process for lenders that includes (among other things) minimum capital, minimum reserves, qualified personnel, risk rate management, documentation and delinquency review, underwriting supervision, and historical review for continued authority.

*Response:* The Agency agrees with the commenter and has accepted many of the lender's comments to ensure that this rule is consistent with business practices of the commercial lending community for the Business and Industry program and all of the programs associated with this rule's guaranteed loan platform.

*Comment:* Five commenters stated that the Agency should address the current problems with the slow delivery system of the guaranty programs (minimum 1 month, but usually much longer). The commenters stated that these issues result in borrowers and/or lenders declining to be involved in the guaranty programs because the timeframes for turnaround and the variance in requirements are not realistic in today's world. Two of these commenters stated that they do not believe the rule, as proposed, does enough to address the slow delivery system. One commenter suggested that a better program for lenders, especially for Business and Industry lenders, would include streamlining the process to make sure the Agency can deliver the guarantees in a very timely basis.

One of the commenters suggested that the Agency mandate approval time for loan approval and servicing actions, as the Small Business Administration (SBA) did years ago.

*Response:* One of the goals of this regulatory process is to develop a better balance between the needs of the Agency to provide proper oversight over the loan guarantee programs versus the needs of our lender partners for rapid loan guarantee decisions. In response to this and other comments, the Agency has revised the rule to further reduce the burden on lenders and the Agency to address only those areas necessary to properly manage risk associated with the programs. For preferred lenders, the rule now commits the Agency to act on loan applications from preferred lenders within 10 working days of the receipt of a complete loan guarantee application. Lastly, the Agency notes that, through this new platform, the paperwork burden for this program has been reduced by approximately 25 percent.

*Comment:* One commenter stated that the proposal retains the current limited delegated lending authority. According to the commenter, there is no value to requiring lenders to submit origination and servicing policies, provide monthly reports on loans in default, and provide notification within 5 days of any loan agreement violation, because these further restrict a lender's ability to manage these loans. The commenter recommended using the SBA's Preferred Lender Program as a guideline to expand delegated lending authority.

*Response:* In response to this and other related comments, the Agency has revised the rule to provide more tangible benefits to the lender by:

(1) Requiring lending entities seeking to participate in the guaranteed loan programs included in this rule to submit summaries of their loan origination and servicing policies and procedures,

(2) Providing monthly reports on loans that are in monetary default (rather than any kind of default as was proposed), and

(3) Providing notification of loan agreement violations within 15 calendar days (rather than 5 days as was proposed).

Finally, the Agency reviewed several other loan guarantee programs, including those for the SBA and for the Farm Services Agency (FSA). The Agency determined that the FSA loan guarantee program had features more appropriate for this rule and has adopted a number of the FSA program features for this rule.

*Comment:* One commenter stated that the delivery system that is so unique to the Agency, that has been so successful in the past, and that is envied by so many within government is being substantially abolished. The commenter also stated that local outreach, information, and accountability would become practically nonexistent.

*Response:* The Agency agrees that its delivery system provides extraordinary service to our rural customers. The Agency believes that the adoption of this rule will better empower the Agency's delivery system team to provide even better service in the future by enabling Agency staff to engage in increased program outreach and community development, in large measure by eliminating regulatory redundancy and emphasizing lender expertise.

*Comment:* One commenter stated that there is no provision in the proposed rule for outreach to lenders, and two commenters recommended that the Agency participate in the National Association of Government Guaranteed Lenders (NAGGL) and the National Association of Development Companies (NADCO) to improve communication with its lenders. Another commenter suggested that making sure the USDA staff are well trained and experienced in the programs they are administering will do more for the program than a new platform, especially for the Business and Industry program.

A fourth commenter stated that local outreach, information, and accountability would become practically nonexistent under the proposed platform.

*Response:* Outreach, information, and accountability are delivered at the State and local level to ensure our relationship with lenders is maintained. At the national level, the Agency works with a variety of national organizations to promote the programs and to determine if program adjustments are necessary to better meet the needs of our rural customers.

*Comment:* Two commenters stated that the proposed rule should address the current problems with the lack of uniformity in administration, due largely to decentralization and lack of training both at USDA and with lenders. One of the commenters encouraged the Agency to address these issues and offer a more responsive, more uniformly delivered, and more efficiently administered guaranty program that is borrower and lender friendly, but still maintains program integrity. The other commenter recommended that the Agency needed to better manage staff.

*Response:* The Agency acknowledges the commenters' points and considers the new platform to be just the first step in achieving greater uniformity in its administration of the loan guarantee programs. In addition, after the adoption of this rule, the Agency will accelerate its numerous training activities to ensure uniform and consistent adoption of the requirements of the regulation nationwide.

*Comment:* Two commenters stated that the Agency should rely more on the input of local offices and staff. One of the commenters stated that the proposed rule practically ignores grassroots participation and is aimed at large lenders, stating that ''local involvement is too little, too late'' and that local knowledge and input should be obtained as soon as a request is received. This commenter recommended that the present structure and Divisions become an integral part of the rule.

The other commenter stated that local directors should be allowed to approve loans high enough to allow for reasonable loan volume. According to this commenter, micro-management by the Agency's central office makes no sense at all—let your offices perform the tasks at local levels—this is why you hired them.

*Response:* The Agency believes that its field delivery system is critical to the operations of its loan guarantee activities. The regulation does nothing to diminish the importance of the field office in developing and processing loan guarantee applications. In fact, by eliminating unnecessary differences among the loan guarantee programs, the field offices will be able to spend more time in processing and servicing loan guarantees in these programs.

Lastly, with regard to the comment concerning the level of loans that local directors can approve, certain Agency field offices currently have approval authority of up to $10 million. The

Agency believes that this level is sufficiently high and has not modified approval authority levels in this rule.

*Comment:* One commenter stated that the Agency has attempted to create a Loan Specialist Accreditation Plan to help, but there is no implementation plan for this program nor has it been determined who is responsible to schedule and pay for the proposed training to the field specialists, the State Director or the National Office. The commenter stated that the skill level of the field specialists needs to be at least on par with the bank's commercial loan officers, so the field specialists can understand what the lender is doing with their loan analysis and why. The commenter concluded that anything less will hurt the Business and Industry program in quantity and quality of the portfolio.

*Response:* The Loan Specialist Accreditation Plan is not part of this rule, but, at the discretion of Agency managers, may be used in support of Agency training associated with the implementation of this rule.

*Comment:* One commenter suggested making each regulation self-contained, even if it means repeating the same rules four times. The commenter also stated that there are simply too many differences between these four lending programs to make them fit into the same mold.

*Response:* The Agency appreciates the commenter's concern and will use guidance material to assemble program-specific requirements for each of the programs included in the rule. However, as far as the rule itself is concerned, the Agency is retaining the subpart A and subpart B structure. Agency experience shows that there are more common elements associated with the guaranteed loan programs included in this rule than there are differences. Provisions for these differences are provided for in subpart B. Having a common platform for each of the guaranteed loan programs included in this rule will reduce burden for Agency staff, lenders, and borrowers, easing program delivery and improving efficiency. Grouping common elements in subpart A will assist lenders in managing diverse program portfolios and meeting Federal requirements.

*Comment:* One commenter provided a suggested list of the elements that increase the probability of a loss, in approximate order of risk:

—Startup company,
—Management without a proven business track record,
—Company that is unprofitable or has inconsistent retained earnings or cash flow,
—Equity which just meets a 10% or 20% minimum threshold,
—Personal guarantees with little outside net worth,
—Collateral which is unique or remote from an urban center,
—Loan officer with no Business and Industry experience,
—Collateral coverage which is not discounted sufficiently, and
—Lending institution with no Business and Industry experience.

*Response:* The Agency thanks the commenter for the input on those elements that contribute to risk. The Agency has taken these elements into consideration during the development of both the proposed and interim rules. The challenge in administering a loan guarantee program is the need to balance the interest in minimizing losses versus the need to take reasonable risk to promote rural development. This rule attempts to better balance interests by focusing on the risk management approach described in the proposed rule.

*Comment:* One commenter recommended that the Agency centralize its loan process, as SBA did years ago, and, except for the differences in eligibility and guaranty amounts, copy SBA regulations and standard operating procedures (SOPs), including SBA's preferred lender program (it works, and most USDA lenders know it and are members). Two other commenters stated that USDA should ''copy'' the SBA program, which the commenters described as a successful program.

*Response:* The Agency believes that the strength of its programs and program delivery systems is found in the local relationship our field offices develop in rural communities that we serve. To the extent that centralization of certain processes will improve the efficiency of the programs without damaging the critical local relationship, the Agency will centralize such processes. The centralized servicing center for the single family housing programs is but one example.

In its consideration of all of the comments received on the proposed rule, the Agency notes that it looked at a number of other guaranteed loan programs, most notably SBA and FSA programs. The Agency has revised various portions of the rule based on the FSA program, which the Agency found to be more in line with the types and size of loans the Agency guarantees than in the SBA guaranteed loan program.

*Comment:* One commenter stated that the publication of the new 1970 Environmental Regulation is critical to the successful implementation of this Unified Guaranteed Loan regulation for three reasons:

First. Currently, two separate environmental regulations will be used by the lenders. This will be confusing.

Second. For large projects that may require an environmental impact statement (EIS), 7 CFR § 1940.336 imposes upon the Agency the responsibility to contract and pay for the EIS which could cost millions of dollars.

Third. The new 1970 environmental regulations include streamlining in many aspects that will make the National Environmental Policy Act (NEPA) process more practicable.

The commenter stated that the 1970 regulation has been cleared by all Rural Development program areas and has been awaiting OGC review since June 2007. The commenter also recommended that every effort be made to expedite that review.

*Response:* The environmental regulation is a critical regulation in the operation of USDA Rural Development programs, including the loan guarantee program. The Agency is currently reviewing the environmental regulation to determine whether it is appropriate to revise it. The consideration of amendments to the environmental regulation is outside the scope of the proposed rule. Therefore, these comments have not been considered in the context of the finalization of this rule.

*Comment:* One commenter noted that the proposed rule indicates Subpart B of Part 4280 is removed and reserved. The commenter also noted that Section A of 7 CFR part 4280, subpart B, addresses the grant portion of the Agency's Renewable Energy Systems and Energy Efficiency Improvements Program and that no new grant regulation has been proposed. The commenter recommended that only Section B of 7 CFR part 4280, subpart B, be removed and reserved, thus leaving the grant, direct loan, and combination financing sections in the regulation. The commenter also questioned whether, if this new regulation is adopted, subpart A of 7 CFR part 4279 and subpart B of 7 CFR part 4287 should also be removed and reserved?

*Response:* The Agency agrees with the commenter that only Section B of subpart B of 7 CFR part 4280 should have been reserved and removed, and has made this correction. The Agency notes that the combined funding provisions found in Section D of subpart B of 7 CFR part 4280 have been revised to make necessary conforming changes

as the result of the removal of Section B.

*Comment:* Two commenters stated that in Exhibit II—Guarantee Fee and Loan Closing Procedure Procedures: Item (b) should include a statement that all conditions in the Conditional Commitment have been met by the lender before approving the lender's loan closing documents.

*Response:* The proposed rule does not include an Exhibit II and therefore the Agency has not considered the comment.

*Subpart A—General Provisions*

Purpose (§ 5001.1)

*Comment:* Two commenters pointed out that proposed § 5001.1 stated that this part regulates ''Rural Development guaranteed loans.'' The commenters stated that this is misleading because the proposed new part covers only four of the guaranteed loan types offered by Rural Development.

*Response:* Although it is the Agency's intention to add the other guaranteed loan programs to this platform as determined by the Agency on a program-by-program basis at a later date, the Agency has revised the purpose statement to clarify that this part applies to the guaranteed loan programs specified in subpart B of this part.

Definitions and Abbreviations (§ 5001.2)
Applicant

*Comment:* Two commenters stated that the definition of ''applicant'' does not indicate whether it means the business or the lender because both are seeking a guarantee. One of the commenters stated that it is the lender who is seeking the guarantee and, therefore, the applicant and the lender are the same and asked why define both.

A third commenter suggested revising the definition of applicant to include both persons and entities to be consistent with the Business and Industry and the Renewable Energy programs.

*Response:* The Agency reviewed the use of the term applicant throughout the proposed rule and agrees that in some places the specific entity being referred to is unclear. The Agency decided that the term is unnecessary and has deleted it from the rule. In its place, the rule now specifies directly whether a particular requirement applies to the lender, the borrower, or both.

In making this change, the Agency also revised the definition of ''borrower'' to include a person that seeks to borrow money, which was referred to as a ''prospective borrower'' in the proposed rule. By making this change, the rule is simplified by using the term ''borrower'' and letting the context of the rule make the differentiation between ''borrower'' and ''prospective borrower.''

Finally, because the definition of applicant has been deleted, it becomes unnecessary to revise the definition to include ''persons.''

*Comment:* One commenter recommended that the term ''prospective borrower'' be replaced throughout the rule with the term ''applicant'' when appropriate, to be consistent with the definition of applicant.

*Response:* After considering this comment, the Agency agrees that the terminology in the proposed rule was inconsistent. In the rule, the Agency has elected to delete the term ''applicant'' and use the term ''borrower.'' The Agency then redefined the term ''borrower'' to cover ''the person that borrows, or seeks to borrow, money from the lender.'' The context in which the term borrower is used in the rule determines whether the rule is referring to the person that borrows money, or is seeking to borrow money, from the lender.

Approved Lender and Preferred Lender

*Comment:* One commenter suggested that definitions be provided for the terms ''approved lender'' and ''preferred lender.''

*Response:* The Agency agrees with the commenter and has added definitions for both terms to § 5001.2 of the rule.

Business Plan

*Comment:* Two commenters stated that the definition of ''Business plan'' should include a statement that all projected financial statements are to be completed by an independent certified public accountant in accordance with Generally Accepted Accounting Principles (GAAP) for all for-profit businesses. The commenters also noted that nonprofit corporations and public bodies should be required to obtain this only if the loan request exceeds $1 million.

*Response:* The intent of the definition of business plan is to provide broad guidance as to the minimum requirements of a business plan. The Agency notes that not all borrowers will be able to provide financial statements that are prepared in accordance with GAAP, but that such financial statements can still be acceptable if they are prepared in accordance with Agency-approved guidelines. The Agency will identify additional guidance as to what a business plan should contain for each specific program in a handbook. The Agency notes that, in response to comments specific to financial statements, the requirements associated with financial statements have been modified in the rule to require, for borrowers that have been in existence one or more years, the most recent audited financial statements of the borrower, unless alternative financial statements have been authorized by the Agency, if the guaranteed loan is $3 million or more, or the most recent audited or Agency-acceptable financial statements of the borrower if the guaranteed loan is less than $3 million. If the borrower has been in existence for less than one year, the rule requires the most recent Agency-authorized financial statements of the borrower regardless of the amount of the guaranteed loan request. Therefore, the Agency has not revised the definition of business plan in response to this comment.

*Comment:* One commenter stated that the definition of ''Business plan'' is too specific. The commenter stated that, with loans ranging from several hundred thousand dollars to tens of millions of dollars the requirements for business plans, the definition should be reasonably general to allow the borrower and lender to achieve reasonableness depending on the project.

*Response:* The Agency does not agree with the commenter that the definition of business plan is too specific. The definition is intended to identify the requirements that constitute a minimal business plan that would be adequate for the smallest projects where one is required. For larger, more complex projects, the Agency and/or the lender may require a more detailed business plan. Therefore, the Agency has not revised the definition of business plan in response to this comment.

*Comment:* One commenter noted that the definition of ''Business plan'' calls for description of the ''applicant's'' ownership structure, etc., and commented that, by definition, this would be in reference to the lender (''The entity that is seeking a loan guarantee under this part.'') rather than the borrower. The commenter suggested that ''applicant'' be replaced by ''borrower.''

*Response:* The Agency agrees with the commenter that, as the proposed rule defined applicant, this would refer to the lender when in fact this requirement should apply to the ''potential borrower.'' The Agency has revised the definition to indicate that this requirement applies to the borrower and not the lender.

Cash Equity

*Comment:* Twelve commenters commented on the need for a definition of cash equity. Commenters stated that the proposed rule did not provide a definition of cash equity and that a definition needs to be fully and carefully defined.

One commenter expressed concern that without a clear definition, the public could not effectively comment on the rule and stated that the point in time of its measurement should also be established. Another commenter added that depending on how cash equity is defined and the timing in the year, this could be a challenge for even strong businesses to meet.

Three commenters wondered if by cash equity, the USDA meant cash contribution.

One commenter suggested the cash equity could be 10% down payment, or define equity as the owner's interest in a building based upon the appraised value.

*Response:* As noted elsewhere in response to comments on the financial criteria associated with project eligibility, the rule does not contain a ''cash equity'' criterion (cash equity has been replaced with debt-to-tangible net worth ratio). Therefore, it is unnecessary to define ''cash equity'' because that term is no longer used in the rule.

Conflicts of Interest

*Comment:* One commenter stated that the definition of ''Conflicts of interest'' needs to be revised because, as written, it makes inter-family transfers of ownership ineligible.

*Response:* In response to a similar comment made by this commenter on proposed § 5001.103(b)(5) concerning unauthorized projects and purposes, the Agency has revised the rule to allow for inter-family transfers of ownership (see § 5001.103(c)(4) in the rule). The Agency believes that this addresses the commenter's concern both on proposed § 5001.103(b)(5) and on the proposed definition of conflicts of interest, and the Agency does not believe it is necessary to modify the definition of conflicts of interest. However, the Agency has decided not to include a definition of conflicts of interest in the rule and will instead provide guidance in a handbook on what the Agency considers to be conflicts of interest or appearances of conflicts of interest.

Cooperative Organization

*Comment:* One commenter stated that, by not including true cooperatives as part of the definition of ''Cooperative organization'', true cooperatives are no longer eligible entities for the Business and Industry program.

*Response:* The Agency agrees with the commenter that the proposed rule would have excluded true cooperatives as eligible entities and this was not the Agency's intention. Therefore, the Agency has revised the definition of cooperative organization to include true cooperatives.

Debt Coverage Ratio

*Comment:* One commenter stated that debt coverage ratio needs to be defined. Another commenter stated that the proposed definition is vague and that, if USDA uses the ''net operating income'' criteria, the minimum coverage ratio of 1.0 is a very high requirement and may result in the exclusion of some very worthwhile projects.

Two other commenters stated that the proposed definition needs to be revised to conform to normal banking practice and that non-cash expenses (e.g., depreciation) and debt service expenses (e.g., interest) should be added back to net operating income. One of these commenters suggested that debt coverage ratio should be defined as ''the ratio obtained when dividing a business's realistically-projected Earnings Before Interest, Taxes, Depreciation (and depletion for natural resource companies), and Amortization (EBITDA) by its annual debt service (principal and interest) on all loans of the business.'' This commenter noted that EBITDA is a clearly, widely-used and well-understood term in the banking industry. The other commenter offered a similar definition of ''a comparison of the company's cash flow, measured as EBITDA to the required debt service (principal and interest payments).'' This commenter stated that they prefer this standard industry definition over the definition that compares net operating income to the principal and interest requirements.

*Response:* The Agency agrees that the definition of debt coverage ratio needs to be revised and agrees with the commenters who suggested that the definition more conform to normal banking practice. Therefore, the Agency has incorporated the concept of EBITDA into the definition of debt coverage ratio in the rule.

Environmental Review

*Comment:* One commenter suggested adding a definition for ''Environmental review'', as follows: ''An analysis, as required by The National Environmental Policy Act (NEPA), of potential environmental impacts likely to result from the implementation of a proposal. This is documented by the appropriate report in the form of a: Categorical Exclusion (CE), Environmental Assessment (EA), or Environmental Impact Statement (EIS)''.

*Response:* The rule contains sufficient guidance as to what is expected for an environmental review. Thus, the Agency does not believe it is necessary to create a definition for environmental review.

Essential Community Facility

*Comment:* One commenter questioned the meaning of the phrase ''Not include a project that benefits a group of single individuals as opposed to a class within a community'' in paragraph (iii) of the proposed definition of ''Essential community facility.'' The commenter stated that a list of some examples of projects that are being referred to should be included.

*Response:* The Agency agrees with the commenter that the meaning in paragraph (iii) of the proposed definition was not clear. In the rule, the Agency has revised this paragraph to read ''benefit the community at large.'' The intent is that the project not benefit a specific individual or a uniquely defined set of individuals within the community. The Agency will provide additional guidance, including a list of examples, in a handbook for the rule.

*Comment:* Two commenters suggested that paragraph (vi) of the proposed definition of ''Essential community facility'' be expanded to state: ''Be located in and provide service to a rural community''.

*Response:* The Agency disagrees that it is necessary to modify the referenced paragraph to include ''provide service to a rural community.'' The introductory paragraph to this definition already states that the resulting service is to be provided to ''primarily rural residents.'' The Agency notes that in the rule the subject paragraph has been removed from the definition and placed in subpart B as a specific project eligibility criterion, where the Agency believes it is more appropriately addressed.

High Impact Business

*Comment:* One commenter noted that the definition of ''high-impact business'' could reasonably be construed to include a day-spa, an art store, or some other small business creating few jobs. The commenter stated that the Agency has developed the Socio-Economic Benefit Assessment System measurement tool, which can estimate a project's impact in terms of job creation, tax base increases, and gross domestic product, and recommended that ''high-impact'' be redefined in these terms

versus the vague generality currently adopted.

*Response:* The Agency agrees that the types of businesses described by the commenter should not be considered ''high impact businesses'' as intended under this rule. The Agency, therefore, has revised the definition of high impact business to include reference to jobs with an average wage exceeding 125% of the Federal minimum wage. The Agency does not believe it is necessary to incorporate the metrics proposed by the commenter (e.g., tax base increases) to appropriately define high impact businesses.

Lender's Agreement

*Comment:* One commenter stated that the lender's agreement should be referred to as a form and not as an agreement.

*Response:* The Agency agrees with the commenter and has made the suggested edit.

Loan Agreement

*Comment:* One commenter noted that the definition of ''loan agreement'' refers to an Agency approved agreement and asked what the process is to approve a loan agreement.

*Response:* The process used by the Agency to approve a loan agreement is internal to the Agency and it is inappropriate to include internal procedures in the rule. The Agency will make clear the process in a handbook to this rule or in other internal guidance material.

Loan Note Guarantee

*Comment:* One commenter stated that a Loan Note Guarantee should be referred to as a form, not an agreement.

*Response:* The Agency agrees with the commenter and has made the suggested edit.

Negligent Loan Origination

Several commenters expressed concerns with the second paragraph of the proposed definitions of negligent loan origination and negligent loan servicing, which states the failure of the lender to perform its origination or servicing responsibilities in accordance with the origination or servicing policies and procedures in use by the lender.

*Comment:* One commenter suggested revising the definition of ''negligent loan origination'' to rephrase the ambiguous phrase ''at the time of the loan'' with ''at the time the loan is made.''

*Response:* The Agency agrees with the commenter and has made the suggested edit.

*Comment:* One commenter stated the proposed rule creates unpublished program eligibility guidelines and standards for loan origination and servicing for lenders. The Agency proposed to use unpublished origination standards, credit policies, and procedures of each lender that are unavailable to other lenders as a new standard. According to this commenter, this requirement places a dual, unfair, and undue burden on the lender. The commenter stated that the Agency proposes double, unpublished standards and procedures that are burdensome to lenders, mandating that lenders use their own credit policies or procedures if more stringent than the Agency's.

Elsewhere, the commenter stated that the Agency is proposing to hold lenders to three standards—a reasonable prudent lender, the lender's own credit policies and procedures, and acts and omissions standards. The commenter concluded that, combined, they are confusing, overly burdensome, and difficult to administer.

*Response:* The Agency believes that the commenter misunderstands the intention of the Agency. Each lender will, as is currently their practice, be using its own policies and procedures in underwriting a loan for Agency guarantee and need not be concerned with those of another lender. Thus, lenders will have full knowledge of the requirements necessary under this rule for submitting an application for loan guarantee.

Further, the Agency would expect a lender's policies and procedures to be consistent with a ''reasonable prudent lender'' standard, which would include acts and omissions standards. Therefore, the Agency disagrees with the commenter's conclusion that this rule and the lender's own policies and procedures would be confusing, overly burdensome, or difficult to administer. If the lender has any questions on the implementation on this issue, then they can seek Agency guidance.

*Comment:* One commenter stated that, as proposed, the rule would create unpublished eligibility metrics by including lender credit policies and procedures if those procedures are more stringent than published procedures and that it is unreasonable to use those policies, if stricter than the Agency's published standards, as unpublished credit, project eligibility, loan terms, or servicing standards not otherwise made available to the public. According to the commenter, this is unfair to borrowers, such as small businesses, because a borrower will have no knowledge as to how to become eligible and a borrower working with a lender with a stricter credit policy than the Agency's standard will not know that their project could possibly qualify with another Agency approved lender. Further, this requirement creates an unfair standard for projects by discriminating against projects that would qualify under one prudent lender with less stringent credit policies and procedures.

*Response:* While the Agency does not disagree with the commenter's concern, the Agency points out that this rule is intended to define the relationship between the lender and the Agency in order for the Agency to guarantee the loan presented to it by the lender. It is not the intent of this rule to lay out one set of conditions that all loans would be approved under, which is no different from the current situation that a borrower faces. In other words, a borrower seeking a loan will not know the various conditions required by one lender or another. This rule does not change that situation. If a borrower works with a lender who cannot qualify the loan under that lender's policies and procedures, the borrower is always free to work with another lender.

*Comment:* One commenter stated that the proposed unpublished standards go beyond current USDA Rural Development regulations and are onerous and unreliable for all lenders to equally comply to and be held accountable for.

*Response:* The Agency has intentionally set out to develop a new regulatory platform for administering its loan guarantee programs. In developing this platform, the Agency has implemented provisions that are different from the current programs being included in this rule. Thus, to the extent that this rule results in different and new requirements than current program regulations, this is intentional.

With regard to the concept that the rule established ''unpublished'' standards, the Agency considers this a matter of perspective. The Agency has elected to lay out a framework for originating and servicing guaranteed loans that relies more on the lender's own policies and procedures than on the Agency setting, or trying to set, one comprehensive standard that would apply to each of the included programs. To the extent that lenders have different loan origination and servicing standards, then the Agency understands the perspective that those policies and procedures are ''unpublished''; at least in the sense that they are not spelled out in a **Federal Register** notice or in the Code of Federal Regulations.

However, the Agency does not believe this to be a critical issue in the successful implementation of its

guaranteed loan programs. Each lender that is approved for participation in this program will know both its own policies and procedures and those that are spelled out in the rule. Thus, the Agency does not agree that this results in a rule that is either ''onerous'' or ''unreliable'' to each lender.

*Comment:* One commenter stated that the proposed rule contains no credit or loan servicing standards that are not already found in the current regulations.

*Response:* The Agency believes that the rule contains the necessary elements for guaranteeing loans. In the absence of specific suggestions or recommendations from the commenter associated with this topic, the Agency cannot be more specific in its response.

*Comment:* One commenter stated that the proposed rule does nothing to eliminate the inefficiencies and inconsistencies that the Agency currently acknowledges exist in the programs.

*Response:* The Agency disagrees with the commenter. The Agency believes that developing a single platform for the delivery of these guaranteed loan programs improves the efficiency with which the Agency can deliver the programs and allows the Agency to reduce any inconsistencies across Agency offices.

*Comment:* One commenter disagreed with the third paragraph of the proposed definitions for negligent loan origination and negligent loan servicing for dealing with the inclusion of acts and omissions to act. According to the commenter, the prudent lender standard in the first paragraph of the proposed definition should prevail as in the current regulation.

*Response:* The third paragraph is not intended to narrow the requirement of the first paragraph, but rather is intended to include the notion of failure to act in addition to actual acts performed. As such, the Agency does not accept this comment.

Participation

*Comment:* One commenter stated, with regard to defining participation, that no participations will occur under the program because the new rule would preclude selling participations under the regulations due to the fact that the Agency requires no pari passu.

*Response:* The Agency has reinstated the concept of pari passu in the rule.

Permanent Working Capital

*Comment:* One commenter stated that, in the definition of ''Permanent working capital,'' the word ''liquid'' should be replaced with ''current.''

*Response:* The Agency has removed the definition of ''permanent working capital'' from the rule because the term is no longer used. In its place, the Agency is using the term ''working capital.''

Preliminary Engineering Report

*Comment:* One commenter noting that the definition of ''Preliminary engineering report'' is pertinent to the Water and Waste Disposal guaranteed loan program, there should also be a definition of a ''Preliminary architectural report'' for the Community Facilities guaranteed loan program.

*Response:* The Agency agrees with the commenter and has provided a definition of ''preliminary architectural report.''

Promissory Note

*Comment:* One commenter recommended that the words ''or on demand'' be deleted from the definition of ''promissory note,'' because guaranteeing a demand note can create a balloon payment, which is not allowed under the Business and Industry program.

*Response:* The Agency agrees with the commenter and has made the suggested edit. The Agency notes that, because of potential considerations on this edit with regard to acceleration, the Agency will provide guidance on this definition and change relative to the acceleration of loans in the handbook to the rule.

*Comment:* One commenter noting that ''bonds'' are included within the definition of ''promissory note'' in the proposed rule and can be the guaranteed instrument, suggested clarifying that a ''lender'' is the entity providing the debt financing, regardless of whether they are making a traditional loan or providing investment (''bond'') financing.

*Response:* The Agency agrees with the commenter that further clarification that a lender is the entity providing the debt financing is needed. However, the clarification is more appropriately addressed outside of the rule and the Agency will address this issue in the handbook to the rule.

Rural or Rural Area

*Comment:* One commenter stated that the proposed definition of ''rural or rural area'' includes Census Designated Places (CDPs), which are not part of the Consolidated Farm and Rural Development Act definition contained in § 343(13)(A)(i) and (ii).

*Response:* While the Agency would be able to include CDPs in the definition of rural or rural area as it applies to the Business and Industry and the Rural Energy for America programs even though CPDs are not part of the Consolidated Farm and Rural Development Act, the Agency agrees that CDPs are not required to be part of the definition of rural or rural area for these two programs. Therefore, the Agency has removed reference to CDPs in the definition of rural or rural areas for these two programs. The Agency notes that for both Community Facilities and Water and Waste Disposal Facilities, reference to CDPs in the rural or rural area definition remains in the rule.

Small Business

*Comment:* One commenter noted that, under the current program regulations, there is no definition of ''small business'' or size standards. According to the commenter, the proposed rule excludes, by implication, those businesses that exceed SBA size limitations, such as publicly traded companies or other large private entities. The commenter recommended that the definition of small business should be excluded from the defined terms under the program because it implies limiting the size of business entities that may be eligible to participate in the program.

*Response:* The rule keeps the definition of small business because it is a statutory requirement for the Rural Energy for America Program guaranteed loan program (as that program applies to rural small businesses). The Agency notes that the term applies only to this program and not to the other programs and does not limit the size of businesses that participate in the other programs.

Startup Business

*Comment:* One commenter stated that the proposed definition of ''Startup business'' needs to be clarified because it could be interpreted that only newly formed entities that are constructing ground up facilities would be considered startups. According to this commenter, all newly formed entities should be considered startup businesses.

Another commenter stated that, for borrowers that have established track records/experience operating businesses, but for accountant or attorney, recommended formation of a new entity for each additional site, the proposed definition is prohibitive and should not require the same tangible net worth requirements as a truly new business by a borrower with no prior history or experience owning and operating the business.

*Response:* The Agency agrees that the definition of startup business needs to be revised and has done so in the rule.

With regard to the comment recommending that all newly formed entities be considered startup businesses, in the revised definition, a newly formed entity would be considered to be a startup business even if the owners of the startup business own affiliated businesses doing the same kind of business, unless it buys an existing business or facility and the business or facility being bought remains in operation and there is no significant change in operations. In such instances, the newly formed entity would be considered an existing business, not a startup business.

With regard to the second comment, the Agency agrees that an existing business should not be treated as a new entity solely on the basis of changes that merely restructure the business. The revised definition of ''Existing business'' addresses this issue.

However, the Agency disagrees that it is appropriate to use the experience of individuals in an associated business in determining whether the business will be treated as a startup business or an existing business. While the track record of such individuals is helpful in evaluating the strength of the applicant, it does not change the fact that the entity itself is a new business that lacks an existing track record. Therefore, the Agency believes such a business should be treated as a startup business. The Agency has revised the definition of startup business accordingly.

Unincorporated Area

*Comment:* One commenter stated that the proposed definition of ''Unincorporated rural area'' only includes census defined place. The commenter stated that any unincorporated places that are less than 20,000 and not currently included as a CDP are not eligible as the language is written. The commenter suggested adding language to the definition of unincorporated area to include open country and small unincorporated places that are not included as census defined places.

Another commenter questioned whether all unincorporated areas are a Census Designated Place. The commenter then stated that, if not, this should be changed.

*Response:* The Agency did not intend to exclude open space from being considered a rural area. The Agency has revised the definition of ''rural or rural area'' to address the commenter's concern. The statute uses the phrase ''unincorporated area'' in the definition of rural area for the Community Facilities and the Water and Waste Disposal facilities programs. The Agency has determined to use the concept of census designated places as defined by the Bureau of the Census to be the equivalent of the term unincorporated area in the statute.

Abbreviations

*Comment:* One commenter recommended that abbreviations in addition to RUS and SBA be included in the rule.

*Response:* The Agency has removed the abbreviations section from the rule because it is no longer needed.

Agency Authorities (§ 5001.3)

*Comment:* One commenter stated that the Office of Inspector General required Administrator exceptions for the Business and Industry program to be reviewed by the Office of the General Counsel and the Under Secretary and questioned why that requirement was removed.

*Response:* The requirement referred to by the commenter reflects procedures internal to the Agency. Even though previously included in Agency regulations, the Agency has determined that it is not necessary to keep this reference to internal procedures in the regulation and, therefore, removed them from the rule.

*Comment:* One commenter recommended that appeals should only be conducted if the lender requests the appeal. The commenter stated that a business should not be permitted to appeal a guaranteed loan decision without the participation of a lender. The commenter noted that this approach is already in practice for USDA's Single Family Housing guaranteed loan program (see RD Instruction 1980–D, § 1980.399) and FSA guaranteed loan programs.

Another commenter stated that, because lenders are the applicants in all guarantee programs, appeals should be allowed only when participated in by the lender involved in the project.

*Response:* Both appeal situations referred to by the commenters are controlled by the National Appeals Division (7 CFR part 11). Because these rules apply to this regulation, there is no need for this rule to specifically address these appeal situations.

Oversight and Monitoring (§ 5001.4)

*Comment:* One commenter noted that the proposed rule seems to be increasing the USDA's micromanagement of lenders, rather than following SBA's lead in being an administrator of a lender's program for thousands of lenders.

*Response:* The Agency disagrees with the commenter's remarks. The Agency has made substantial changes to the rule to address similar concerns, especially with regard to no longer requiring copies of the lender's policies and procedures.

General (§ 5001.4(a))

*Comment:* One commenter suggested revising § 5001.4(a) to read ''The lender will cooperate fully with Agency oversight and monitoring of lenders'' in order to move the focus to the lender.

*Response:* The Agency agrees with the commenter's suggestion and has revised the text in the rule accordingly.

*Comment:* One commenter asked what the Agency review requirements for other lenders was, noting approved and preferred lenders are reviewed every two years.

*Response:* Under the rule, all participating lenders are either ''approved lenders'' or ''preferred lenders.'' This includes regulated and supervised lenders as well as other lenders. Thus, another lender would be subject to review at least every two years, regardless of its being an approved or a preferred lender.

*Comment:* One commenter suggested adding language that permits the Agency to assess the costs of the reviews of certain lenders (*e.g.*, safety and soundness examinations) to the lenders being reviewed. According to the commenter, this would be consistent with the current practices of the Federal Deposit Insurance Corporation and Farm Credit Administration.

*Response:* In response to comments made concerning lender eligibility, the Agency has included in the rule a provision that other lenders undergo an examination acceptable to the Agency in order to be eligible for participation in the guaranteed loan programs included in the rule. Thus, it is unnecessary for the Agency to include a provision in the rule for assessing the costs of the reviews of these lenders.

Reports and Notifications (§ 5001.4(b))

*Comment:* One commenter stated that requiring lenders to submit origination and servicing policies, provide monthly reports on loans in default, and provide notification within 5 days of any loan agreement violation, restrict a lender's ability to manage these loans, and there is no value to this.

Another commenter stated that § 5001.4(b) needs to be totally reworked to better address risk, and suggested completely replacing this paragraph with the following:

(b) Reports and Agency notifications. Lenders will submit to the Agency reports and notifications to facilitate the Agency's oversight and monitoring.

These reports and notifications include, but are not necessarily limited to:

(1) For all loans in monetary default, the lender shall provide monthly default reports in a form approved by the Agency.

(2) Notification in writing within 5 days of:

(i) Downgrade in the loan classification of any loan. The lender will advise the Agency of classifications upgrades in a reasonable period of time.

(ii) Loan is 30 days past due or is otherwise in monetary default.

(3) Any material change in the general financial condition of the lender since the last periodic report to be submitted semiannually.

(4) Otherwise required for non-routine servicing actions and as specified in this section.

*Response:* In consideration of these and other related comments, the Agency has made changes to the rule that address most of these commenter's concerns. Specifically, the rule does not require that lenders submit copies of their origination and servicing policies and provides for 15 calendar days, instead of the proposed 5 days, for providing the Agency with information on loan violations. In addition, the Agency is requiring under the rule default reports only for monetary defaults rather than all types of defaults as that term is defined in the rule.

The Agency agrees with the suggestion that any downgrades in a loan's classification be reported and has added this requirement to the list of items to be reported within 15 calendar days to the Agency. However, the Agency does not believe it is necessary to receive reports on upgrades in a loan's classification and has not added this to the rule.

With regard to the suggestion that the Agency be notified of only monetary defaults rather that all defaults, as that term is defined in the rule, the Agency is requiring that notifications on all defaults be submitted within 15 calendar days because it is the Agency's intent in managing risk that such problem loans are addressed in a timely fashion and provides the Agency with better and more up-to-date information in its monitoring of a lender's portfolio of Agency loans.

With regard to the suggestion on the material change in the financial condition of the borrower, the Agency intended this requirement to address the borrower rather than the lender, as was stated in the proposed rule. Thus, the Agency has retained this provision, but corrected it to apply to the borrower, as was suggested by the commenter.

Finally, one commenter suggested that reports and notifications include those ''otherwise required for non-routine servicing actions and as specified in this section.'' As the Agency understands this comment, we believe that text in § 5001.4(b) stating ''These reports and notifications include, but are not necessarily limited to:'' sufficiently covers the intent of the commenter's suggestion. Therefore, the Agency has not included the commenter's suggestion as a separate paragraph in the rule.

Periodic Reports (§ 5001.4(b)(1))

*Comment:* One commenter stated that the semiannual Guarantee Loan Status Report requirements of 7 CFR § 3575.69(d), which require the lender to report to the Agency the outstanding principal and interest balance on each guaranteed loan semiannually, should be stated and retained.

*Response:* The rule provides for the submittal of a periodic report on a semiannual basis under § 5001.4(b)(1). The periodic report to be used is Form RD 5001–8, Guaranteed Loan Borrower Status. The form provides for the reporting of outstanding principal and interest balance for the guaranteed loan.

Default Reports (§ 5001.4(b)(2))

*Comment:* One commenter noted that the proposed regulations do not define whether a default is based on the inability to make the payment from cash flows or if the facility is delinquent only if the payment is not made.

*Response:* The intent was to require monthly default reports for loans that are in monetary default, which occurs if payment is not made within 30 days after the payment due date. The Agency has revised the rule, including adding a definition for monetary default, to make its intention clear.

*Comment:* One commenter suggested that loan classification be adopted as the primary risk indicator used by Rural Development, because essentially all lenders use loan classification to monitor the risk in their portfolios. Requiring lenders to immediately notify the Agency of any change in loan classification is the most effective risk indicator to help the Agency focus its oversight activities on the highest risk borrowers and lenders and better understand its risk exposure in the portfolio.

*Response:* The Agency believes that there are a number of factors important to managing risk. The Agency agrees with the commenter that changes in a loan's classification is an important factor in managing risk and, therefore, has added a provision to the rule requiring lenders to notify the Agency when there has been an adverse change in a loan's classification. The Agency does not believe that it is necessary to require reporting when a loan's classification has improved.

*Comment:* Seven commenters stated that monthly reporting for loans in default is over-burdensome and recommended continuing to require every 60 days. Two other commenters suggested that a quarterly reporting frequency, rather than monthly, is sufficient.

*Response:* The Agency proposed a monthly reporting frequency for loans in default in order to better manage risk and potential Agency loss, and as noted in a response to a previous comment, the rule clarifies that monthly reporting is limited to loans that are in monetary default. The Agency further recognizes that monthly reporting, compared to quarterly or semiannual reporting, imposes increased burden on those lenders who have loans that are in monetary default. On balance, though, the Agency believes that the benefits of focusing on loans in monetary default on a monthly basis outweigh such increased costs and has retained the monthly reporting frequency for loans in monetary default.

Notifications (§ 5001.4(b)(3))

*Comment:* Several commenters stated that the 5-day period for providing notifications was too short.

One commenter stated that notification within 5 days is too short of a timeframe and not consistent with industry time standards and unreasonable for institutions. The commenter recommended that the Agency adopt 15-day notification period timeframes for paragraphs (b)(3)(i) and (b)(3)(ii) within this section.

Three other commenters stated that the five-day notification of a loan agreement violation is burdensome and unnecessary. One of these commenters suggested allowing the lender 30 days to report real problems to the Agency.

Two commenters recommended retaining the current regulation requiring notification within 10 days of any permanent or temporary reduction in interest rate.

*Response:* The Agency agrees that the proposed 5-day period for notifying the Agency is unnecessarily short and has changed this to a 15-calendar day period in the rule.

*Comment:* One commenter stated that it seemed unnecessary for the Agency to require immediate notification of an interest rate cut, because the Agency's exposure is reduced by this action and the interest rate changes will show up

on the next quarterly or monthly status report.

*Response:* As noted in the previous response, the Agency has revised the rule to allow lenders up to 15 calendar days to provide notification of reductions in interest rate. However, the Agency is still requiring notification of all interest changes in order to ensure compliance with the underlying promissory note.

*Comment:* Five commenters provided comments on notification of a loan agreement violation.

One commenter recommended that, instead of a 5-day notice to the Agency if the lending agreement has been violated, notification to the Agency of borrower covenant default occur within 30 days of the lender's knowledge of the default. In support of this recommendation, the commenter stated that there are many items in a Lending Agreement, not all of which are readily discernable within 5 days of default. Other items may be readily discernable but create much overhead if tied to a 5-day notice. Such items include:

1. Reporting requirements: Notifying Rural Development within 5 days of covenant violation creates excessive reporting overhead and is burdensome to the lender. Thirty days is much more appropriate.

2. Insurance coverage: If the insurance company has failed to notify the lender of failure to pay insurance, the lender cannot notify USDA until it has knowledge of default.

3. Financial Covenants: Guaranteed Community Facilities may have annual, semiannual, quarterly or monthly reporting requirements. Breach of financial covenants cannot be known until reporting is received and the lender has had time to review the reports.

4. There are many other criteria including capital expenditures, negative pledges, no debt incursion, controls on the use of funds, etc., that may have drag time between the covenant breach, the lender's knowledge, the lender's response to the breach and lender's notification to USDA.

One commenter recommended that, for Community Facilities, notification of delinquencies be provided within 30 days of monetary default. The commenter pointed out that Community Facilities are non-profit organizations or public bodies. Debt Service Reserve requirements stipulate funding of the reserve overtime. The reserve fund may allow the payment to be made as agreed. The proposed regulations do not define whether the default is based on the inability to make the payment from cash flows or if the facility is delinquent only if the payment is not made. Thirty days is the normal collection period for regulated lenders. Reporting to its regulatory agency is based on 30, 60, 90 days past due and non-accrual.

One commenter added that placing more reporting requirements on lenders will only make it more difficult for lenders to participate in the Business and Industry program. This commenter pointed out that the Lender must certify in the Lender's Agreement at closing that the loan will be serviced in a prudent manner. This proposed oversight by the Agency is restrictive, and the Agency should trust that lenders will act in their best interest. Placing more reporting requirements on lenders will only make it more difficult for lenders to participate in the Business and Industry program.

Another commenter added that current reporting requirements are adequate for the Agency to mitigate its risk. Specifically, this commenter stated that requiring notification within 5 days of the violation of any term of the loan agreement is onerous and unnecessary, and does not allow for management of loss exposure other than by creating improbable standards so the Agency can claim improper servicing. For example, a borrower fails to submit financial statements by the specified date—the lender must notify the Agency within 5 days that the financial statements weren't received. To what effect? What will the Agency do with this information to mitigate its risk? Similarly, the loan agreement has financial covenants measured as of the end of the borrower's fiscal year but not due to the lender for several months. The lender wouldn't even know of the covenant violation until almost three months after it occurred.

This commenter also suggested that this type of requirement is more intuitively found in the Lender Servicing section than in Oversight and Monitoring and suggested moving it there.

Two commenters recommended that the current regulation be retained, stating that the current schedules are difficult enough for the lenders to meet, and to tighten them up would make them more difficult to accomplish and add no value to the servicing process.

*Response:* As noted in a previous response, the Agency has revised the 5-day reporting period to a 15-calendar day reporting period in the rule.

The Agency has not modified the language in the rule with regards to notifying the Agency based on when the lender became aware of the loan violation for two reasons. First, the lender is responsible for being ''on top'' of each loan it services. Second, writing into the rule a timeframe based on ''when the lender became aware of the loan violation'' would result in very practical issues of documenting when the lender did become aware of the loan violation. The Agency believes that it is more practical for the lender to properly service the loan and in the course of doing so will have knowledge of such issues. The Agency will provide guidance for failure to provide the Agency with information on loan agreement violations in a handbook for use by its field offices.

*Comment:* One commenter noted that there is an inconsistency in the language. Section 5001.4(b)(3) requires notifying the Agency within 5 days of default, but the Administrative section states that the Agency must be notified upon discovery.

*Response:* The Agency's intent is to require notifying the Agency as stated within the rule and not as stated in the preamble. As provided in the rule, notification is required within 15 calendar days.

Project Eligibility (§ 5001.6)

*Comment:* One commenter stated that the project eligibility section is redundant, because the existing and proposed rules provide Agency authorized and unauthorized projects, and thus should be eliminated. The commenter stated that the Agency has outlined eligible and ineligible projects in the proposed rule and no further eligibility criteria are needed unless the Agency has examples of projects that produced losses that should be included in the ineligible classification.

*Response:* The two areas of the rule being referred to by the commenter—(1) authorized and unauthorized projects, and (2) project eligibility criteria—have different purposes. The authorized and unauthorized project lists identify the types of projects that are, respectively, eligible or not eligible for loan guarantees. The project eligibility criteria then identify for those projects that are eligible for loan guarantees the minimum financial metrics required for the Agency to consider approving loan guarantees. The project eligibility criteria directly address potential project risks. Therefore, the Agency has retained both of these aspects in the rule.

*Comment:* One commenter suggested that the major eligibility requirements should be repeated and self-contained in the individual program portions so that the reader does not have to flip back and forth between sections.

*Response:* In developing the rule, the Agency considered what the commenter

is suggesting. However, the Agency's fundamental rule of organization and structure provides for maintaining common provisions in subpart A and program specific provisions in subpart B. The Agency will use the handbook to address the commenter's suggestion.

*Comment:* One commenter suggested adding paragraph (e) to § 5001.6 stating that the project must comply with all environmental policies of the agency. The commenter states that non-compliance would then provide the Agency with a valid reason for rejection. The commenter recognizes that reference is made to environmental compliance in § 5001.7, and states that projects should also comply with the Consolidated Farm and Rural Development Act to protect wetlands and the National Historic Preservation Act (NHPA) to prohibit anticipatory demolition.

*Response:* The Agency currently relies on its existing environmental regulations and clearance process to ensure that projects comply with its environmental policies. This rule would continue this practice and a separate section as proposed by the commenter is not required to continue this practice. The Agency will provide its staff with additional guidance in a handbook on this rule to ensure projects comply with the Agency's environmental policies, as well as the provisions identified by the commenter contained in the Consolidated Farm and Rural Development Act and the National Historic Preservation Act.

Benefit a Rural Area (Proposed § 5001.6(a))

*Comment:* Two commenters suggested changing the wording under proposed § 5001.6(a) from requiring a project to benefit a rural area to: ''The project must be located in a rural area.'' According to the commenters, this would eliminate confusion and misdirection of assistance; otherwise, virtually any business transaction could claim to ''benefit'' some rural area.

*Response:* The Agency agrees with the commenters that the proposed requirement that all projects to be eligible must ''benefit a rural area'' needs to be revised. The Agency has revised the rule as follows: First, the Agency has moved the requirement concerning a project's relationship to a rural area from subpart A to subpart B so that each program can address it specifically. Second, except for the Water and Waste Disposal guaranteed loan program, the rule requires the project to be located in a rural area. Third, for the Community Facilities and the Water and Waste Disposal guaranteed loan programs, the rule requires that, for a project to be eligible, it must ''primarily serve a rural area.'' An example of primarily serving a rural area is where 51% or more of those being served must live in a rural area. The Agency will provide additional guidance on ''primarily serve a rural area'' in the handbook to the rule.

*Comment:* Two commenters requested that the concept of ''benefit'' be more fully defined. The commenters stated that the Agency needs to identify what constitutes a benefit to a rural area (e.g., jobs created, service provided, and whether the size of the benefit matters) because leaving this concept up to interpretation may lead to inconsistency, ambiguity, and Agency/lender conflict. One of the commenters added that the clarification should be opened for public comment.

*Response:* As noted in the response to the previous comment, the Agency has removed the provision that a project ''must benefit a rural area.'' Thus, there is no need to identify what constitutes a ''benefit.'' For the Community Facilities and the Water and Waste Disposal guaranteed loan programs, this requirement has been replaced with the requirement that the project ''primarily serve a rural area.''

*Comment:* Three commenters noted that existing regulations require the project to be in rural area, while the proposed rule states that the project must benefit a rural area. These commenters stated that ''benefit'' be the key element in determining eligibility, not ''location'' because many projects located outside of rural areas (such as food processing plants and ethanol plants) have major benefit to rural farmers and employees living in rural areas.

*Response:* As noted in the responses to the two previous comments, the Agency has replaced the requirement that a project must ''benefit a rural area'' with the requirement(s) that the project be located in a rural area and/or primarily serve a rural area. This change was made, in part, because the authorizing statutes for some programs require the project to be located in a rural area, which in itself provides benefit to the rural area. In addition, the requirement for some programs that the project ''primarily serve'' a rural area allows for the location of the project outside a rural area, provided a program's authorizing statute does not require the project to be located in a rural area.

Financial Criteria (§ 5001.6(b)) (Proposed § 5001.6(c))

*Comment:* Several commenters are against setting minimum financial criteria. One commenter said that current regulations are more than sufficient for policy. The second commenter expressed concern that some very viable projects may not be allowed if they are required to meet these financial criteria and that these financial criteria may limit the Agency's flexibility and flexibility is necessary to using the programs. The third commenter stated that credit decisions are subjective and rely on the analysis and decisions by credit personnel who are not constrained by specific requirements, but create unique loan proposals and terms based on each individual request. The third commenter also suggested allowing the Federal and State Program Directors to set the standards of measure through their underwriting processes rather than through regulations.

A fourth commenter stated that there is a possibility that a number of eligible applicants will be eliminated due to the loan-to-value requirement. Because of the inflexibilities or inconsistencies in project eligibility and loan-to-value ratio, this restriction of approval authority would not allow for the mitigation of situations that have merit, but that are not 100% consistent with these regulations.

The fifth commenter stated that project risk is not mitigated with the proposed metrics, but instead the metrics mitigate economic expansion in rural areas and that rural businesses that otherwise would qualify under the program would be ineligible under the proposed rules thereby discriminating against rural small businesses. This commenter stated that the Agency is making a mistake to mitigate project risk through eligibility metrics rather than through establishing credit evaluation and loan structuring standards. According to this commenter, the proposed project eligibility standard offers no utility to the Agency or program, creates an administrative burden on the Agency that it is not experienced to handle, is a disincentive for small businesses to participate in the Agency guaranty programs, and do little to create fair and published eligibility standards for projects, borrowers, and lenders to follow.

In contrast, a sixth commenter expressed support for having minimum financial criteria as a requirement for program eligibility. This commenter also stated that these criteria must be fully and clearly defined, as well as

being somewhat consistent with GAAP and the realities of the business world.

Lastly, one commenter urged the Agency to distinguish borrower credit risk.

*Response:* The Agency first points out that it has modified the financial metric criteria to reflect that they are to be applied to the borrower's financial condition and not to the individual project.

The Agency proposed, and is maintaining in the rule, minimum financial criteria that borrowers must meet for their projects to be considered eligible for a loan guarantee under this rule. These minimum criteria have been established, primarily, as part of the Agency's overall effort under this rule to manage risk; in this case, project risk. These minimum criteria also provide program delivery consistency across the States and provide multi-State lenders the same level of expectation.

Any financial criteria established for the borrower will not be able to predict with 100% accuracy the success or failure of their projects. However, the Agency believes that the minimum financial criteria will reduce the number of unsuccessful projects.

Finally, it is important to note that these financial metric criteria neither replace the credit analysis that a lender undertakes in originating a loan nor guarantee that a borrower that meets the criteria will be issued a loan guarantee by the Agency. These financial metric criteria simply provide minimum financial thresholds for borrowers for their projects to be eligible under the program.

*Comment:* One commenter stated that the proposed metric criteria are credit evaluation standards that belong in the credit evaluation section of the regulations and should not be used as program eligibility standards.

*Response:* The financial metric criteria referred to by the commenter are not credit evaluation criteria, but set minimum financial thresholds for determining whether or not a loan guarantee application will be accepted by the Agency. Further, these minimum financial metric criteria do not replace the credit evaluation performed by the lender that is required when the application is submitted. Also, as noted elsewhere in this preamble, the purpose of these financial criteria is to address project risk, which is one of the three areas of risk the Agency is addressing under the new platform. For these reasons, the Agency is not moving these criteria to the credit evaluation section of the rule and is keeping them as minimum project eligibility requirements.

*Comment:* Two commenters expressed concern that a project would be ineligible if it fails to meet any one of the three financial metric criteria. One of the commenters noted that this is the biggest impact of the proposed rule and that these minimum eligibility requirements cannot be waived. The other commenter suggested that requiring a project to meet these criteria is going to make deals harder to get approved and make the program less feasible. This commenter also noted that, if a lender has stricter eligibility requirements, a project would be required to meet the lender's requirements. A third commenter stated that the metrics are too restrictive for rural businesses and will not create, retain or promote jobs or economic growth in rural communities.

*Response:* The Agency agrees that providing minimum financial metrics will eliminate some worthy projects from consideration for a loan guarantee. The Agency disagrees, however, that having the criteria will make it harder for a project to get approved because, even in the absence of the rule, the borrower would still need to meet the requirements of the lender. Finally, the Agency points out that the overall intent of this provision and others in the rule is to manage risk and these financial metrics are but one example of achieving the objective to mitigate project risk.

*Comment:* One commenter requested that the rules allow the project eligibility criteria to be met on a pro forma basis.

*Response:* As this comment applies to startup businesses, the Agency agrees that these eligibility criteria would be met on a pro forma basis and the rule allows this. However, for existing businesses, it is unnecessary and inappropriate to allow these criteria to be met on a pro forma basis. Existing businesses have a historical record and that record should be the basis for determining eligibility.

*Comment:* One commenter requested that the rule allow the financial criteria to be met at the time of issuance of the Loan Note Guarantee, not at time of application.

Similarly, another commenter stated that the Agency is proposing that rural businesses meet these metrics prior to evaluating the application and approving a loan guaranty rather than the current regulation which is prior to issuing the loan note guaranty. According to the commenter, this will result in fewer rural businesses, non-profits, and municipalities in participating in the Agency loan guaranty programs.

*Response:* As noted in responses to previous comments on this section of the rule, these financial metric represent minimum thresholds and do not determine whether or not the Agency will issue the loan guarantee. The Agency believes that borrowers meeting these minimum threshold criteria are more likely to succeed than those that do not. Thus, the Agency believes it needs to have this information at the time the application is received. Further, these minimum financial metric criteria, including any financial criteria identified in the Conditional Commitment, are to be maintained up to and through the point in time when the Agency issues the Loan Note Guarantee. Failure to maintain these minimum criteria will result in an ineligible application. Again, as stated in a previous response, just because a borrower meets the minimum financial metric criteria does not mean that the borrower will automatically receive the Loan Note Guarantee. The Agency will still review the lender's analysis and other information in making its determination on whether or not to issue the Loan Note Guarantee.

*Comment:* Two commenters stressed the difference in requirements for profit and nonprofit lending. One commenter stated that program underwriting should be different for profit and nonprofit lending and is against posting minimum standards through USDA regulations. It recommends the retention of the Guaranteed Facilities regulations on this subject as is. The other commenter pointed out that the accounting standards are different, the revenue streams are different, and the protection of stockholders in the event of a default is significantly different from the protection afforded taxpayers or rate payers in the event of a municipal default.

Two other commenters expressed similar concerns, stating that many of the requirements for lending to nonprofit corporations and public bodies do not work well with for-profit businesses. The commenters illustrated their concerns by referring to the proposed collateral requirement indicating a 1-to-1 debt-to-value ratio. According to the commenters this is common when lending to non-profit organizations and public bodies in the Water and Waste Disposal and Community Facility programs, but it is extremely uncommon and not recommended when loaning to for-profit businesses. A common maximum collateral ratio for for-profit businesses is a 1-to-1 debt to discounted value. Current regulations do permit lending over the maximum debt to discounted

value only if the cash flow is unusually strong for the type of business and the ratio does not exceed 1-to-1 on the loan-to-value ratio.

*Response:* The Agency disagrees with the commenters that the financial metric criteria setting minimum thresholds need to be different solely on the basis of whether the borrower is a nonprofit or for-profit entity. Further, it is unnecessary at this stage of the process to require discounting when calculating the financial metric criteria, as suggested by the commenters referring to the loan-to-value criterion. Such discounting will occur, as directed by the Agency, when the lender conducts its analysis.

Debt Coverage Ratio

Numerous commenters expressed concern over using debt coverage ratio as a financial metric criterion, ranging from dropping this as a financial metric criterion to its appropriateness. These concerns are addressed below.

*Comment:* Three of the commenters stated that using this criterion would most likely eliminate most startups and expansions of businesses, which in general do not have a positive debt service coverage in the startup or expansion phases of operations. A fourth commenter stated that this specific metric would curtail the Agency's ability to support new businesses in rural areas that frequently have insufficient debt service coverage during ramp-up and, therefore, should be removed from the rule. Further, according to the commenter, it is common for solid businesses to expand into new projects which do not, initially, have debt service as individual projects, but have substantial long-term possibilities. Lastly, a fifth commenter stated that this criterion is particularly unfair to startup businesses who may not project this threshold for one or two years.

*Response:* The Agency agrees with the commenters that as proposed this financial metric could pose unnecessary difficulties for startup borrowers and expansions of such borrowers. Therefore, the Agency has revised the definition of debt coverage ratio to be based, in part, on the ''realistically projected earnings and cash injection.'' This change addresses the concerns of the commenters.

*Comment:* One commenter stated that defining a specific debt service coverage ratio could result in the exclusion of credit accommodations to otherwise qualified and desirable borrowers. According to this commenter, a mandatory coverage ratio would eliminate those companies who may have had a significant, but nonrecurring expense item in the most recent reporting period, applicants with growing and improving trends which permit a reliable projection of prospective repayment ability, and, by definition, startup applications. The commenter stated that a standard that sets forth a reasonable expectation of repayment ability is inherent in every reasonable loan request, but to attempt to quantify and codify a requirement that is often subjectively determined is inappropriate.

*Response:* The Agency believes that it is appropriate to include basic financial metric criteria as part of the Agency risk management strategy under this rule. However, we agree, as noted in the response to the previous comment, that revision to the definition of debt coverage ratio is needed to address startups and business expansions. This revision requires this ratio to be calculated based, in part, on the business' ''realistically projected earning and cash injection.'' This change provides flexibility to a business that has experienced, as the commenter states, a ''significant, but nonrecurring expense item in the most recent reporting period.'' Thus, the rule addresses this comment.

*Comment:* One commenter stated that it is not critical that a project has debt service as long as the borrower has debt service.

*Response:* The Agency agrees with the commenter. Because the rule allows the Agency to review borrower statements, the Agency does not believe it is necessary to make revisions to the rule in response to this comment.

*Comment:* One commenter stated that having a litmus test with no flexibility could be unfair to rural businesses with unusual circumstances, such as natural disasters or national economic downturns. Three other commenters also suggested that the rule should also provide for mitigating circumstances in case the ratio is not met.

*Response:* The intended benefits of improved risk management provisions included in the rule outweigh the potential loss of projects due to the occurrence of individual and unusual instances. Further, the rule has been modified to base the criteria on a typical operating year, which would accommodate businesses affected by unusual circumstances, such as those suggested by the commenter.

*Comment:* One commenter stated that a debt coverage ratio of 1.0:1 is a credit criterion and should not be used as a project eligibility standard. According to the commenter, it discriminates against borrowers and projects that may have high impact to rural communities that do not generate income for two or three years that the current regulations allow. The commenter recommended that the debt coverage ratio of 1.0:1 be incorporated in § 5001.16(b)(2)(ii), under Lender responsibilities—Origination, to provide parameters desired by the Agency without compromising project eligibility. By inserting credit evaluation standards in the proposed rules, the Agency can reserve the right not to approve a project either in the pre-application or application stage as opposed to never seeing a possible high impact project. In other words, project risk mitigation can be accomplished in credit evaluation and structuring the loan, not in creating an eligibility criterion.

*Response:* The rule allows the calculation of the debt-coverage ratio to be based on the ''realistically projected earnings and cash injection before interest, taxes, depreciation, and amortization by the annual debt service (principal and interest)'' rather than, as proposed, on ''the net operating income by a business's annual debt.'' This change in the calculation of the debt coverage ratio addresses the concern expressed by the commenter for borrowers and projects that may have high impact to rural communities, but that do not generate income for two or three years.

As noted in a response to an earlier related comment, the Agency continues to believe that providing minimum financial criteria for project eligibility is necessary to mitigate project risk and thus has not moved this or the other two financial criteria to the origination provisions of the rule as suggested by the commenter.

Debt Ratio Definition and Calculation

Several commenters commented on the definition of debt coverage ratio and how it is to be calculated. For example, one commenter stated that a minimum debt coverage of 1.0 is fine, but that the definition and calculation of this ratio is crucial. Specific comments suggesting changes are addressed below.

*Comment:* One commenter asked if the requirement is based on historical or projected financial statements or both. Another commenter expressed a similar question, noting that the proposed regulations do not state how long this coverage must be in effect, and then asked if this is historical debt service coverage or projected, a year or six months?

*Response:* The calculation of this financial metric would be based on either ''realistic information in the pro forma statements or borrower financial

statements.'' The ratio is to be calculated based on ''a typical operating year after the project is completed and stabilized.''

*Comment:* One commenter suggested that there are many ways to look at debt coverage, and the less prescriptive, the better. A second commenter stated that instead of using debt coverage criterion, the Agency should use EBITDA (earnings before interest, taxes, depreciation, and amortization) coverage or allow USDA officers to ensure adequate demonstrated debt coverage. In addition, defining debt coverage based on net operating income is not appropriate for operating businesses, as this term is used with rental property and not with owner-user underwriting.

*Response:* The Agency agrees that there are many ways to assess and calculate debt coverage ratio. In consideration of this and other comments, the Agency has revised the definition of debt coverage ratio to take into account, in part, the concepts suggested by the one commenter on using EBITDA as a basis for determining the debt coverage ratio.

*Comment:* Three commenters stated that the proposed wording for Business and Industry guaranteed loans pertaining to debt service coverage ratio of 1.0 or higher is unclear and provided alternate wording to describe debt service coverage for Business and Industry guaranteed loans as ''loans for 100% refinancing should be able to demonstrate a historical debt service coverage ratio of 1.0 or higher for the refinanced loan and loans other than for 100% refinancing should be able to demonstrate a pro forma debt service coverage ratio of 1.0 or higher once fully operational'' for a project to be eligible. According to these commenters, the language in the proposed rule could suggest that historical cash flow must provide debt service coverage of 1.0 even though proceeds of the new Business and Industry guaranteed loan will be used to expand that business resulting in additional cash flow available for debt service, which is not logical.

*Response:* The Agency agrees the definition of debt coverage ratio as it pertains to the Business and Industry guaranteed loan program (as well as for the Rural Energy for America Program) needs to be further clarified. The Agency has revised the rule to incorporate part of the commenters' suggestion by requiring the financial metric criteria to be calculated from the ''realistic information in the pro forma statements or borrower financial statements of a typically operating year after the project is completed and stabilized.''

*Comment:* Two commenters stated that during the startup phase, the business's debt service coverage ratio may actually be less than 1.0 until later years when it is fully functional, and asked if this makes the projects ineligible.

*Response:* As noted in a response to a previous comment, startup businesses would be required to calculate this ratio based on a ''typical operating year'' once the project is completed and stabilized. If, based on that ''typical operating year,'' the ratio is less than 1.0, the project would not be eligible for a loan guarantee under this program.

*Comment:* Three commenters suggested that the debt coverage ratio of 1.0 is too low. Two of these commenters suggested that the debt coverage ratio should be increased to 1.20:1 or use the lender's normal established debt coverage ratio standard. The third commenter stated that the metric of 1.0 or higher may be acceptable for Community Facilities and Utilities, but is too low for Business and Industry, and that for-profit entities should have a ratio that is higher than 1.0.

A fourth commenter described its procedure for evaluating and monitoring the credit. The commenter compares the company's cash flow, measured as Earnings Before Interest, Taxes, Depreciation, and Amortization, to the required debt service (principal and interest payments). The commenter expects a sufficient coverage (1:1), but allows for periods of shortages when alternative sources of repayment or working capital are available. The long-term objective is for the customer to attain a coverage ratio that provides a 10 to 20% margin.

Two commenters expressed concern about the requirement of a debt service coverage (DSC) of 1.0 or higher to be eligible, because a DSC ratio of 1.0 is considered marginal or substandard when lending to a for-profit business and current Business and Industry regulations (7 CFR § 4279.101(b) last paragraph) prohibits issuing loan guarantees to marginal or substandard loans.

*Response:* As noted in previous responses, this financial metric criterion is intended to be a minimum threshold to be met in order for an application for loan guarantee to be submitted. It does not represent an assurance that any project that meets the minimum will be approved for the loan guarantee. The Agency may require, as reflected in the Conditional Commitment, a higher ratio be met in order to approve the loan guarantee.

In addition, in response to another comment, the rule in subpart B for business and industry specifically states under § 5001.103(j)(1): ''Marginal/substandard loans. It is not intended that the guarantee authority will be used for marginal or substandard loans or for the relief of lenders having such loans.'' In summary, the rule provides for the concerns expressed by these commenters.

*Comment:* One commenter stated that the proposed financial metric criteria are below industry standards for municipal finance. According to the commenter, a 1:1 debt service coverage is too low and is not acceptable in municipal financing and most USDA direct loans for utility financings require at least a 1.2:1 coverage ratio.

*Response:* The value selected for this criterion is the minimum acceptable value for a project to be considered for a loan guarantee; it is a minimum threshold value. As such, it is not intended to reflect industry standards or imply that all projects that meet this value will be issued a Loan Note Guarantee. The Agency will evaluate the lender's analysis on the project and determine if it will issue a Loan Note Guarantee on the basis of that evaluation and other material, not just the debt service coverage ratio. Therefore, the Agency has retained this value in the rule.

Cash Equity (Proposed § 5001.6(c)(2))

Numerous commenters were concerned over the proposed cash equity requirement for project eligibility. Many commenters stated that this proposed criterion was not well defined, was too stringent and inflexible, and needed to be dropped. For example, one commenter stated that a 10% cash equity requirement will eliminate most Business and Industry projects. Many commenters suggested alternatives to cash equity as potential financial metrics. The following summarizes the comments received on cash equity as a financial metric criterion.

*Comment:* One of the commenters asked, ''What is cash equity?'' and stated that the cash equity criterion would make it difficult for most loan proposals processed through Business and Industry to be eligible. One commenter suggested going with the GAAP definition of equity.

Another commenter stated that if the cash equity requirement is a cash match requirement, rather than a tangible book equity requirement as per the current Business and Industry Guarantee regulations, it will prohibit 100% loan financing of a new building even if the

business or community facility currently has no long term debt, needs its cash for inventory or working capital, and has operated successfully for years. The commenter concluded that this requirement should be eliminated from the WEP, CF, and 9006 sections.

A third commenter stated that this metric should be dropped for several reasons:

(1) Requiring this metric to be met prior to an application being submitted rather than prior to loan note guaranty being issued is very restrictive to rural business, more so than the current Business and Industry Regulations, which will result in fewer eligible projects for consideration that offer job creation, growth or retention that would contribute to rural economic growth.

(2) Quality projects that otherwise would qualify under the existing regulations would not be eligible under the proposed rule.

(3) The Agency is proposing a confusing metric. This metric does not provide any indication of a company's capitalization, does not mitigate project risk, provides no assurance of cash flow, and adds no utility in determining a project's eligibility or mitigating a project's risk.

Two commenters stated that the proposed cash equity requirement would disqualify many of their existing USDA guaranteed customers. One of these two commenters added that these customers would not be disqualified because they were bad borrowers, but because they had invested all their available cash into growing their businesses, and this commitment by them should not be punished.

One commenter does not favor cash equity because business owners will have only enough cash on hand to operate their business, with the balance being reinvested or used to pay down their debt.

*Response:* While the Agency agrees that the proposed rule did not clearly identify what was meant by ''cash equity,'' the Agency has replaced cash equity as a financial metric criterion with debt-to-tangible net worth ratio, as discussed below in a response to comments suggesting alternatives to cash equity. For reasons stated previously in response to comments concerning the financial metric criteria in general, the Agency continues to believe that these financial metrics provide useful risk management aspects to the rule and has retained such criteria in the rule.

*Comment:* One commenter suggested eliminating the tangible equity requirement, because State loan committees provide additional objectivity in reviewing Business and Industry guarantees to mitigate perceived risk. According to the commenter, any remaining perceived risk could be mitigated by revising 7 CFR 4279.16(c) regarding State Loan Committees. These committees could be encouraged to supplement the credit quality standards found in 7 CFR § 4279.131 with loan-to-value maximums based on type of collateral, industry risk, regional lending practices, and other underwriting standards for credit quality.

*Response:* As noted in the previous response, the Agency is replacing cash equity with debt-to-tangible net worth ratio. Further, the Agency points out that §§ 4279.16 and 4279.131 are not relevant to the 7 CFR 5001 rulemaking process. Finally, the Agency notes that, in response to a comment from this same commenter on the use of State Loan Committees, the Agency will provide guidance in the handbook to the rule, which will note, in part, that each program will make a determination as to whether or not to have a loan committee. Therefore, the Agency has not revised the rule in response to this comment.

*Comment:* One commenter stated that GAAP does not define cash equity, financial statements are prepared in accordance with GAAP, GAAP does not calculate ratios, and that this is part of credit analysis.

*Response:* As noted in the previous responses, the Agency is replacing cash equity with debt-to-tangible net worth ratio, which is a GAAP defined measure. Thus, the concerns expressed by the commenter over the proposed cash equity criterion are no longer relevant.

*Comment:* Seventeen commenters suggested modifying the cash equity criterion as proposed or replacing it. Commenters frequently suggested using the current tangible balance sheet requirements, but others expressed concern with using them. The suggested alternatives and modifications were:

- Tangible net worth;
- Follow Title 12, Part 34, Subpart D, Appendix A, which gives detailed requirements for appraisals and loan-to-value ratios for construction loans;
- An overall balance sheet requirement is appropriate and has been a part of the Rural Development Administration's Business and Industry standards. Require GAAP balance sheet equity of 10% for existing business or 20% for new business. Most private sector lenders normally require balance sheet equity as defined by GAAP, not tangible balance sheet equity or cash balance sheet equity.
- GAAP equity with the addition of appraisal surplus at 10% and 20% for existing businesses and startup businesses, respectively. The 20% requirement for startup projects should allow equity contributions other than cash, such as land and buildings. Change the current tangible equity to 10% equity for existing businesses, figured according to GAAP, and allow subordinated debt to be considered equity.
- Replace ''cash equity'' with ''equity,'' including fair market value, with no reference specifically to ''cash.''
- Tangible sheet equity. For example, many businesses have substantial equity, but are short on cash.
- Tangible balance sheet equity for the Business and Industry section, as per the current regulations, and eliminate the cash equity requirement from the WEP, CF, and 9006 sections.
- Adjust tangible balance sheet equity requirement such that it is a balance sheet equity test (not tangible) for existing businesses, and stay at 20% tangible balance sheet for new businesses.
- Expand to an either/or whereby a borrower must have 10 or 20% tangible equity or inject 10 or 20% cash into the proposed project.

Some commenters stated that the inclusion of off balance sheet equity, such as the equity found in commonly owned real estate, should be allowed when calculating the leverage/equity requirement for program eligibility. One commenter stated that the balance sheet equity requirement should be eliminated completely, or at a minimum be modified to include the off balance sheet value of tangible assets and subordinated debt owed to the owner. The difference between the depreciated book value of real property assets and their current market value, as well as subordinated owner debt, should be considered if a balance sheet equity requirement is in place.

One commenter stated that the current requirements of tangible balance sheet equity of 10% for existing businesses and 20% for new businesses should remain the same for equity measurement; if cash is a concern, a liquidity measure should be imposed, such as 1:1 current ratio.

Two commenters suggested changing the requirement to tangible book equity for the Business and Industry section as per the current regulations. According to these commenters, the cash equity requirement appears to be a cash match requirement for the project and not a tangible book equity requirement as per the current Business and Industry Guaranteed regulations. If this is a cash

match requirement, it will prohibit 100% loan financing of a new building even if the business (or community facility) currently has no long term debt, needs its cash for inventory and working capital for the expanded venture, and has operated successfully for years. The commenter stated that this is not good loan structuring. This commenter also stated that generally there has not been a tangible balance sheet equity (TBE) requirement for lending to nonprofit corporations or public bodies, but there have been very specific TBE requirements for lending to for-profit businesses. This commenter noted that this requirement was omitted from the proposed regulation and suggested that it be reinstated only for the Business and Industry portion of Subpart B of Part 5001.

Another commenter provided three reasons for using tangible balance sheet equity versus cash equity, and adds that cash equity should be removed from the Section 9006 Energy Program and be replaced with tangible balance sheet equity requirements that Business and Industry currently use for the same three reasons. This commenter's reasons, in brief, were:

(1) There is no difficulty in applying the tangible balance sheet equity criterion and GAAP provides clear guidance on tangible and intangible assets;

(2) The private sector is not moving away from the use of tangible sheet equity; and

(3) Requiring cash equity will result in significantly weaker guarantee applications and greater losses to the agency.

Another commenter believes that the minimum cash equity is generally not enough overall equity needed for a company; however, the balance of the cash equity and lender's expectation of the total equity or net worth allows for a balanced approach for USDA guaranteed loans. The commenter added that the contribution of specific operating assets, existing net worth, and subordinated debt positions often allow for a company to attain adequate equity for improved probabilities of a successful business.

*Response:* The Agency considered carefully all of the suggestions made by the commenters concerning cash equity as a criterion and the alternatives they presented. On balance, the Agency agrees with the commenters that cash equity may not be the most useful or practical metric to evaluate the project's equity, even if the Agency were to adopt some of the suggested revisions to cash equity offered by the commenters. Therefore, the Agency has decided to drop cash equity from the rule.

The Agency then examined the alternatives posed by the commenters, as discussed briefly below. In assessing a replacement criterion, the Agency agrees with the sentiment of many commenters that the metric needs to be commonly used and understood by lenders; for example, the metric is GAAP defined. Based on its assessment of the alternatives, the Agency determined that debt-to-tangible net worth ratio, a GAAP defined measure, is the most suitable replacement for cash equity.

One commenter suggested using Title 12, Part 34, Subpart D, Appendix A. Title 12 is a Comptroller of the Currency, Department of the Treasury regulation that describes real estate lending standards. As such, it is not suitable to be included as a metric for programs included in this rule because the purposes of these programs are much broader than real estate lending. However, the three financial metrics discussed in Title 12 are otherwise provided for in this rule. Further, in response to other commenters, the Agency modified the rule in subpart B for the Business and Industry and the Rural Energy for America programs to provide standards for discounting collateral. This modification addresses the commenter's concern.

Many commenters recommended using the current tangible balance sheet requirement, or some variation thereon, under the Business and Industry regulations. The Agency determined that tangible balance sheet equity is an Agency derived measure and is not either a GAAP measure or a measure used by the Risk Management Association. Further, even though this measure is familiar to Business and Industry lenders, the Agency has determined that other measures are more suitable and less complicated. Therefore, the Agency has decided not to adopt tangible balance sheet equity for any of the programs under this rule.

With respect to the suggestion that the Agency use GAAP equity with the addition of appraisal surplus at 10% and 20% for existing and startup businesses, respectively, the Agency points out that appraisals are used when making loans, but not for determining project eligibility. The Agency does not want to make lenders conduct appraisals with each application because this would be cost prohibitive. If appraisals are available at the time of application, they are to be submitted with the application. Otherwise, the lender must submit complete appraisals to the Agency before loan closing. Finally, this metric is used in the rule to establish a minimum threshold.

With respect to the suggestion that the Agency replace ''cash equity'' with ''equity,'' including fair market value, with no reference specifically to ''cash,'' the Agency points out that cash equity has been dropped from the rule and fair market value would be required when conducting appraisals and, as noted the above paragraph, appraisals are not required in determining any of the minimum financial metrics.

Some commenters suggested that the metric selected allow consideration of ''off balance sheet equity.'' The Agency is concerned about allowing appraisal surplus in the calculation. If a lender wishes to use off balance sheet equity from another business, then that business can simply become a co-borrower. Thus, the Agency has not included ''off balance sheet equity'' in the rule.

*Comment:* Two commenters indicated that the cash equity requirement is too restrictive. One commenter stated that the result would be that many quality applications would become ineligible and that those that can come up with 20% cash equity most likely would not need a guaranteed loan. The other commenter stated that most businesses it works with struggle to meet the current requirement (10% tangible balance sheet equity for an existing business and 20% tangible balance sheet equity for a new business), and the proposed new rule would make most of its applicants not qualify for the program.

*Response:* As noted in responses to previous comments, the Agency has dropped cash equity as a financial metric criterion. In its place, the Agency is using debt-to-tangible net worth ratio. This financial metric differs from cash equity, in part, by not requiring the business to tie up assets in cash and provides more flexibility to businesses seeking a loan guarantee. Thus, the rule addresses these commenters' concerns.

*Comment:* One commenter stated that this metric may be acceptable for business and industry guaranteed loan, but is not acceptable for Community Facilities and Utilities. While the proposed regulations allow for community support to mitigate this measure, this will, according to the commenter, place Rural Development in the position of trying to quantify the value of community support versus cash equity.

*Response:* As noted in responses to previous comments, the rule does not include cash equity as a financial metric. Further, the Agency agrees with the commenter that certain financial

metrics are not appropriate for all projects. Thus, the applicable financial metrics to be applied to Community Facilities and Water and Waste Disposal projects differ from those to be applied to business and industry projects. Specifically, Community Facilities and Water and Waste Disposal projects would be allowed to satisfy the debt coverage ratio and the debt-to-tangible net worth ratio criteria with community support. This approach is appropriate for these types of broad community supported projects and is also consistent with current program administration, with which the Agency has had good experience.

Loan-to-Value Ratio (§ 5001.6(b)(3)) (Proposed § 5001.6(c)(3))

*Comment:* One commenter stated that it would seem reasonable to require a certain loan-to-value, regardless of tangible net worth, because, given a fully depreciated building, the real net worth would be substantially higher than book value. According to the commenter, the real net worth is what would repay a loan if the collateral is liquidated.

*Response:* The Agency appreciates the commenter's support for a loan-to-value ratio, which the rule continues to provide for. Further, the Agency points out that it makes its decision on whether to issue a Loan Note Guarantee based on the value of the asset, in accordance with commercial lending standards and generally acceptable account principles, as the commenter suggests.

*Comment:* One commenter stated that the proposed rule is unclear in its application of loan-to-value and that adding this standard is not likely to improve credit quality, but will add confusion.

*Response:* The loan-to-value ratio will be applied in the rule as one of three metrics that must be met at the time an application is submitted for a loan guarantee under this program. Including loan-to-value ratio as a criterion is consistent with OMB Circular A–129, which provides guidance on the management of Federal credit programs and specifically refers to loan-to-value ratio as a criterion for managing programmatic risk. Thus, the Agency has retained this criterion in the rule.

*Comment:* Seven commenters suggested that the loan-to-value ratio be modified to take into account discounted values, as is the practice under the current Business and Industry regulations, and that the value of 1.0 is too lenient. Commenters also suggested either specific discounting values for certain types of collateral or letting lenders use their own policies for setting discounted values. Specific comments are presented below.

Two commenters suggested using current loan-to-value criteria for for-profit businesses as explained in RD AN 4279 (4279–B).

Three commenters agree that a loan-to-value of 1.0 would be okay if it is loan-to-discounted-value. Two of the commenters added that this means that you would use the market appraised value discounted as in the old regulation, and that this ratio should also be used. Another commenter recommended changing this proposed criterion to a discounted loan-to-value of 1.0 to 1.0 for Business and Industry projects.

One commenter suggested that a 1.0 loan-to-value ratio is extremely lenient and that it would be more prudent to insist on a loan-to-discounted value of no more than 1.0, specifying that collateral discounts are to be set by lender policy but never higher than 80% for fixed assets (real property and equipment) and 60% for current assets (accounts receivable and inventory).

Another commenter suggested that the Agency use the lender's commercial loan loan-to-value ratios established for commercial real estate/fixed assets, equipment, inventory, and accounts receivable and project specific.

Another commenter states that higher loan-to-value ratios would seem appropriate, as banks will normally go up to 85% on accounts receivable, 65% on land with entitlements/utilities, 50% on raw, and 100% on new equipment.

One commenter states that it generally wants a ratio of less than 1.0:1 for the loan-to-value, where value is defined as market value of the on-going operation.

One commenter stated that the proposed loan-to-value is too lenient. Federal regulations require lenders to establish discounted values for their credit policy. For real estate and equipment, normal advance rates would be 80% of fair market value or less.

One commenter suggests that this metric is too low for some programs.

One commenter stated that a loan-to-value ratio of no more than 1.0:1 is too risky and does not meet the Agency's goal of reducing risk. This measurement, as defined, means the loan will equal 100% of the value of the collateral. According to the commenter, a more appropriate loan-to-value ratio is a discounted-loan-to-value no greater than 1.0:1 and the commenter recommended that the Agency adopt an additional requirement that states that no loan should be greater than the discounted-loan-to-value ratio. According to the commenter, loan-to-value, as a measurement of risk, is a poor guideline in that a 1.0:1 loan-to-value means the loan equals 100% of the value of the collateral; or, in other words, there is no equity cushion. The commenter then stated that a discounted-loan-to-value is a better measurement of collateral coverage in that a discount is applied to the type of collateral pledged for the loan. The commenter noted that it is prudent to have equity in collateral.

*Response:* The Agency agrees that it is appropriate in evaluating a loan to determine the loan-to-discounted value ratio. The Agency further agrees that, for most loans, a loan-to-value of 1.0 is too lenient. However, the rule proposed a loan-to-value ratio of 1.0 as one of three minimum threshold levels that must be met in order for an application for loan guarantee to be submitted, not as a criterion for determining whether the Agency would issue a Loan Note Guarantee. As a threshold criterion, the Agency continues to believe it is appropriate to keep this ratio as ''loan-to-value'' and at a 1.0 level. Each individual program will evaluate loan applications and loan-to-discounted value ratios appropriate for the program. This will be done when the Agency considers whether to issue the Loan Note Guarantee and not at the application stage.

With regard to the suggested specific discounted values, the rule contains discounted values for the Business and Industry program and the Rural Energy for America program. For other types of collateral in these two programs and for the other programs, the Agency will identify appropriate discounted values in the Conditional Commitment. The lender is required to use either the discounted values in the rule or in its own policies and procedures, whichever is more stringent, unless otherwise approved by the Agency.

*Comment:* One commenter expressed concern over how ''value'' will be determined, and used examples of rural water pipelines and special purpose community facility buildings to show where the value is not equal to their cost. Similarly, another commenter suggested that this metric is not applicable at all for other programs, citing as examples that valuation of community facilities or utilities is very difficult and while they are invaluable to the community, they are valueless if not in operation or not operated to the expected level of efficiency.

A third commenter stated that no collateral value should be given on other assets, such as intangibles, unless the lender is a preferred lender, and

then, it should be limited to a 25% discounted value.

*Response:* The Agency agrees with the concern expressed by the one commenter as to how value will be determined for those situations cited by the commenter.

With regard to the second commenter's concern not providing collateral value to other assets, such as intangibles, unless the lender is a preferred lender and then limiting it to 25% discounted value, the Agency agrees with basic tenet of comment with respect to intangibles and with discounting collateral as it applies to the Business and Industry and the Rural Energy for America programs. The Agency, as noted in a previous response, has addressed these concerns in the rule in subpart B for these two programs. However, for the Community Facilities and the Water and Waste Disposal programs, in consideration of the limited market for these facilities, the Agency will consider community support in lieu of the evaluation of equity. Finally, the Agency reiterates that at this stage of the process the loan-to-value ratio is a screening metric and does not need to address these concerns, which will be addressed when the Agency reviews the lender's analysis in determining whether or not to issue the Loan Note Guarantee.

*Comment:* One commenter recommended that the Agency specify that it may alter the discounted values in the rule from time to time as underwriting conditions change through the publication of a **Federal Register** notice.

*Response:* The Agency agrees with the commenter that the **Federal Register** provides a mechanism for modifying discounting metrics found in the rule. If the Agency elects to use this mechanism, it would do so through a proposed rule published in the **Federal Register** allowing for public comment.

*Comment:* Two commenters stated that there appears to be confusion in setting an equity ratio for applicants pointing out that project equity and tangible book equity do not mean the same thing. Project equity means the applicant has to provide matching dollars to the total project cost and is unusual when lending to for-profit businesses. This equity is determined more by discounting the value of the collateral than actually setting the project equity, and if a business has sufficient collateral even after discounting, USDA could approve a loan for 100% of the project so long as the business has sufficient tangible balance sheet equity.

*Response:* The Agency has revised the rule to state that the financial metric criteria are to be determined based on the borrower's position and the loan being sought. In addition, the proposed cash equity criterion has been replaced with a debt-to-tangible net worth ratio.

Unauthorized Projects and Purposes (§ 5001.7)

*Comment:* One commenter noted that under this section, it is proposed that certain projects not be considered as eligible type projects. The commenter expressed concern that certain projects, while financially risky, can still make good projects for the agency to be involved with, if additional financial and/or environmental assurances are in place to mitigate the risk. The commenter would prefer that new regulations require additional financial and/or environmental assurance in order to be guaranteed.

*Response:* There are several reasons as to why projects are identified as being ineligible. For example, some projects are ineligible because of the program's authorizing statute. Some projects are included as ineligible because they are not of the type that would be consistent with the types of projects authorized by a program's statute. This is especially true for racetracks and the authorizing statute for Community Facilities program. In other instances, the Agency has experienced losses to the extent that the Agency has determined that such projects are not acceptable. The Agency believes that the environmental and additional financial requirements in this regulation, and elsewhere, are sufficient to address project risk and does not believe it is in the best interest of the rule to include additional criteria in order to allow specific projects that fall within the list of ineligible projects.

*Comment:* One commenter stated that, although illegal in most States, cock-fighting (and possibly other businesses) is legal in Puerto Rico and possibly other areas of the country or U.S. territories, but probably not an appropriate business for a Federal loan guarantee. The commenter suggested considering language to address this issue.

*Response:* While lengthy and specific, the list of ineligible projects is not intended to be ''all inclusive.'' The Agency can use the annual NOFA process to identify additional other inappropriate projects, as specified in § 5001.7(o), as warranted. The Agency does not believe that it is necessary to include cockfighting in the list of ineligible projects.

*Comment:* One commenter recommended deleting proposed § 5001.7(a), investment or arbitrage, or speculative real estate investment, as an unauthorized project or purpose. The commenter explained that this is necessary for many rural development projects. The commenter also questioned what would constitute investment vs. non-investment properties. The commenter stated that both proposed § 5001.7(a) and (m), commercial rental, still meet USDA's mission to create jobs in rural areas and that to no longer allow this type of development is contradictory.

*Response:* The Agency does not disagree that certain projects included in the list of ineligible projects would provide jobs in rural areas. However, it is the Agency's experience that investment and arbitrage (which are currently prohibited in the current rules) and speculative real estate (where someone builds a property with the intent to sell when completed) do not create a lasting community benefit. With regard to proposed § 5001.7(m), properties to be used for commercial rental, not all such projects are ineligible. If the borrower has the authority to determine the tenants, then such a project would be eligible. The Agency will provide additional guidance in the handbook to the rule to further explain what is and what is not allowed under § 5001.7(l).

*Comment:* One commenter asked why water parks are no longer eligible projects under the Business and Industry program. Another commenter stated that golf courses have been great for community development in small communities, and that they would like to keep golf courses and other ''certain recreational facilities'' as eligible guaranteed purposes. The commenter added that these recreational facilities add to the quality of life for many rural citizens.

*Response:* After considering these comments, the Agency believes that the restrictions proposed by this paragraph are too broad across all of the programs. The Agency has revised this paragraph in subpart A to address golf courses and other similar recreational activities. All of the other projects identified in the proposed paragraph (racetracks, water parks, ski slopes) have been moved in the rule to subpart B for the Community Facilities program. This revision addresses the one commenter's question concerning water parks, which would be eligible under the Business and Industry program in the rule. Golf courses, however, remain as an ineligible purpose for all programs because the Agency has determined that, based on past experience, these projects represent unacceptable risk in

comparison to the impact on the quality life for such rural community.

*Comment:* One commenter noted that proposed § 5001.7(c) would continue to disallow Business and Industry financing for businesses which receive 10% or more of their annual gross revenue from gambling activity. The commenter stated that State lottery programs are now widespread and are an accepted State Government revenue vehicle. The commenter also stated that many restaurants and recreational businesses receive significant lottery revenue, and it is a rare business that can afford to shun this State-authorized revenue source. The commenter recommended that ''Gambling'' should be defined to exclude State lottery programs, so that these otherwise-eligible businesses are not disqualified. Two other commenters also agreed that if a State allows and promotes a lottery, this should be allowed under Federal Business and Industry lending programs and the 10% requirement should be abolished.

*Response:* The Agency agrees with the commenter that this paragraph needs to be revised to recognize that State-authorized lottery proceeds are an important source of income for otherwise eligible businesses. Because such proceeds are State-authorized, the Agency believes it is appropriate to modify this paragraph to accommodate State-authorized lottery proceeds and has provided an exclusion for such proceeds from the calculation of the ''10 percent from gambling proceeds.'' In addition, the Agency has incorporated an exemption for public bodies and for not-for-profit approved projects only, such that any other funds derived from gambling activity, as approved by the Agency, conducted for the purpose of raising funds for the approved project would also be excluded from the same calculation.

*Comment:* Three commenters objected to § 5001.7(e) prohibiting the guaranteeing of lines of credit. One commenter stated that making lines of credit eligible would likely significantly increase program usage, as there is a need for working capital. The commenter pointed out that it is not an automation issue, since FSA Farm Programs regulations permit guaranteeing lines of credit. The commenter also noted that those FSA loans generally perform well, but that additional regulatory and administrative guidance would be needed to implement. One commenter stated that cooperative lenders commonly provide their financing to coops as lines of credit rather than promissory notes and that USDA should, at the very least, try out this authority on a demonstration basis, limiting it to loans to cooperatives only at first. Another commenter stated that today a seven year term loan is used to support a guarantee of the operating needs of a company but that this structure is often not the most effective method; especially, when you have borrowers with large seasonal needs for operational credit. This commenter suggested that guarantees for lines of credit be approved for a specific time period, possibly three to five years, provided the line of credit renewal is within the previously approved guarantee conditions.

*Response:* The Agency agrees with the commenters to the extent that lines of credit should be an eligible purpose under the Business and Industry loan guarantee program only. The Agency also believes that it is necessary to establish certain limitations on lines of credit. The rule, thus, has been modified to allow lines of credits as an eligible purpose under subpart B for the Business and Industry program.

*Comment:* Three commenters expressed opposition to the elimination of finders', packagers', or brokers' fees from the eligible list of costs. These commenters stated that the Business and Industry program and many lenders work closely with these entities to match clients with appropriate capital sources.

One of the commenters explained that intermediaries who understand and promote the guaranteed loan programs provided by Rural Development, are a valuable resource that should be utilized to continue promoting the programs as well as providing feedback to Rural Development. The commenter further stated that it is appropriate for Rural Development to pass on the ''reasonableness'' of those fees for each transaction and that the elimination of the fees would curtail the use of the programs in many parts of the country.

A fourth commenter stated that broker fees should not be allowed in loan proceeds unless the broker agrees to sign a compensation agreement form (and signed under penalty of perjury), disclosing all fees received—before and after closing, from all parties relating to loan, including secondary market purchasers of guaranteed loans, and lenders. The commenter also explained that many brokers are making large fees while providing very little benefit.

Finally, a fifth commenter recommended deleting finder's and packager's fees from the unauthorized projects and purposes list, as this is a way to refer quality projects to the program.

*Response:* Currently, the Community Facility program does not allow these types of fees as part of the guarantee. The Agency believes this is a reasonable position for all guaranteed loan programs because the Agency believes that the interests of the programs are best served by guaranteeing the project and not those entities who ''bring us'' the project. The Agency notes that the rule does not prohibit these fees from being charged; they just cannot be part of the guaranteed loan.

*Comment:* One commenter suggested expanding the language in proposed § 5001.7(i) to specifically prohibit the financing of any illegal activity, and proposed the following language: ''Any business deriving income from illegal drugs, drug paraphernalia, or any other illegal product or activity.''

*Response:* The Agency agrees with the commenters suggested language and has incorporated it into the rule.

*Comment:* Six commenters stated their opposition to disallowing the use of loan proceeds to pay a judgment. One commenter explained that in rural areas of America they sometimes encounter a business that has had a credit problem, but it is a problem that is a one time occurrence and that they need the flexibility to be able to pay off judgments to help put deals together. Another commenter also mentioned that the payoff of tax liens should be permitted if it is a reasonable situation. One of the commenters stated that eliminating the payment of any judgment seems to be going too far and that this should be underwriting criteria, not eligibility criteria. The commenter also stated that if the judgment can be refinanced as part of a debt restructure, then it should be okay. One commenter stated that clearing a judgment as a part of a larger project can be of significant benefit to a rural business and help to continue or restore its economic contribution to its community.

*Response:* As proposed, this paragraph would have prohibited the ''payment of a judgment.'' In reviewing the proposed language and considering the commenters' concerns, the Agency believes that the proposed paragraph was too broad, prohibiting certain actions that could benefit both the borrower and the Agency. In the interim rule, this has been changed to ''The payment of either a Federal judgment or a debt owed to the United States, excluding other Federal loans.''

*Comment:* Two commenters stated that they assumed that proposed § 5001.70(j) means that guaranteed loan funds cannot be used to pay the applicant for rental of machinery and

equipment owned by the applicant, but that the language in the paragraph needs to be clarified.

*Response:* The Agency has rewritten this paragraph (§ 5001.7(i) in the rule) to better express its intent, which is, as the commenters pointed out, that loan funds cannot be used to pay the borrower for rental of machinery and equipment owned by the borrower.

*Comment:* Ten commenters were opposed to the disqualification of ''properties to be used for commercial rental when the borrower has no control over tenants and services offered.'' These commenters provided numerous reasons why this provision should be removed, including:

—The Business and Industry program is the only guaranteed loan program that can be used for non-owner occupied purposes;
—Financing for retail centers and office buildings has been a very good market for rural lenders;
—It helps establish shopping centers, office condos, and other multi-tenant properties in rural areas;
—Retail opportunities are born from such investments by developers;
—Such loans don't significantly add risk to the Agency;
—They support economic expansion and job creation in rural communities;
—Not all businesses can afford to build and renting is a good option to create vitality;
—There is a huge need for this type of commercial property in the rural areas;
—This provision will restrict the growth of infrastructure to be used in private enterprise in Rural America;
—It will take opportunities away from community banks, and put those in the hands of larger regional and national banks;
—Many rural areas lack suitable/modern commercial office space and the program helps to meet an important rural need; and
—The SBA cannot do these types of projects and therefore the use of funds is a good marketing tool for the Agency.

*Response:* As noted in a previous response, the Agency has not revised this provision. The Agency believes that it is important that only those commercial properties over which the borrower has control of the tenants will be eligible for a loan guarantee. For example, if a borrower builds a property with the intent to sell (e.g., speculative real estate), this may be inconsistent with the purpose of the program. Further, where an owner does not have control over the tenants, this may result in tenants using the property for unauthorized purposes. The Agency will provide additional guidance on this provision in the handbook to the rule.

*Comment:* One commenter recommended that § 5001.7(o) include restrictions in accordance with the Consolidated Farm and Rural Development Act (the prohibition against disturbing wetlands) and the National Historic Preservation Act (the prohibition against ''anticipatory demolition'').

*Response:* The Agency does not believe that it is necessary to revise proposed § 5001.7(o) (§ 5001.7(n) in the rule) to include restrictions associated with disturbing wetlands or anticipatory demolition because the rule already requires compliance with applicable Federal laws. Thus, the Agency does not believe it is necessary to include the suggestion here.

Borrower's Eligibility (§ 5001.8)

*Comment:* One commenter urged the Agency to include a credit standard of eligibility in addition to the eligibility requirements in this section.

*Response:* While the Agency agrees with the basic concern of the commenter, the provisions of § 5001.8 are intended to be the most fundamental eligibility criteria applicable across all programs. The rule provides for assessing the credit worthiness of the borrower through the project eligibility criteria and through the lender's credit evaluation (§ 5001.16(b)), in which the lender applies credit standards and analysis to the borrower. Further, through the Agency's process for approving lenders for participation in this program, the reasonableness of the lender's credit analysis procedures is reviewed.

*Comment:* One commenter stated that the mission of USDA programs is to assist rural communities and that the citizenship of owners should be irrelevant when the financing is for a fixed asset located in a rural area of the U.S. that will result in U.S. jobs created and retained in a rural area. The commenter recommended that a good solution is to add the provision, ''If the applicant does not fit this criteria, the guaranteed financing purposes must be limited to real estate improvements only.''

*Response:* The Agency has decided to not change the citizenship requirement as suggested by the commenter, but to leave it as was proposed. The Agency believes that the language, as proposed, will ensure the returns realized on the investments in rural America stay within the U.S. The Agency points out that foreign entities can still participate in these guaranteed loan programs if they partner with domestic companies.

*Comment:* One commenter recommended that § 5001.8(b) be revised to include language requiring any owner with 20% or more ownership interest in the borrower to also comply. This would be consistent with agency implementation of the Debt Collection Act of 1996 (DCIA).

*Response:* The Agency agrees with the commenter—that in order to be eligible not only must the borrower not be ineligible under the provisions of § 5001.8(b), but that each of the borrower's owners with 20% or more ownership interest in the borrower must also not be found to be ineligible under the provisions of § 5001.8(b). Such a provision is consistent with the DCIA. Thus, the Agency has revised this paragraph in the rule to reflect the commenter's recommendation.

Participation Eligibility Requirements (§ 5001.9) (Proposed Lender Eligibility Requirements)

*Comment:* One commenter stated that the proposed standards have no relationship to Agency guaranteed loan making and servicing or to current published regulations and provide no basis for assurance of lender Agency guaranty loan making competence, regulatory compliance, or reduction of lender risk.

*Response:* The Agency has made changes to the proposed rule in response to comprehensive public comments received that the Agency anticipates will improve the delivery of its guaranteed loan programs. These changes are most noticeable in the revised requirements for both approved lenders and preferred lenders, including, but not limited to, requirements associated with lender experience in similar loan guarantee programs. Thus, the Agency disagrees with the comment.

*Comment:* One commenter recommended deleting the two categories of lenders to be created, because there is no real advantage to either the lenders or the borrowers. According to the commenter, the two application requirements only serve to confuse the lenders, borrower, and Agency staff.

*Response:* As noted earlier in this preamble (see Changes to the Proposed Rule), the Agency has revamped the lender eligibility requirements such that there is only one type of lender (approved lender) for all programs except for the Business and Industry guaranteed loan program, and that approved lenders must submit ''full documentation'' applications. The

Agency is implementing a preferred lender program for the Business and Industry guaranteed loan program that provides distinct advantages. Thus, the Agency has made modifications to the proposed rule that address the commenter's concerns.

*Comment:* Two commenters submitted comments on institution eligibility. One commenter recommended the inclusion of language requiring that a federally chartered entity submit applications and other required documentation to the state office in the state where it maintains its principal place of business. The other commenter suggested clarifying that all Farm Credit System institutions with direct lending and investing authority are eligible lenders for all four existing Rural Development guaranteed loan programs.

*Response:* The Agency agrees with the two commenters that the rule needs to cover federally chartered entities. Therefore, the rule has been modified to state that state chartered entities are to submit applications and other required documentation to the State in which it is chartered. If the lending entity is federally chartered, then it is to submit the application to the State in which the entity's headquarters is located.

The Agency disagrees with the comment that the rule needs to clarify that all Farm Credit institutions with direct lending and investing authority are eligible lenders. The rule language stating ''Any regulated or supervised lender'' is sufficiently clear to provide that Farm Credit System institutions are covered by the provisions regarding eligible ''regulated or supervised lenders.''

*Comment:* One commenter stated that the entire section needs to be rewritten. According to the commenter, USDA Rural Development should not become a bureaucratic reviewer of lenders' worthiness to make a guaranteed loan. The commenter stated that this would slow the Agency's response on every bank's first time use of the program and send the opposite message that should be sent. The commenter stated that USDA should be doing everything possible to simplify the process and speed up the process. The commenter also noted that requiring approval of every new lender will make the process appear to be bureaucratic and will definitely slow the process, discouraging use of the Business and Industry program by every regulated lender.

*Response:* The Agency recognizes that requiring lender approval for participation in the guaranteed loan programs included in the rule adds a step to the process. However, the Agency believes that it is an appropriate step from the perspective of mitigating lender/institutional risk. Therefore, the Agency rejects this comment.

*Comment:* Two commenters addressed appeals. One commenter expressed opposition to a National Appeals Division and recommended that the final authority for guaranteed lending decisions rest with the Program Director. The ability to appeal should be restricted to the highest level of professional position rather than to a committee, which may be politically influenced. The other commenter stated that preferred lender eligibility should be a privilege rather than an absolute right, and that USDA should retain the non-appealable authority to determine that the conference of preferred lender status on any given lender is not in the Government's best interest.

*Response:* The Agency has not revised provisions associated with appeals because the appeals process is statutorily-driven and the Agency cannot change it within the context of this rule. Similarly, the Agency cannot make the decision to deny a lender preferred status and determine that decision to be non-appealable within the context of this rule. Therefore, no changes have been made to the rule with regard to appeals.

*Comment:* Two commenters suggested additional lender eligibility criteria. One commenter recommended that one criteria for both regulated and other lenders should be added—evidence of good standing with SBA and/or FSA's guaranteed loan programs if the lender has used either of their programs in the past two years.

The other commenter requested that any approved traditional or nontraditional lender be required to meet the following requirements:

(1) If not a credit regulated institution, the institution should be required to submit to Federal/State credit examination; and

(2) The lender must show its ability to perform as a Lender of Record and to service, through the Loan Agreement (loans) or Trust Indenture (bonds) and through the history of the organization's past performance.

*Response:* The Agency believes that the commenters' suggestions for evaluating lender eligibility are valid. In the application for lender approval, the Agency is asking for other guaranteed loan experience, which would identify any SBA and FSA guaranteed loan program experience that the lender may have. However, to ensure such information is provided, the Agency has revised the rule to require regulated and supervised lending entities with no outstanding Agency guaranteed loans and other lending entities provide other guaranteed loan experience, which would include any SBA and FSA experience. The Agency will also provide guidance in the handbook to the rule to assist program staff in evaluating such experience when reviewing lender approval applications.

The Agency has also revised the rule to require that other lenders obtain an examination acceptable to the Agency. The Agency believes that such an examination will further mitigate the institutional risks associated with the program. The Agency will provide guidance in the handbook to the rule as to what examinations will be acceptable to it.

Finally, the Agency believes that the requirement in the rule to provide the Agency information on the lender's credit management system and the information required in the lender's application (Form RD 5001–1) are already sufficient for the Agency to assess a lender's ability to perform and to adequately originate and service guaranteed loans. Therefore, the Agency has not added any additional provision specific to this comment.

Loan Origination and Servicing Policies and Procedures

*Comment:* Eight commenters provided comments on the submittal of lender policies and procedures. Two commenters suggested that not all lenders will be willing to submit a copy of their written policies and procedures for loan origination and servicing. One commenter also pointed out that some lenders may submit binders full of policy or provide reference to their websites, and that this requirement may not provide the expedited application review the Agency wants.

Three commenters stated that adopting it would further deter new lenders from using the program. One commenter stated that this requirement would be very burdensome to the Agency and the lender. This commenter also suggested that it would create a number of separate eligibility criteria and exceed the Agency's expertise and stated mission.

Another commenter stated that lender's credit and evaluation policy and procedures must be provided to the Agency. Banks credit policies are changed regularly and keeping up with changes would be impossible for the Agency.

One commenter stated that there is no value to requiring lender's to submit origination and servicing policy; it just

serves to further restrict a lender's ability to manage these loans.

Two commenters pointed out that current Business and Industry regulations do not include the requirement that if the lender's credit policies and procedures are more restrictive than Agency regulations, the more restrictive lender's policy shall be followed.

Three commenters suggested that the requirements of the agencies that regulate lenders should be sufficient.

One commenter stated that requiring a lender to supply its written policies and procedures to become an Agency approved lender is too burdensome on the lender and the Agency and serves no practical utility or purpose in guaranteed loan making. Instead, the commenter suggested that it serves the Agency more utility and efficiency that the lender adopts the Agency's regulations to the lender's existing credit policies and procedures and executes the Lender Agreement with the Agency that states so. According to the commenter, the Agency is not equipped to evaluate lender credit policies and procedures for commercial loans that do not relate to loan guarantees issued by the Agency.

*Response:* The Agency has revised the rule to not require lenders to submit copies of their policies and procedures at the time of lender application. Instead, the rule requires lenders to submit a written summary of their loan origination and servicing policies and procedures. Such information is still important to the Agency in its evaluation of lenders for approval for participation in the program. Further, the Agency revised the rule (see § 5001.15(d)) to require the lender to notify the Agency of any changes to its loan origination and servicing policies and procedures provided under § 5001.9(a). In addition, if a lender makes any changes to its loan origination and servicing policies and procedures that are inconsistent with the requirements of this part, the lender is required to notify the Agency in writing and the lender must receive written Agency approval prior to applying the changes to loan guarantees under this part.

*Comment:* One commenter stated that it is not unreasonable to request copies of lender credit policies and procedures. The commenter noted that there are over 1,400 lenders now participating in Rural Development guarantee loan programs who would be required, under the proposed rule, to present their credit policies and procedures to become a Rural Development approved lender and when a loan loss report is submitted. This requirement is burdensome to the lender and the Agency and adds no value to granting loans with guarantees, or mitigating what the Agency has referred to as ''institutional risk.''

The commenter further stated that the Agency proposes to monitor over 1,400 credit policies and procedures, which serves no utility in loan servicing or guaranteed loan making. According to the commenter, the Agency is not qualified or experienced enough to monitor this requirement and that it will be virtually impossible for the Agency to monitor over 1,400 lender credit policies and procedures and compare them to the proposed rule for compliance.

*Response:* In response to this and other related comments, the Agency has revised the rule to require lending entities seeking to participate in this program to submit a summary of their loan origination and servicing policies and procedures rather than copies. This will reduce the burden on the lenders and reduce the amount of material to be reviewed by the Agency. The Agency continues to believe that such information is important in considering lenders for approval, especially those who do not have guaranteed loan portfolios with the Agency, as one of many provisions for managing institutional risk.

The Agency disagrees with the commenter's characterization that the Agency does not possess the necessary qualifications to assess a lender's policies and procedures for originating and servicing loans under this program.

*Comment:* One commenter suggested changing the word ''participate'' to ''originate'' in the introductory language to § 5001.9, which states that only lenders approved by the agency can participate in the program.

*Response:* The Agency has not changed ''participate'' to ''originate'' as suggested by the commenter because the word ''participate'' covers both originate and service, which is what the Agency intends.

Regulated or Supervised Lenders

*Comment:* Several commenters stated that regulated and supervised lenders should not have to submit an application for lender approval, while non-regulated lenders should receive scrutiny.

One commenter stated that all federally regulated financial institutions should be approved by default. The commenter also stated that non-regulated lenders should receive heavy scrutiny.

Another commenter stated that they believe that the non-traditional and non-regulated lenders are the only ones that should face an approval process from USDA. The commenter further stated that the automatic approval of all state and federally regulated commercial lenders should remain the way it is, but that it would be acceptable to require the extra approval process for the preferred lenders.

Two commenters stated that regulated and supervised lenders should not need to submit an application to the USDA. One commenter pointed out that existing federal regulations cover such lenders already, and the other commenter stated that because the standards for approved lender status appear to be very simple, any regulated lender should qualify. The other commenter suggested that, in lieu of application, USDA should only ask for the written policies (and certificate of good standing) with the first application.

One commenter stated that the current practice in the Business and Industry program requiring only non-traditional lenders to apply is sufficient; the requirement for regulated lenders to apply for participation is unnecessary and does not significantly reduce Agency risk. The commenter pointed out that the issue is suspending poor performing lenders rather than creating burdens for those not yet involved. The commenter also offered an alternative for reducing risk: Any lender with greater than 15% guaranteed loan portfolio delinquency (measured on September 30 each year) be suspended from new loan generation for 12 months. Standards for first-year or first-three-year delinquency and/or portfolio losses could also be promulgated.

*Response:* The Agency disagrees that federally regulated financial institutions should be approved by default. As noted in a previous response, the Agency recognizes that lender approval adds a step to the process, but believes it is appropriate and prudent from a risk management perspective. In addition, the Agency has revised the rule to require other lenders to have undergone an examination acceptable to the Agency. The Agency believes that the rule provides sufficient and necessary requirements both for regulated and supervised lenders and for other lenders. Additional steps to become a preferred lender are included in the rule.

With regard to the suggestion that the Agency rely on the evaluation of lender performance once a year and suspend those that fail to meet an acceptable level of performance in lieu of an initial

approval step, the Agency believes that removing the approval step places too much of the risk management after the fact. The rule incorporates provisions for maintaining approved and preferred lender status and these provisions address lender performance. By requiring an approval process up front, the Agency intends to reduce the number of lenders failing to meet acceptable performance later on. Thus, the Agency is retaining the lender approval process.

Finally, one commenter suggested that, in lieu of a regulated or supervised lending entity submitting a lender approval application, the Agency should only ask for the written policies and certificate of good standing with the first application. The Agency agrees with the commenter for those regulated or supervised lending entities that have at least one outstanding Agency guaranteed loan. However, for the reasons stated above, the Agency continues to believe that regulated or supervised lending entities that do not have any outstanding Agency guaranteed loans need to go through an approval process, which the Agency views as an effective tool for managing risk. Therefore, the Agency has not accepted this specific suggestion with regard to regulated or supervised lending entities that do not have any outstanding Agency guaranteed loans.

*Comment:* One commenter stated that § 5001.9(a)(1) is redundant and can be removed, as it is restated in § 5001.9(a)(1)(i) and (ii).

*Response:* The Agency agrees that the text provided in this paragraph is redundant, but it is included in accordance with administrative policy. Therefore, the Agency has not modified this paragraph in response to this comment.

Application Content

*Comment:* One commenter noted the requirement that a lender without an existing portfolio with Rural Development must submit an application for lender approval to the Rural Development State Office and asked what the application would consist of.

*Response:* Lenders with no outstanding guaranteed loans would submit a lender's application to be approved for participation for the guaranteed loan programs included in this rule. This application requires the lender to provide:

(1) General information on the lender such as name, tax identification number, and contact information;

(2) A written summary of the lender's loan origination and servicing policies and procedures;

(3) Evidence of good standing with its regulator; and

(4) A description of its lending history and experience.

*Comment:* One commenter questioned how the Agency will know if a lender is in good standing with its regulator.

*Response:* The Agency will address the procedures it will use to determine if a lender is in good standing in the handbook to the rule.

*Comment:* One commenter noted a typo in proposed § 5001.9(a)(1)(ii)—the word ''proved'' should be ''approved.''

*Response:* The Agency has revised this proposed paragraph and making the correction is no longer needed.

Other Lenders

*Comment:* Two commenters questioned the requirement the other lenders have an ''Agency approved line of credit that totals $5 million or more.'' One commenter stated that the language is not clear, as the Agency does not provide lines of credit to lenders. The other commenter recommended eliminating the requirement, as the requirement seems both vague and unnecessary.

*Response:* The Agency agrees that it does not provide lines of credit to lenders and that the language in the proposed rule is unclear. The Agency does intend that lines of credit be suitable and necessary in order to demonstrate adequate sources of funds for funding and closing loans and they provide evidence that the lender has the necessary capital, resources, and funding capacity to successfully meet its responsibilities. In order to make this assessment, the Agency needs to review and consider the line(s) of credit available to the lender. For these reasons, the Agency is retaining the requirement for lines of credit, but has revised the language to make clear that the Agency is not providing lines of credit.

*Comment:* One commenter noted the requirement that other lenders have liquid assets of at least $500,000 and requested that USDA provide a definition of ''liquid assets.''

*Response:* The term ''liquid assets'' refers to cash and cash equivalents. The Agency will identify in the handbook to the rule what qualifies as liquid assets.

*Comment:* One commenter stated that it is unfair to require other lenders with an existing USDA guaranteed loan portfolio to reapply for eligible status, and suggested that a simple approach paralleling § 5001.9(a)(1)(i) should be instituted instead.

*Response:* The Agency believes that the risk management approach being implemented under the new rule is best served by requiring all non-regulated/non-supervised lenders to undergo the same approval requirements regardless of whether or not they have existing Agency guaranteed loan experience. Therefore, the Agency has not adopted the suggestion made by the commenter.

Guarantee Application Process (§ 5001.11)

*Comment:* Five commenters provided comments on the pre-application. Three commenters noted that there is no definition of pre-application, and two commenters suggested that the pre-application be defined simply as a draft version of the lender's analysis and credit evaluation (i.e., a draft credit memo from the lender). Two commenters noted that there is no description of what material will constitute a pre-application, and recommended using the pre-application material now required by the 7 CFR part 4279, subpart B.

*Response:* The Agency agrees that a definition of ''pre-application'' is needed and has defined a pre-application as ''Information submitted to the Agency for which the applicant requests the Agency to make an informal assessment prior to submitting a full application. The information must be sufficient for the Agency to make a determination that the borrower and project are eligible.'' The Agency has intentionally not included the specific contents of a pre-application because they may vary between programs and because the Agency prefers to work with the applicant on the basis of what they submit. Further, an applicant may seek an informal assessment for only a part of the project and to provide a prescriptive list of items that must be in a pre-application could discourage this. The Agency will provide guidance in the handbook to the rule to assist applicants as to what items should be included in a pre-application for each program.

*Comment:* One commenter questioned the utility of submitting a pre-application if the Agency is not going to render a favorable or adverse decision, noting that the purpose of the pre-application is to determine if the Agency will look favorably or unfavorably on a potential loan with a USDA guarantee. The commenter, therefore, recommended that this section be amended to include favorable or adverse decisions.

*Response:* The pre-application is an optional tool available to the applicant to help provide feedback before

spending resources to submit a full application. If an applicant wants a formal determination, the applicant can still submit a full application without having submitted a pre-application. Therefore, the Agency has retained this provision.

*Comment:* Three commenters expressed concern over the proposed § 5001.11(b)(2) that would allow the Agency to require a lender to obtain additional assistance in those areas where the lender does not have the requisite expertise to originate or service the loan. One of the commenters stated that, if the lender does not have the requisite expertise to originate or service the loan, they should not be an approved lender. The other two commenters stated that the regulator's chartering and monitoring process requires that lenders have origination and servicing experience, and that the Agency is overstepping its expertise and authority with this proposed regulation, thus further reducing the number of lenders waiting to participate. These two commenters also noted that current Business and Industry regulations do not address this issue.

*Response:* It was not the intent of the phrase ''those areas'' to point to loan origination or servicing, as interpreted by the one commenter. The Agency agrees with this commenter that a lender's expertise in origination or servicing would be evaluated when the lender submits its lender's application (Form RD 5001–1) and if the Agency determined that the lender did not have sufficient expertise, the lender would not be approved.

The intent of this provision was to take into account that some otherwise qualified lenders may seek to originate and service a loan in an area outside of their expertise and, in such instances, the Agency could require the lender to obtain additional assistance. What the Agency had in mind was that an approved lender may seek to originate and service a loan (1) the type and complexity of which (e.g., asset-based financing) or (2) in an industry (e.g., renewable energy) in which the lender did not have experience or very little experience. Because of the lack of specificity of the proposed rule, the Agency has revised the rule to define ''those areas'' in which the Agency may require a lender to seek additional assistance.

The Agency believes that the ability to require such additional assistance in these instances is consistent with the risk management approach of this rule. Therefore, the Agency has retained this provision in the rule.

*Comment:* One commenter suggested editing § 5001.11(b)(2) to add the following language to the end of the sentence: ''(e.g., environmental compliance).''

*Response:* As noted in the response to the previous comment, the phrase ''those areas where the lender does not have requisite expertise'' is referring to the type and complexity of the financing and the industries with which the lender has little or no origination and/or servicing experience. There are other provisions in the rule that address the obligation of lenders with regard to environmental compliance. Furthermore, there are other obligations in addition to environmental compliance for which the lender is responsible. The Agency finds it neither necessary nor appropriate to refer to environmental compliance within this paragraph. Therefore, the Agency rejects this comment.

*Comment:* One commenter suggested that proposed § 5001.11(b)(2), which allows the Agency to require a lender to obtain additional experience, be deleted. The commenter pointed out that the Agency in the proposed rule has provided provisions for lender approval for an Agency Approved Lender and Preferred Lender designation and thus this paragraph has no utility and is burdensome to the lender. To the extent that the Agency has another level of concern not already addressed, the commenter suggested that the Agency should clearly state the concern and address it in the lender approval process.

*Response:* The Agency cannot anticipate the level of expertise that a lender has for specific projects until the Agency reviews the actual application, and the determination of the lender's level of expertise for specific projects cannot be covered in the lender approval process. As part of its risk management approach, the Agency needs to have the ability to require the lender to obtain additional assistance in those areas where the Agency determines that the lender lacks the requisite expertise. For these reasons, the Agency rejects this comment.

*Comment:* Four commenters expressed concern over the length of time that the application process takes. One of the commenters, noting that lenders get frustrated with how long it takes to get a Business and Industry application approved, suggested that the Agency include a paragraph that discusses the maximum length of time the application process will take. This commenter also suggested that a preferred lender should be guaranteed a short (3 to 5 days) turnaround time on any application they submit, and that this could be an incentive for lenders to become preferred lenders.

One commenter stated that the proposed regulations do not address the USDA's long turnaround time (minimum of one month, but usually three to six months) and unfriendly lender atmosphere. Another commenter suggested that a decision on the loan application should be made by the Agency within 30 days. Another commenter said that 60 days for processing applications is too long and suggested that it should be reduced to two weeks at the State level and two weeks in Washington.

*Response:* As noted in a response to a previous comment, the Agency has revised the proposed rule to incorporate a turnaround time for applications from preferred lenders (which under the rule only applies to the Business and Industry program). In the rule, the Agency will approve or disapprove complete applications from preferred lenders within 10 business days from the receipt of complete applications. The Agency believes that 3 to 5 days is too short to commit to even for preferred lender applications because of uncertainty associated with the availability and allocation of Agency resources.

For applications from approved lenders that do not have preferred status, the Agency cannot incorporate a specific turnaround time because such applications will be more complicated (than from preferred lenders) and the amount of time to review such applications is dependent on the availability and allocation of Agency resources. Incorporating a specific timeline for such applications, even if it is as long as 30 days as suggested by one of the commenters, could encourage the Agency to deny applications before the deadline is reached, which could lead to the Agency not approving applications in the areas where they are most needed. For these reasons, the Agency has not incorporated a turnaround time for applications from approved lenders who do not have preferred status.

*Comment:* One commenter addressed the issue of State Loan Committees and suggested revising the regulation to include the following language: ''Applications processed under this paragraph are exempt from any mandatory State Loan Committee review so long as the State Director has a written policy in place that incorporates a discretionary Committee certification for applications of $600,000 or less.''

*Response:* The Agency agrees with the comment, but disagrees that it needs to

be addressed in the rule. Instead, the Agency will provide guidance in the handbook to the rule, which will note, in part, each program will make a determination as to whether or not have a loan committee. Therefore, the Agency has not revised the rule in response to this comment.

*Comment:* One commenter stated that it believes there are significant benefits to be realized to both lender and the Agency by review and approval of the loan application prior to the issuance of the Conditional Commitment and, therefore, encouraged the Agency to study this issue further.

*Response:* The Agency considered this issue and, as provided in the rule, loan applications submitted by approved lenders without preferred lender status will be reviewed by the Agency prior to issuance of the Loan Note Guarantee. For preferred lenders, while the Agency will not re-underwrite the lender's credit evaluation and determination, the Agency will review the loan applications for borrower and project eligibility prior to issuance of the Loan Note Guarantee.

Application for Loan Guarantee Content (§ 5001.12)

*Comment:* One commenter noted that the process appears very cumbersome and without advantage to anyone other than the USDA. Another commenter said that the proposed preferred lender and approved lender with low documentation and full documentation makes the process more confusing. This commenter suggested that, if a lender wants to participate, it should be approved by the Agency and submit a full set of documentation for each loan requested.

*Response:* In response to this and other comments, the Agency has revised the guarantee application requirements so that all approved lenders without preferred lender status submit ''full documentation'' guarantee applications. If a lender has preferred lender status, which in the rule is currently available only under the Business and Industry loan guarantee program, the rule requires a different content for the guarantee application. These changes simplify the rule and are consistent with rule provisions for managing risk.

*Comment:* One commenter recommended that forms common to all four programs should be listed here, and program specific forms should be listed in their particular sections in subpart B.

*Response:* The Agency recognizes the value of identifying the forms relevant to each of the four guaranteed loan programs, but it is not necessary to do so. Identifying the forms in the rule may require revising the regulation if any of the forms substantially change. Instead, it is the Agency's intent to identify the forms in the handbook to the rule rather than in the regulation. Therefore, the Agency has not incorporated the commenter's suggestion in the rule.

*Comment:* One commenter suggested that after ''Environmental Information'' in § 5001.12(a)(3) the following words be added: ''as required by 7 CFR part 1940, subpart G or 7 CFR part 1794, as applicable, and any future and succeeding Agency environmental regulation.'' The commenter made this suggestion for both the full documentation and low documentation guarantee loan applications. The commenter also suggested that this paragraph should be relocated to § 5001.11(a) and the information be submitted with the pre-application. The commenter noted that the environmental review needs to happen at the earliest time possible in the application process to avoid difficulties in loan processing.

*Response:* The rule text referred to by the commenter states ''Environmental information required by the Agency to conduct its environmental reviews (as required in § 5001.16(h)).'' The cross-referenced paragraph states, in § 5001.16(h)(1): ''Provided the necessary environmental information to enable the Agency to undertake its environmental review process in accordance with subpart G of either 7 CFR part 1940 or 7 CFR part 1794, or successor regulations, including the provision of all required Federal, State, and local permits.'' The rule, therefore, already addresses the commenter's suggestion and the Agency has not revised the ''environmental information'' paragraph for the loan guarantee application.

With regard to the commenter's second suggestion concerning the placement of the environmental information in § 5001.11(a) and its submittal with the pre-application, the Agency has not incorporated either suggestion. Under this rule, a pre-application provides the opportunity for a potential applicant to obtain an informal assessment from the Agency on the applicant's and project's eligibility and to comment on the pre-applications strengths and weaknesses. It is in the best interest of both the applicant and the Agency that environmental considerations be considered at the earliest point in the process at which such information becomes available. However, the Agency does not believe that such information should be a prerequisite to the applicant's submitting a pre-application. Therefore, the Agency has not incorporated this suggestion in the rule.

*Comment:* One commenter suggested consolidating proposed § 5001.12(a)(4) and (7) into one item, and recommended that they be moved to § 5001.104 because they only relate to the section 9006 program.

*Response:* The paragraphs referred to by the commenter addressed technical reports and energy audits (§ 5001.12(a)(4)) and energy assessments (§ 5001.12(a)(7)). These requirements are not limited to the Rural Energy for America Program guaranteed loan programs. For example, similar types of projects could be funded under the Community Facilities guaranteed loan program. However, the Agency agrees that these three items can be combined into a single item and has done so in the rule.

*Comment:* One commenter noted that the Form 10–K is now available to the general public online and that there is no need to require it from the lender or business as part of a complete application.

*Response:* The Agency agrees with the commenter that it is not necessary to require submittal of a company's Form 10–K with the guaranteed loan application and has removed this requirement from the rule.

*Comment:* Nine commenters commented on the proposed requirement to submit a copy of the loan agreement with the guaranteed loan application. One commenter stated that the draft loan agreement is redundant and unnecessary. This commenter added that most lenders use a standardized system for generating their primary documents, and if the USDA requires more than that, it can be placed in the document as an additional item in the standard Commercial Security Agreement.

One commenter stated that USDA absolutely needs to get out of the practice of micromanaging the lender's loan agreement with its borrower. This commenter stated that if there are specific conditions that the Agency needs met, these should be spelled out in the global Lender's Agreement between the lender and USDA so that the lender knows what USDA's baseline requirements are whenever using USDA guaranteed programs. Beyond this, USDA as a guarantor should rely on its ''approved'' and ''preferred'' lender partners to be able to craft a prudent, comprehensive loan agreement with the borrower.

Three commenters stated that the draft loan agreement should be eliminated. One of these commenters stated that USDA should rely on its

lender partners to craft a prudent, comprehensive loan agreement with the borrower. The other commenter recommended that the financial covenants in the final loan agreement should be very limited, allowing more flexibility depending on the individual proposal. This commenter also noted that if the USDA continues to require specific covenants, the USDA agent should have the authority to decide when, which ones, and at what level.

One commenter stated that the draft agreement seems like overkill, since 95% is boilerplate information. The commenter stated that USDA should ask for the other 5%, which basically means loan covenants.

Two commenters said that this section should identify the minimum acceptable conditions for a loan agreement rather than waiting until the Conditional Commitment is issued.

One commenter said that there should be no USDA loan agreement review. Instead, USDA should lay out specific conditions, covenants, or requirements to be included in the loan agreement. Another commenter stated that the loan agreement requirement should be carefully reviewed and should not include absolute requirements that are not always applicable. Another commenter suggested that it would be beneficial for the review and approval of the loan documentation following USDA approval to allow the inclusion of any USDA requirements.

*Response:* Overall, the Agency agrees with the commenters that it is not necessary to require a copy of the loan agreement between the borrower and the lender when the guarantee loan agreement is submitted. The Agency further agrees that lenders approved to participate in the guaranteed loan programs under this part have the experience and expertise to produce loan agreements to acceptable industry standards and, therefore, the Agency does not believe it is necessary to provide within the rule an itemization of the minimum requirements of a loan agreement acceptable to the Agency. (The Agency may elect to provide such information in the handbook to the rule.) Instead, the Agency agrees that the proper time to review the loan agreement is prior to loan closing.

*Comment:* Three commenters addressed appraisals. Two commenters suggested that allowance should be provided for USDA approvals to be issued subject to an acceptable appraisal being obtained and reviewed before issuance of the USDA guarantee. Another commenter suggested that appraisals should be a contingency of a Conditional Commitment rather that being required to be submitted with the application.

*Response:* The Agency continues to believe that appraisals acceptable to the Agency should be submitted with the guaranteed loan application, but recognizes that the guaranteed loan application process can move forward in their absence. Therefore, the Agency has kept this requirement, but conditioned it based on the appraisal being available. If the appraisal is not available at the time the guaranteed loan application is submitted, the lender must submit the complete appraisal to the Agency before loan closing.

*Comment:* Nine commenters provided comments on the business plan requirement in proposed § 5001.12(a)(9). Six commenters did not recommend requiring a business plan (especially for existing businesses), and four commenters suggested that the lenders should decide if they need to see a business plan for their credit evaluation. One of these commenters also stated that for startups, the business plan and feasibility study should be combined. One commenter said that this requirement will only serve as a deterrent to the loan program.

Two commenters said that for existing businesses, a business history, budget, and projections should be enough.

Two commenters stated that the Agency should say what it expects to be in a business plan, and suggested adding a reference to the definition section for business plan so that the financial statements described in the definition are included.

*Response:* The Agency has left intact the requirement that a business plan be included with the guaranteed loan application, although a separate business plan does not need to be submitted if the information required in the business plan is included in the feasibility study (as was proposed) or in the lender's analysis (as added in the rule). The Agency continues this provision for existing businesses because existing businesses may be expanding into new areas and/or markets, in which case the business' history, budget, and projection may not be sufficient to evaluate the borrower.

As noted above, the rule does not require a separate business plan if the information is contained in the lender's analysis. This addresses commenters' suggestion that the lender be responsible for deciding if a business plan is needed.

Finally, there is no need to add a cross-reference back to the definition of ''business plan.'' When a term is used in the rule and that term is defined in the definitions section of the rule, then that term has that meaning regardless of whether or not there is a cross-reference back to the definitions section. The Agency does not intend to insert such cross-references for the defined terms in this rule.

*Comment:* One commenter stated that a feasibility study should not be a standard requirement, but should be required only on an as-needed basis, to be determined by the lender based on the nature of the project. This commenter also noted that feasibility studies are not typical in the small business lending industry underwriting process.

Another commenter stated that the requirement for a feasibility study or analysis should remain a requirement. The specific type, scope of work, and preparer should remain the lender's responsibility to propose and obtain with Agency concurrence.

*Response:* The Agency has elected to retain in subpart A the identification of a feasibility study as part of the guarantee loan application and use subpart B to identify whether a specific program requires it (as under § 5001.104) or may require it (as under §§ 5001.101, 5001.102, and 5001.103). Thus, the rule does not make it a ''standard'' requirement and it will be required only to the extent identified in subpart B for a specific program.

*Comment:* Five commenters provided comments on the Affirmative Fair Housing Marketing (AFHM) plan in proposed § 5001.12(a)(11). One commenter noted that this requirement is currently used by the U.S. Department of Housing and Urban Development and that it is a timely/difficult report.

One commenter noted that the proposed rule requires the AFHM plan for for-profit nursing homes or assisted living center, and questioned whether it is required for non-profit facilities of this type. The commenter also noted that presently the AFHM plan is required for these type of facilities regardless of the profit type. Another commenter recommends deleting the requirement for for-profit facilities.

One commenter stated that this requirement is duplicative and unnecessary, and noted that because in all Business and Industry loans and in the Conditional Commitment, the borrower must certify compliance with Equal Employment Opportunity and Civil Rights law, the requirement is already in place. Another commenter also stated that because this requirement is already handled through compliance with Civil Rights laws, etc., the proposed requirement should not be part of the guaranteed loan program,

and that it would be an extra burden on the lenders and duplicate what they already have to do as lenders.

A sixth commenter suggested that the Agency insert the phrase ''to the extent that state or Federal statute requires this certification''.

*Response:* This rule implements requirements already established by Rural Development under 7 CFR § 1901.203(c)(2)(i), which applies to all Rural Development programs involving housing, which includes both profit and not-for-profit housing. If the requirements associated with 7 CFR part 1901, subpart E are to be changed, it would occur under another rulemaking, not this one. Therefore, the Agency has retained the requirement for the AFHM plan in the rule.

The Agency, however, has revised proposed § 5001.12(a)(8) because, as noted in the above paragraph, the requirement for the AFHM plan applies to both profit and not-for-profit housing. The revision deletes the reference to ''for profit'', and makes reference to nursing homes and assisted-living centers as being included under residential units (''residential units, including nursing homes and assisted-living centers'').

The Agency notes that the requirement for preparing the AFHM plan is borne by the borrower and not the lender. Thus, it is not a burden on the lender. In addition, the AFHM plan is a marketing tool whose purpose is to promote the project in order to have people move into the housing and makes underserved and minority populations aware of the project. The AFHM plan is required by legislation separate from applicable Equal Employment Opportunity and Civil Rights regulations.

Finally, because the requirement for the AFHM plan is based on 7 CFR part 1901, subpart E, the Agency rejects the suggestion to add the phrase ''to the extent that state or Federal statute requires this certification.''

*Comment:* Three commenters commented on the proposed requirement to submit a preliminary engineering report with the guaranteed loan application. One commenter stated that this requirement should be moved to § 5001.101 because it is only related to the water and waste disposal guaranteed program. Another commenter recommended deleting the requirement for a preliminary engineering report for all new construction. The third commenter stated that the engineering report should only be required for projects where the technology and engineering is not an industry standard or has sufficient historical applications.

*Response:* In consideration of these comments, the Agency has elected to delete reference to preliminary engineering report (PER) from subpart A and the rule only references it in subpart B with respect to the water and waste disposal guaranteed program. As additional guaranteed loan programs are added to this part, the Agency will place any PER requirement in subpart B as appropriate.

With regard to the suggestion that this requirement be deleted for all new construction, the Agency first notes that the rule is consistent with the current implementation of the water and waste disposal guaranteed loan program. It is not the Agency's intent to deviate from the current implementation of the program because, as a matter of Agency policy and experience, the PER is invaluable in ensuring that the engineering principles are sound and that viable alternatives have been considered.

Finally, with regard to the suggestion that the PER only be required for projects where the technology and engineering is not an industry standard or has sufficient historical applications, the Agency disagrees that the PER should not still be prepared and submitted. Even in these situations, the PER allows the Agency to evaluate possible alternatives and helps determine eligible project costs. The complexity of the PER depends on the complexity of the project. Thus, those projects that meet industry standards or have historical applications could be less complex and require less time to prepare. But in all instances, the PER still provides value to the Agency in evaluating the guaranteed loan application.

*Comment:* One commenter suggested adding the following language to proposed § 5001.12(a)(13): ''Current credit reports or equivalent on the applicant and any parent, affiliate, and subsidiary firms, and other persons or entities liable for the debt, except for public bodies; and.''

*Response:* The proposed rule stated, in part, that current credit reports or equivalent would be submitted for ''any other person liable for the debt.'' The phrase ''any other person'' includes, but is not limited, to those entities identified by the commenter (i.e., parent, affiliate, and subsidiary firms). Therefore, it is unnecessary to revise the provision as suggested by the commenter. To the extent that the Agency determines it useful, the Agency will clarify ''any other person'' in the handbook to the rule.

*Comment:* Eleven commenters recommended deleting proposed § 5001.12(a)(14), Audited financial statements. One commenter noted that requiring an audit for more than $1 million would be punitive. Five commenters noted that audited financials are expensive. One commenter said that it was not necessary and was a bad idea, and another commenter said it was inappropriate. Two commenters said that $1 million is a ''ridiculously low level'' at which to require audited statements. Six commenters stated that it should be up to the lender. One commenter stated that the change from an independent accountant prepared statement to an audited financial statement would severely limit the number of companies who would be eligible for the program, and two commenters said that the proposed requirement would be detrimental to the program. One commenter said inclusion of this requirement would be a significant hindrance to the Agency's ability to support many of its current borrowers.

*Response:* The Agency has considered these comments and has made revisions to this requirement to differentiate between startup businesses and existing businesses. For borrowers that have been in existence less than one year, the Agency revised this requirement by eliminating the threshold and requiring the submittal of the most recent ''Agency-authorized financial statements'' of the borrower regardless of the amount of the guaranteed loan request. For borrowers that have been in existence for one or more years, the Agency raised the threshold from $1 million to $3 million at which audited financial statements would be required and has added a provision that would allow the submittal of alternative financial statements provided such statements have been authorized by the Agency. For borrowers that have been in existence for one or more years that request guaranteed loans of less than $3 million, the most recent audited or Agency-acceptable financial statements of the borrower would be submitted. The Agency believes that these revisions address most of the concerns expressed by the commenters while maintaining the Agency's intent in this rule to manage risk.

*Comment:* Nine commenters suggested different threshold levels for when audited financial statements would be required. One commenter suggested that the minimum should apply to loans over $3.0 million. Five commenters suggested audited statements for loans over $5 million.

Two commenters suggested audited statements for loans over $10 million.

One commenter stated that audited statements make sense only for loans of over $5 million because reviewed statements are good for $3,000,000 to $4,999,999, and statements prepared by certified public accountants are good for $1.00 to $2,999,999. Another commenter suggested review statements for loans under $5 million.

One commenter stated that current regulations have a floor of $3 million for certified financial statements which has been cost prohibitive for small business owners. The commenter expressed concern that lowering the floor, as in the proposed rule, will make this very problematic and should be eliminated. The commenter recommended that the Agency consider CPA reviewed financial statements for all loans under $5 million and that all financial statements must be prepared in accordance with GAAP.

*Response:* The Agency considered the suggestions made by the commenters as to an alternative, higher threshold at which audited financial statements would be required. Among other changes concerning the submittal of financial statements, the Agency has raised the threshold from $1 million to $3 million. The Agency is concerned that raising this threshold to a higher limit ($5 million or $10 million) may unnecessarily result in increased risk.

*Comment:* Eleven commenters suggested alternatives to requiring audited financial statements. Two commenters recommended retaining the current regulation whereby the USDA may require annual audited financial statements after the Business and Industry guaranteed loan closes. These commenters also stated that the intention of the proposed regulation is unclear, and that if the intention is to require applicants for loans over $1 million to have audited financial statement for prior years, this will severely impact many otherwise good credit worthy potential rural businesses that need Business and Industry guaranteed loans.

One commenter recommended returning to the requirements in the old 7 CFR part 4279, subpart B regulation which called for a current balance sheet; and projected balance sheets, income and expense statements, and cash flow statements for the next two years. Existing businesses must also submit balance sheets and income statements for the three previous years. This commenter also noted that the lender's policies may require the applicant to provide more, but suggested that the Agency not impose additional requirements, including GAAP prepared financials.

Four commenters suggested requiring tax returns. These commenters stated that they are now the most widely used financial tool in business banking and that they are the only financial statement that is uniformly and consistently available from all businesses. One of the commenters added that they are the common statement used in underwriting owner-occupied real estate loans.

Two commenters pointed out that 99 percent of for-profit businesses that will apply do not have audited financial statements, and will not go through the expense of an audit to apply for a Business and Industry guarantee. These commenters suggested that the requirement for for-profit businesses should be for ''accountant prepared financial statements'' and added that the statements should be ''completed in accordance with Generally Accepted Accounting Principles.'' Another commenter also supported requiring accountant prepared financial statements for for-profit businesses.

*Response:* As noted in previous responses to comments on financial statements, the Agency has revised this provision to allow for the submittal of Agency-authorized financial statements for all businesses that have been in existence for less than one year regardless of the amount of the guaranteed loan request. For businesses that have been in existence for one or more years seeking a guaranteed loan size that is less than $3 million, the Agency revised the rule to allow such borrowers to submit either the most recent audited or Agency-acceptable financial statements of the borrower. In such situations, the types of financial statements identified by the commenters may be acceptable to the Agency, which will work with the lenders on a case-by-case basis. However, for guaranteed loans of $3 million or more from businesses that have been in existence for one or more years, the Agency believes that requiring audited financial statements (unless alternative financial statements are authorized by the Agency) is reasonable relative to the potential risk associated with such guaranteed loans.

*Comment:* One commenter stated that the Agency's annual audits requirements were inconsistent and atypical of lender's requirements. The commenter questioned why, if only annual audits are needed for risk projects over $3 million, up front audits are needed for a sound borrower and a $1 million project.

*Response:* The Agency has revised, among other changes, the level at which audited financial statements are required to be submitted with the guaranteed loan application to $3 million. As noted in responses to other related comments, the Agency has removed the requirement for annual audited statements for projects over $3 million and has replaced it with a requirement for the submittal of financial reports, either as required by the lender's regulatory authority if the lender is regulated or supervised or as contained in the Conditional Commitment if the lender is an other lender (*see* § 5001.17(d), Financial reports).

*Comment:* One commenter noted that no allowance is made for startup businesses where there would be no audit available.

*Response:* The Agency agrees with the commenter and has revised the rule to allow borrowers in existence less than one year, which includes startup businesses, to submit ''Agency-authorized'' financial statements.

*Comment:* One commenter suggested that the full documentation guarantee application should also include the following items: Complete organizational documents of the borrower, list of governing board members of the borrower, community support documentation, historical financial statements of the borrower, State Clearinghouse/Intergovernmental Review comment letter, copies of any existing or proposed lease, management agreement, or other applicable legal documents involving the borrower and the proposed facility, and the lender's letter on the need for the guarantee.

*Response:* The Agency has considered each suggested item for inclusion in a full documentation application, which corresponds to an approved lender application in the rule (see § 5001.12(a)), and has made the following determinations.

With regard to the submittal of complete organizational documents of the borrower, the Agency as a matter of policy has determined that these documents are needed in verifying if a borrower is a non-profit and has the authority to engage in obtaining the loan. Of the four programs included in the rule, such documents are relevant to the Community Facility and Water and Waste Disposal programs, but not to the other two programs. While Form RD 5001–3 requires lender certification to the borrower's authority to obtain a loan, the Agency has determined that it is necessary to ensure these organizational documents are obtained for the Community Facilities and the

Water and Waste Disposal programs. Therefore, the Agency has added this as a requirement in subpart B for both programs.

With regard to the list of governing board members of the borrower, such information is needed to determine whether a facility is locally controlled. This is important to the Community Facility and the Water and Waste Disposal programs, but not to the other two programs under the rule. Therefore, the Agency has added this as a requirement in subpart B for both programs.

With regard to community support documentation, Form RD 5001–3 requires the lender to certify that the borrower has obtained a certificate of support. Lender certification is sufficient to meet the needs of the Community Facilities and Water and Waste Disposal programs and, thus, there is no need to require submittal of such documentation with the loan guarantee application.

With regard to historical financial statements of the borrower, if the Agency determines that the financial statements in § 5001.12(a)(10) are insufficient to properly assess the viability of an individual project, the Agency may at its discretion request additional financial information (see § 5001.12(a)(10)(iii)).

With regard to State Clearinghouse/Intergovernmental Review comment letter, the requirement to submit such a letter is covered under USDA's Office of the Chief Financial Officer regulations in 7 CFR part 3015, subpart V. This requirement is applicable to this rule under § 5001.16(g), which requires compliance with ''applicable Federal laws.'' Therefore, the Agency has not included this item as a separate line item for applications. However, the Agency recognizes that this letter is not very well known and will address this issue in the handbook to the rule.

With regard to copies of any existing or proposed leases, the rule allows the Agency to request any additional information it determines is necessary to evaluate the application (§ 5001.12(a)(11)). Thus, while Form RD 5001–3 contains a provision to address the relationship between the length of the loan and the length of the lease (e.g., to ensure that the lease is longer than the loan term), if the Agency determines that additional information is needed to properly assess the lease, the Agency may request that the lender provide a copy of the lease under this provision of the rule. The Agency will provide guidance in the handbook to the rule as to the circumstances under which it might request a copy of the lease.

With regard to a management agreement and other applicable legal documents involving the borrower and the proposed facility, the Agency agrees that submittal of such agreements, where applicable, is useful to ensure that a for-profit company does not receive the benefit of Federal government subsidized funds. This suggestion is applicable to the Community Facilities and the Water and Waste Disposal programs and has been provided for in subpart B for both programs.

Finally, with regard to the lender's letter on the need for the guarantee, Form RD 5001–3 addresses through the lender's certification the need for the guarantee. Therefore, there is no need to add this as a separate item to the application.

*Comment:* One commenter recommended that non-preferred lenders submit a complete application package for all loans and a full loan package should be required for all loans above $5 million.

*Response:* The Agency has revised the rule, as discussed in responses to other related comments, such that all non-preferred lenders must submit full documentation applications regardless of the size of the loan. For preferred lenders, which would only be allowed under the rule for the Business and Industry guaranteed loan program, the Agency is requiring a different set of application requirements to be submitted regardless of loan size.

*Comment:* One commenter noted that many of the application requirements refer the reader to subpart B. This commenter suggested that each section in subpart B should have its own application section so that they can be program specific without having the reader flipping around the regulation.

*Response:* The Agency intentionally developed the new platform to improve the administrative efficiency of adding new programs to the rule, recognizing that this format would require readers to consider requirements for a single program in both subpart A and subpart B of the rule. The Agency will provide implementation materials and application guides in which the requirements of the rule will be presented in a manner as suggested by the commenter.

Low Doc Applications (Proposed § 5001.12(b))

*Comment:* The Agency received a number of comments pertaining to low documentation applications, including the lack of significant differences and relief between low documentation and full documentation applications, the potential for abuse, and the importance of full and careful review of all applications.

*Response:* The Agency has removed low documentation applications from the rule. The requirements contained in the rule are those necessary to ensure applications are adequately evaluated and these comments are no longer relevant.

Determination of Documentation Level (Proposed § 5001.12(c))

*Comment:* The Agency received a number of comments on the determination of documentation level for existing businesses in the context of low documentation applications, including loan amount threshold, credit criteria for preferred and non-preferred lenders, debt coverage ratios, equity requirements, and loan to value ratio.

*Response:* As noted above, the Agency has removed low documentation applications from the rule. The requirements contained in the rule are those necessary to ensure applications are adequately evaluated and these comments are no longer relevant.

Lender Responsibilities—General (§ 5001.15)

*Comment:* After noting the manner in which the proposed rule attempts to manage risk to the Agency, one commenter suggested placing the burden of risk management on those with the expertise to do so (i.e., on the lenders) because, while financial and other criteria as part of project eligibility will assist in identifying risk, experienced lenders have a good understanding on how to mitigate an identified risk.

*Response:* As discussed in the preamble to the proposed rule, the new platform for guaranteed loans addresses four types of risk—loss exposure, project risk, institutional risk, and operational risk. One of the key components in managing risk is to ensure that applications for projects that will repay their loans are submitted by the lender. While the Agency ultimately approves or disapproves the guarantee, the rule relies on the lender's experience and expertise to originate such loans. Further, under the rule, preferred lenders are afforded more responsibility in loan origination as Agency review of loans from preferred lenders is limited. The rule also relies heavily on the lender's servicing policies and procedures for monitoring loans and for taking corrective actions when necessary for loans that start experiencing problems. In sum, the rule employs provisions that manage risk using both Agency and lender expertise

and experience. The Agency believes it has struck an appropriate balance between responsibilities to ensure minimizing losses in the Agency's guaranteed loan portfolio.

*Comment:* One commenter stated that, to the extent that the Agency's action or inaction created a loss, the lender should be compensated accordingly to the extent that the lender continued its responsibilities to originate and service the loan.

*Response:* The Agency understands the commenter's concern that there are actions or inactions that the Agency may take that could result in a loss to the lender. For example, collateral value could degrade while the Agency is making a determination. However, there are statutory constraints, as contained under the Consolidated Farm and Rural Development Act, that prohibit the Agency from implementing a provision as suggested by the commenter. While the lender has the right to pursue an appeal of a loss claim if it disagrees with the loss claim payment, the Agency cannot establish a separate category of loss claims associated solely with alleged agency action or inaction. Therefore, the Agency has not revised the rule as suggested by the commenter.

*Comment:* One commenter recommended adding the following language: ''Guaranteed loans must be properly classified. Within 90 days after the Agency issues the Loan Note Guarantee, the Lender must notify the Agency of the loan's classification or rating under its regulatory standards. The Lender must also notify the Agency when there is a change in the original loan classification.'' The commenter then asked ''If this is not published, how will the lender be required to notify the Agency of the loan classifications?''

*Response:* In response to this and other related comments, the Agency has revised the rule to require the lender to notify the Agency of a loan's classification no later than 90 days after loan closing (see § 5001.16(a)(2)), and to notify the Agency within 15 calendar days of when a loan's classification has been downgraded (see § 5001.4(b)(3)(iii)). As noted in a response to another comment, the Agency does not believe that it is necessary to report all changes in a loan's classification, just those that result in a downgrade. Finally, the loan classifications that would be used to classify guaranteed loans will be identified in the handbook to the rule. The Agency does not believe there is any utility in incorporating those classifications in the rule.

Lender Responsibilities—Origination (§ 5001.16)

*Comment:* One commenter stated that it is better for the Agency to have its own underwriting standard and administer that exclusively.

A second commenter also suggested that the Agency set its own reasonable standards and accept projects that meet the Agency's standards even though it might be outside the lender's normal credit criteria. This is a valid reason for a lender to seek a government guarantee.

A third commenter stated that the Agency is establishing more stringent eligibility requirements under the program that are unfair and will not achieve the Agency's desired goal. According to this commenter, the proposed rule will not reduce the Agency's so called ''institutional risk,'' but will instead create unpublished standards of metrics for Agency program eligibility, credit evaluation, servicing, and liquidation that discriminates against those lenders with tighter credit standards. Therefore, this commenter recommended that the Agency:

(1) Establish clear credit evaluation and loan servicing standards that it expects from lenders,

(2) Hold the lenders accountable to those standards as a reasonable and prudent lender, and

(3) Mandate that all lenders adopt the Agency's regulations as part of their written policies and procedures after the proposed rule and credit evaluation standards are established in order to ensure compliance.

A fourth commenter stated that the Agency should have its own credit policies that it follows regardless of the lender's credit policies. The commenter pointed out that typically a guarantee is needed because there are exceptions to the lender's credit policy and a guarantee mitigates the risk allowing for the credit to be approved and then stated that if the Agency reverted to the lender's credit policy, it would not be able to approve the guarantee because there would be exceptions to the credit policy.

*Response:* The Agency has intentionally not tried to create a comprehensive set of requirements to cover all aspects of loan origination and servicing under this program, because, in part, the Agency does not believe that a comprehensive set of standards can be established to fit all guaranteed loans (one size does not fit all). Instead, the Agency is setting specific minimum standards in certain areas it has determined important to managing risk for the loans it will guarantee under this program. Further, for the reasons stated in the preamble to the proposed rule, the Agency intends to leverage lender experience in originating and servicing loans and to do so using those policies and procedures with which they are most familiar (i.e., their own) and that are satisfactory to their regulators. This provides a flexibility for the individual loan programs as well as for the lenders seeking to participate in the program and allows the lender to develop case-by-case analyses for individual projects.

*Comment:* One commenter suggested that, as an alternative, the Agency should mandate that all Rural Development approved lenders, preferred lenders, and approved non-regulated or supervised lenders include Agency loan origination, servicing, and liquidation servicing regulations into their origination policies and procedures in use by the lender to level the playing field. This should be included in the Lender Agreement, Conditional Commitment, and Lender Certification given at loan closing. According to the commenter, this will eliminate the burden of monitoring lender credit policies and procedures, and create more time for Agency personnel to devote to approving more loan guarantees.

*Response:* First, the Agency believes that setting the standards it has in this rule sufficiently levels the playing field to help ensure that risk is being mitigated across all loans that are originated and serviced under this program. The Agency does not believe that it is necessary that each loan and its accompanying documents require the same exact set of conditions, policies, and procedures in order to ensure its likelihood of repayment.

Second, the Agency expects lenders to monitor all loans guaranteed under this program in accordance with their policies and procedures as they would any other loan they make. The lender is required to notify the Agency of changes in a loan's status (any downgrades). Further, the rule requires lenders to notify the Agency of any changes to those policies and procedures and, where the change is inconsistent with the requirements of this rule, the lender must notify the Agency in writing and receive written Agency approval prior to applying the changes to loan guarantees under this part. This places the primary responsibility on the lender and allows the Agency to more efficiently allocate its resources.

*Comment:* One commenter noted that the SBA currently requires in the bank note that it would not do the deal without the government enhancement. The commenter recommended that the

USDA program should match this SBA requirement.

*Response:* The Agency agrees that the issue raised by the commenter needs to be addressed in this program. In Form RD 5001–3, item 2 under the Community Facility sheet and item 2 under the Water and Waste Disposal sheet require the lender to indicate whether or not the lender is willing to provide financing for the project at reasonable rates and terms without the reduced risk derived from the USDA loan guarantee. The Agency believes this sufficiently addresses the commenter's suggestion.

*Comment:* One commenter made two suggestions of language that should be added:

—''The lender is primarily responsible for determining credit quality. Lenders are responsible for developing and maintaining adequately documented loan files, recommending only loan proposals that are eligible and financially feasible, following Agency regulations, and performing a thorough credit evaluation addressing all credit factors. The lender is required to have an adequate underwriting process to ensure that loans are reviewed by a qualified loan officer other than the originating officer. The Agency relies upon the lender to perform these and other credit evaluation responsibilities outlined in the regulations.''

—''Lenders are responsible for obtaining valid evidence of debt and collateral in accordance with sound lending practices.''

*Response:* The Agency has considered the commenter's suggestions and the rule addresses each substantive suggestion. As part of the lender approval process, the rule requires all lenders to maintain internal audit and management control systems to evaluate and monitor the overall quality of its loan origination and servicing activities (§ 5001.9(a)(2)). This is also required in § 5001.15(f). Lenders are also required to compile and maintain in their files a complete application for each guaranteed loan (§ 5001.15(e)). In addition, the rule requires each lender to originate loans in accordance with its loan origination policies and procedures, to follow the requirements of this part with regard to origination and servicing, and to service loans in accordance with its servicing policies and procedures. Further, the rule clearly states, in § 5001.16(b), that lenders are required to conduct credit evaluations for all applications for guarantee. Lastly, the rule requires lenders to provide real property and chattel collateral appraisals conducted by an independent qualified appraiser. To the extent that additional guidance on these requirements is required, the Agency will provide such guidance in the handbook to the rule.

*Comment:* One commenter suggested adding a new paragraph (j) on surety bonds, as follows: ''(j) Surety bonds. The lender must ensure that surety bonds will be provided by construction contractors if Agency grant funds are provided to the borrower prior to completion of construction.''

*Response:* The Agency agrees with the commenter that the rule needs to address surety bonds. The Agency has revised the rule in two ways. First, in subpart A, the Agency has added a provision for surety bonds. Second, the Agency has added in subpart B a requirement for payment and performance bonds sufficient to mitigate Agency risk if the project is never completed for both the Business and Industry guaranteed loan program and the Rural Energy for America Program guaranteed loan program.

General (§ 5001.16(a))

Numerous commenters (as detailed below) expressed varying degrees of concern over the proposed requirement that the lender meet the more stringent requirements of either its policies and procedures or those of the Agency. Many commenters stated that this requirement should be removed from the rule, with some commenters stating that the Agency needs to set its own reasonable standards. Because their concerns were addressed at both loan origination and loan servicing, all of these comments are addressed in this section. Though similar, comments are addressed by individual commenter.

*Comment:* One commenter stated that the Agency's requirement to apply the lender's more restrictive portion of its credit policy and procedures to either credit evaluation or servicing rather than conform to the Agency's regulation is too restrictive and penalizes those lenders with more restrictive credit policies. The commenter further characterized this requirement as onerous and unjust, placing higher standards on some lenders and less on others, and punitive to lenders with more stringent credit guidelines, who would be held to higher standards than those of the Agency, while other lenders with prudent credit policies and procedures have lesser standards to meet.

Two other commenters stated that, for both origination and servicing, they disagree with the ''whichever is more stringent'' requirement, in part, because it would have the lenders operating at different levels.

*Response:* First, as noted in responses to other related comments, the Agency has revised the rule to allow exceptions to the ''whichever is more stringent'' requirement by adding the phrase ''unless otherwise approved by the Agency.'' This reduces the ''restrictiveness'' of this requirement as objected to by the commenter.

Second, the Agency disagrees that lenders with more stringent standards are being placed in a ''punitive'' position compared to those lenders with less stringent standards. The rule does not change how lenders currently apply their criteria to projects and borrowers under their lending practices. What the rule is doing is allowing lenders to apply their own policies and procedures, the ones with which they are familiar, to loans being guaranteed under this program. For any lender, where the rule has a policy or procedure that is more stringent than a lender's corresponding policy or procedure, the lender must comply with the more stringent policy or procedure in the rule.

*Comment:* One commenter stated that requiring lenders with stricter term limits and larger collateral discount requirements to use those criteria rather than the standard Agency criteria will lead to such lenders offering shorter loan terms, which will create the concept of balloon, puts, and calls currently not allowed under the current regulations. According to the commenter, this will lead to shorter loan terms with balloons, resulting in fewer project and small business qualification and participation under the Agency program, because lenders will be required to use shorter terms with balloons if their policies and procedures are stricter than the Agency's terms limits. The commenter then stated that this result is inconsistent with the intent of the current and proposed rules.

*Response:* The Agency disagrees with the commenter because the rule requires loans subject to Agency guarantee to be fully amortized.

*Comment:* One commenter noted that the ''whichever is more stringent'' requirement removes one of the incentives for using the program, as many lenders use the Business and Industry program as a credit enhancer. The commenter illustrated this by stating that lenders' internal policies may limit the term of the loan to less than is allowed by Business and Industry program regulations. According to the commenter, this does

not mean that the loans are more risky, but it allows payments to be spread out over a longer period providing the borrower with a smaller debt service requirement and a better opportunity for success.

A second commenter similarly noted that making the bank's more restrictive credit policy take precedence over the Agency's defeats the purpose of the Business and Industry Guarantee Program in that the Business and Industry program should make credit available when a lender would not ordinarily make the loan.

*Response:* The Agency agrees with the commenter that the situation posed would need to be considered. In response to this and other related comments, the Agency revised the rule to require that the lender comply with its own policies and procedures or those in the rule, whichever is more stringent, unless otherwise approved by the Agency. The addition of this ''unless otherwise approved by the Agency'' allows the Agency and the lender to work together to address such situations as posed by this commenter and to consider each loan application on a case-by-case basis. Any agreement reached between the Agency and the lender must be reflected in the Conditional Commitment.

*Comment:* One commenter stated that the ''whichever is more stringent'' requirement is inappropriate and unwieldy. This commenter recommended that the Agency establish its standards and lenders should be able to present any project that meets the Agency's standards even though it may be outside the lender's normal credit criteria. The commenter stated that this is a valid reason for a lender to seek a government guarantee. To illustrate its concern, the commenter gave the following example: If a lender's standard criteria for a loan to a non-profit group is 30% cash equity but they have a long-standing customer with significant assets, good debt service coverage, but only 23% cash equity, the lender may use a guarantee to mitigate the exception. The project still meets Agency standards, but could not be done as the language is currently written.

The commenter also stated that this requirement should be eliminated because, in part, it eliminates the opportunity for lenders to use a guarantee to mitigate a policy exception.

*Response:* The Agency agrees with the commenter that the proposed rule could have prohibited the lender from submitting an application for a loan guarantee and that this would not necessarily have been desirable. As noted in the response to the previous comment, the Agency has revised the rule to provide for ''unless otherwise approved by the Agency.'' The addition of this conditional phrase allows the Agency and lender to address such situations as posed by the commenter.

*Comment:* One commenter stated that the ''whichever is more stringent'' requirement is redundant because where the lender has more stringent policies than the Agency's, the lender will have to follow those to get the loans through its own credit administration policies.

*Response:* While this requirement might be considered redundant for those lenders that have policies and procedures more stringent than those contained in the rule, it is not redundant for those lenders that have policies and procedures less stringent than those contained in the rule.

*Comment:* One commenter stated that if the Agency's rules are more stringent, it is up to the Agency personnel to ensure that the lender follows Agency rule. The commenter stated that they believe this does not have to be a written rule, it is obvious. Another commenter stated that this requirement should be eliminated because, in part, it unrealistically expects Agency staff to be able to verify that a project/borrower met all of the lender's criteria.

*Response:* The Agency disagrees with the commenter's assertion that it is up to Agency personnel to ensure that a lender follows Agency rules. It is the lender's responsibility to know and follow the requirements in the rule. While the Agency may not have sufficient information to determine the lender's standards on a case-by-case basis, the Agency can still verify that the requirements are being met through other rule provisions for routine servicing and lender oversight.

*Comment:* One commenter asked what would happen if the more stringent Agency's policies resulted in a default, and suggested that this requirement increases the potential for the Agency to micromanage the loan itself.

*Response:* The Agency's standards establish minimum criteria for loans that the Agency is willing to guarantee. If the lender's standards are less stringent than these, then the Agency would not guarantee that loan. The Agency's standards do not cause the borrower to go into default.

The Agency disagrees with the commenter's characterization that the rule increases the potential for the Agency to micromanage the loan itself. The entire rule is built around providing lenders with more independence in originating and servicing loans than under the current regulations for the programs included in this rule. In addition, the lender knows beforehand what policies and procedures will be required when the lender agrees to participate in this program.

*Comment:* One commenter asserted that the proposed ''whichever is more stringent'' requirement could lead to a scenario where an Agency reviewer starts second-guessing lenders on what their in-house underwriting standards say.

*Response:* The Agency disagrees with the commenter's assertion. While the Agency may not have sufficient information to determine the lender's standards on a case-by-case basis, the Agency can still verify that the requirements are being met through other rule provisions for routine servicing and lender oversight.

*Comment:* One commenter stated that the ''whichever is more stringent'' requirement should be eliminated because, in part, by using this policy, the Agency is inviting more participation from lenders with the lowest credit standards as they will be able to find more rural businesses that meet their credit standards.

*Response:* The fact that a lender has less stringent policies and procedures than another lender is, by itself, an insufficient reason not to allow the former to participate in this program. If the former lender's policies and procedures are determined by the Agency to be sufficient for participation, then the Agency believes such lenders should be allowed to participate. Therefore, the Agency has not eliminated this requirement as requested by the commenter.

*Comment:* Two commenters stated that, for both origination and servicing, they disagree with the ''whichever is more stringent'' requirement, in part, because it would interfere with the authority of the lender's regulators. These commenters recommended keeping the current regulation.

*Response:* The rule sets up a relationship between the lender and the Agency in guaranteeing loans for programs included in this rule. The relationship between the lender and its regulator is outside the purview of this rule.

*Comment:* Two commenters stated that, with regard to servicing, if the ''whichever is more stringent'' requirement is adopted, it would cause confusion and generate many legal suits and would not be acceptable to lenders. These commenters recommended keeping the current regulation.

*Response:* The Agency does not believe that this requirement would create the ''confusion'' claimed by the commenter. Each lender would be responsible for complying with its own policies and procedures or those in the rule, and would not be responsible for or concerned with the policies and procedures of other lenders. Thus, the Agency does not agree that there would be confusion for what an individual lender is required to do to comply with this rule.

In addition, the rule allows the Agency and the lender to reach agreement under the ''unless otherwise approved by the Agency'' provision, which the Agency believes resolves most, if not all, of a lender's concern with this requirement.

*Comment:* One commenter stated that, in reading the requirement that the lender must comply with whichever is more stringent, they interpreted the requirement to say that, if the lender would not approve a deal at 80% loan-to-value conventionally, then it could not use the USDA program to add value to the property and relax its credit policy.

*Response:* The Agency has revised the rule to require the lender to comply with whichever is more stringent, unless otherwise approved by the Agency. The proposed rule did not contain the ''unless otherwise approved by the Agency'' clause. Thus, the rule would allow the Agency and the lender to reach agreement on how to handle the situation posed by the commenter and such agreements would be reflected in the Conditional Commitment.

*Comment:* One commenter had questions regarding § 5001.16(a)(1) in which the Agency may require an independent credit risk analysis on the loan. The commenter questioned what this analysis is, who would do it, who would pay for it, and what it is for.

*Response:* On a case-by-case basis, the Agency may require the lender to provide a rating or opinion of the underlying credit by an independent credit rating organization at other than Agency expense.

Credit Evaluation (§ 5001.16(b))

*Comment:* One commenter stated that the lender should be required to compare the financial projections to the industry averages for reasonableness.

*Response:* The Agency agrees that this can be a reasonable comparison as part of credit evaluation. Such a comparison, though, would be applicable to Business and Industry and the Rural Energy for America programs and would not be applicable to the Community Facilities and Water and Waste Disposal programs. The rule (§ 5001.16(b)(2)(v)), Conditions) provides the Agency with the ability to require this when it is appropriate or is needed to address reasonableness. Therefore, the Agency has not revised the rule in response to this comment.

*Comment:* Two commenters noted that although the proposed rule requires the lender to prepare a credit evaluation that is consistent with Agency standards ''found in this part,'' there are no standards found in this part, only a general description of the 5 C's of credit. They also noted that the proper standards to use are detailed in RD AN No. 4308 (4279–B, 4280–B, and 4287–B), and suggested using the Administrative Notice's definition in the **Federal Register** (rather than in the Administrative Notice).

A third commenter noted that the Agency has issued a variety of Administrative Notices and Unnumbered Letters relating to, but not limited to: credit due diligence, lender credit due diligence, project risk, and collateral evaluation and appraisal requirements, as guidelines for State Offices. We find that those standards are missing from the proposed rule. The commenter encouraged the Agency to incorporate its administrative notices, including but not limited to, RD AN No. 4280 and RD AN No. 4308, in this section in order to establish published regulations for credit evaluations.

*Response:* The standards being referred to by the commenters are the ''5 C's of credit'' (§ 5001.16(b)(2)(i) through (v)) as well as the eligibility standards set forth in § 5001.6(b). With regard to the Administrative Notices referred to by the commenters, the Agency will incorporate the appropriate notices in the handbook for the rule.

*Comment:* One commenter stated that the correct 5 Cs of credit are character, capacity, capital, collateral, and conditions, not credit worthiness, cash flow, capital, collateral, and conditions.

*Response:* For the purposes of this rule, the Agency is characterizing the 5 C's of credit as proposed and has not modified the rule as suggested by the commenter.

*Comment:* One commenter suggested that the following be incorporated in § 5001.16(b)(2)(i): ''Credit history should indicate no derogatory past or present credit or payment performance, no bankruptcy, foreclosures, judgments, collections, no Federal, State, Municipal, County unpaid tax liens, no fraud or felonies individually, corporately or of any related concerns, affiliates, subsidiaries.'' If so, explain.

*Response:* ''Credit history'' is a well understood industry term that contains the elements identified by the commenter. Therefore, the Agency does not believe it necessary to spell out to this level of detail in the regulation and no changes to the rule have been made in response to this comment.

*Comment:* One commenter suggested the following for § 5001.16(b)(2)(ii): Including, but not limited to, cash flow available to service the proposed and historical debt with a service requirement of 1.0 to 1 as defined in the proposed regulation.

*Response:* ''Cash flow'' is a well understood industry term that contains the elements identified by the commenter. Therefore, the Agency does not believe it necessary to spell out to this level of detail in the regulation and no changes to the rule have been made in response to this comment.

*Comment:* One commenter suggested the following for § 5001.16(b)(2)(iii): Capital, including, but not limited to, for existing businesses, 10% tangible balance sheet equity, new company 20% tangible balance sheet equity.

*Response:* The Agency does not intend this part of the rule to spell out specific metrics that each project must meet when a lender conducts its credit evaluation (other than as specified in § 5001.6(b) as minimum threshold levels). Rather, the Agency is relying on the lender to perform its credit evaluation in accordance with its policies and procedures and the Agency will review such evaluations when determining whether or not to issue the Loan Note Guarantee.

*Comment:* Two commenters stated that there is no discussion on the proper discounting of collateral for Business and Industry guarantees. The commenters added that § 5001.16(b)(2)(iv) is adequate for lending to nonprofit entities and public bodies, but is inadequate for lending to for-profit businesses. The commenters recommended using the language found in RD AN No. 4279 (4279–B).

A third commenter offered suggested discount loan to value ratios as follows:

Land: 40% (low), 80% (high)

Improved Commercial Property: 50% (low), 85% (high)

Chattels: 50% (low), 65% (high)

Inventory: 25% (low), 60% (high)

Accounts Receivable (Less than 90 days): 50% (low), 85% (high)

*Response:* As noted in responses to previous comments, the Agency has revised the rule for the Business and Industry and the Rural Energy for America programs by adding specific discounted values in subpart B for the two programs. For other types of collateral in these two programs and for the other programs, the Agency will

identify appropriate discounted values in the Conditional Commitment. The lender is required to use either the discounted values in the rule or in its own policies and procedures, whichever is more stringent, unless otherwise approved by the Agency.

Appraisals (§ 5001.16(c))

*Comment:* One commenter recommended that appraisal requirements should follow 7 CFR part 3575, subpart A in that appraisals may be required by the lender or the Agency. According to the commenter, community facility projects are typically specialized facilities and may very well not appraise for the cost to actually construct them. The security package generally relies on revenues and community support of the facility to pay the debt. This is the primary reason a lender will need the guarantee, because there is not enough hard security to secure the loan without the guarantee.

Another commenter requested the removal of the appraisal requirement and fair market evaluation for real estate collateral taken as security for Community Facilities. The commenter noted that currently more than 50% of Guaranteed Community Facilities are made for benefit of healthcare. The commenter stated that the focus for the next several years will be on Critical Access Hospitals, which are aged and in critically in need of replacement and that for healthcare facilities a fair market valuation is difficult to obtain and comparables within proximity are likely impossible.

*Response:* As noted in a response to a previous comment on appraisals under § 5001.12, Applications, the Agency is requiring that appraisals acceptable to the Agency be submitted with the application, if they are available. If they are not available at the time the application is submitted, complete appraisals must be submitted to the Agency before loan closing.

With regard to appraisals and community facilities, the Agency agrees with the commenter that issues may arise when obtaining appraisals for community facility projects because such projects may not appraise for the full value of the guarantee. However, the Agency believes that, in those instances where this may occur, the project can still be considered for a loan guarantee without compromising risk mitigation if there is sufficient demonstration of community support. Therefore, the Agency has added a provision to subpart B for community facilities (see § 5001.101(e)) that specifically allows the Agency to consider community support in evaluating the application for guarantee when a loan's collateral appraises at a level less than 100% of the loan amount.

*Comment:* One commenter recommended adding the following language: ''Chattel property will be evaluated in accordance with normal banking practices and generally accepted methods of determining value.''

*Response:* The Agency agrees that the rule needs to address chattel property as suggested by the commenter. The Uniform Standards of Professional Appraisal Practices (USPAP) contains standards that cover chattel property. The rule requires that such appraisals be completed in accordance with USPAP standards.

*Comment:* Two commenters commented on who would conduct the appraisals. One commenter noted that Certified General Appraisals perform appraisals, not lenders. This comment recommended that the requirement should read that the lenders will obtain a real property appraisal in accordance with USPAP Standards 1 and 2. The other commenter noted that collateral will be appraised by the lender in accordance with the appropriate guidelines contained in the current USPAP Standards 1 and 2 or successor standards. This commenter stated that it is generally not appropriate for the lender to conduct real estate appraisals, and wondered if the Financial Institutions Reform, Recovery and Enforcement Act standards were intentionally left out and suggested adding the following language, so as to put the responsibility on the lender: ''Lenders will be responsible for ensuring that appraisal values adequately reflect the actual value of the collateral.''

*Response:* The Agency agrees with the commenters that appraisals should be conducted by an independent qualified appraiser, not by a lender. Therefore, the Agency has modified the rule text to state, in part, that ''lenders are required to provide real property and chattel collateral appraisals conducted by an independent qualified appraiser.''

*Comment:* One commenter stated that appraisals should not be required prior to approval, because borrowers would have to pay cash for the appraisal with no assurance that financing would follow. The commenter recommended requiring the appraisal after the guarantee is approved, but before its issuance.

*Response:* The Agency understands the concern expressed by the commenter. In the rule, appraisals acceptable to the Agency are to be submitted with the application if they are available. If they are not available at the time the application is submitted, complete appraisals must be submitted to the Agency before loan closing.

*Comment:* Several commenters raised concerns over environmental hazards and appraisals.

One commenter requested that the requirement that appraisals include consideration of the potential effects from a release of hazardous substances or petroleum products or other environmental hazards on the market value of the property be removed. The commenter noted that an environmental assessment is already performed by USDA on the property and that for certain types of facilities local, state, and federal regulations provide for certain criteria in the handling of hazardous substances and the facilities must be built to those specifications. Another commenter stated that, because environmental assessment reports are already required, the process of identifying possible contaminants is already being performed and any potential threat would already be identified.

One commenter recommended that because appraisers are not usually experts on the scientific aspects of contamination, experts from other fields, such as appropriate regulatory authorities, be consulted to confirm the presence or absence of any contamination or potential release. Another commenter stated that this requirement is not going to be effective because appraisers are not qualified to test for or detect environmental hazards and the appraised value is based on the assumption that no environmental contaminants exist on the subject property. This commenter also noted that unless there is a quantifiable clean up cost, the appraiser cannot be expected to forecast that effect on the future market value.

One commenter stated, in general, that the present process of the lender obtaining an environmental assessment report for the proposed site and including a review of adjacent properties coupled by the NEPA review by USDA personnel would seem to be extraordinary processing. For new construction, the borrower must obtain permits from local authorities that would already include this type of review process.

*Response:* The first commenter is assuming that, under NEPA, the Agency will always conduct an environmental assessment. However, in accordance with the applicable regulation, environmental assessments are not always required especially if a project qualifies for a categorical exception. In

addition, NEPA is a Federal requirement that the Agency cannot waive. For these reasons, the Agency believes it would be inappropriate to remove this requirement from the regulation and rejects this request.

With regard to the concern expressed about the qualifications of the appraiser with regard to environmental hazards, the Agency agrees with the commenters that appraisers may lack the requisite expertise to assess environmental hazards adequately. In such instances, the Agency would expect an appraiser to seek qualified assistance or to note in the report his/her opinion on environmental hazards. However, the Agency does not believe it is necessary to address this concern in the rule.

Personal, Partnership, and Corporate Guarantees (§ 5001.16(d))

The Agency notes that provisions in the rule now include reference to partnership guarantees, although this term is not used in the following comments and responses to those comments.

*Comment:* One commenter suggested adding the following language to the end of the paragraph as follows: ''Personal and corporate guarantees. Unconditional personal and corporate guarantees are part of the collateral for the loan, but should not be considered when calculating the loan-to-value ratio.''

*Response:* The Agency agrees, in part, with the commenter's suggestion in that unconditional personal and corporate guarantees should not be considered when calculating the loan-to-value ratio if these unconditional guarantees are unsecured. The Agency believes that unconditional personal and corporate guarantees that are secured can be used to determine security of the loan. Secured, unconditional guarantees can be used in calculating the loan-to-value ratio because they are part of the security. Because unsecured, unconditional guarantees are not part of the security of the loan, they, by definition, cannot be used in calculating the loan-to-value ratio.

*Comment:* One commenter suggested that the unconditional guarantee form for personal guarantees be modified to allow for some negotiation, for example, pro-rata guarantees based on one's percentage of ownership.

*Response:* The Agency agrees with the commenter that the proposed rule was unclear on whether the unconditional guarantee is secured or not. The commenter appears to believe that such guarantees must be secured and, therefore, should be adjusted on a pro-rata basis. In the rule, the Agency has clarified the difference between secured and unsecured guarantees and believes that this clarification addresses the commenter's concern.

Design Requirements (§ 5001.16(e))

*Comment:* One commenter recommended deleting the entire design requirement because lenders do not have the expertise to certify that design requirements meet accepted practices or that the design and construction of the project conform to applicable federal, state, and local codes and requirements. The commenter also stated that by virtue of the borrower obtaining a building permit, a qualified person and/or agency has already made those determinations of qualifications.

This commenter also expressed concern with the requirement for the lender to ensure that the project is constructed within the original budget. According to the commenter, there are many times when a contractor ''comes across'' an unknown (e.g., abandoned leach line not previously identified, a finding of Native American artifacts on the site, etc.) that would necessitate a change in the overall construction budget that was beyond the control of the borrower, contractor, or the lender. All of these are examples that would necessitate a change in the overall construction budget that were beyond the control of the borrower, the contractor of the lender.

*Response:* The Agency disagrees with the recommendation to delete this requirement. Building permits may not reflect all Federal requirements (e.g., Americans with Disabilities Act). In addition, the Agency believes that lenders either have or can procure the appropriate expertise to address these requirements. Therefore, the Agency has not revised this requirement in response to this comment.

With regard to the comment concerning ensuring that the project is constructed within the original budget, the Agency agrees with the concerns expressed by the commenter. The Agency has revised the rule to state that the project will be fully constructed with the ''approved'' budget, rather than the ''original'' budget as was proposed.

*Comment:* One commenter suggested that a section should be added to require that the design consultant or an independent qualified inspector certify that the project was built in accordance with the plans and specifications as well as all applicable building codes.

This commenter suggested adding the following sentence: ''Lenders must also ensure that all projects are designed using Agency recommended environmental mitigation measures.''

*Response:* The certification that the project was built in accordance with the plans and specifications and all applicable building codes will be provided in the loan documentation. The Agency does not believe it is necessary to state such in the rule.

With regard to the suggestion to add language ensuring that all projects are designed using Agency recommended environmental mitigation measures, this is provided for in § 5001.16(h)(2) and the Agency does not believe any changes are required in this regard.

*Comment:* One commenter noted that in some rural areas, no commercial building code has been adopted by the state or local jurisdiction. The commenter stated that in the Agency's direct programs, the Agency adopts a minimum model building code standard for those areas to meet, and questioned how this issue will be addressed under a guaranteed program with lender involvement. The commenter suggested that it might be simplest to have the lender/borrower/project architect use the commercial building code adopted by the Agency rather than pick another model building code. The commenter noted that in jurisdictions where there is no officially adopted commercial building code, there would be considerable risk involved in development unless some generally recognized commercial building code is followed.

*Response:* The Agency agrees that the situation identified by the commenter needs to be addressed. The Agency has modified the rule to ''or other Agency-approved code.'' This will allow the Agency to address specific situations on a program-by-program basis. In addition, the Agency will provide additional guidance in the handbook to the rule.

Monitoring Requirements (§ 5001.16(f))

*Comment:* One commenter questioned how the Agency will monitor that the lender actually monitored construction and processed funds, ensuring that the funds are used only for eligible project costs. The commenter suggested that attendance at a final inspection could provide verification that work was adequately performed and that there is a product for the funds expended.

*Response:* The rule requires the lender to commit to monitoring construction in accordance with approved plans and specifications and to ensure that project funds are used only for Agency-approved project costs by certifying to such in the Conditional Commitment. While the Agency's general policy is not to monitor construction, either during or at a final

inspection, the Agency reserves the right to take any monitoring action for its own purposes.

Compliance With Other Federal Laws (§ 5001.16(g))

*Comment:* One commenter suggested providing a more comprehensive list that would include all the Federal laws that would apply for a loan guarantee, and suggested that the Office of General Counsel should be consulted. The commenter provided several additional laws that would also apply:

—Copeland Anti-Kickback Act (18 U.S.C. 874)
—Restrictions on Lobbying (Pub. L. 101–121, section 319)
—Suspension/Debarment requirements (7 CFR part 3017)
—Residential Lead-Based Paint Hazard Reduction Act of 1992 (24 CFR part 35)

*Response:* The Agency disagrees with the commenter that additional laws should be added to this list provided in this paragraph. An accounting of all applicable Federal laws is better addressed outside of the regulation. The Agency will consider identifying additional applicable Federal regulations in the handbook to the rule. The Agency has not revised this paragraph in response to this comment.

*Comment:* One commenter recommended verifying with the Civil Rights Staff the language about compliance reviews as being required every three years and that they end three years after the date of loan closing is correct. The commenter suggests that the correct language is more likely three years after loan payoff, because loan closing typically occurs at the end of construction and compliance reviews would end with the first review after completion of building construction.

*Response:* The Agency consulted with their Civil Rights staff in considering this comment. The last sentence of the proposed paragraph, which is what is being commented on, applies to grants and direct loans and not to guaranteed loans. However, if a guaranteed loan is combined with a direct loan or a grant, then this provision needs to be taken into account. Such situations will be identified in the handbook to the rule. Because it is not needed, the Agency has removed this sentence from the rule and further response to this comment is unnecessary.

Environmental Responsibilities (§ 5001.16(h))

*Comment:* One commenter questioned how the Agency will take responsibility for ensuring that the lender has made certain that the borrower has provided the necessary environmental information (e.g., permits), has adopted and implemented required mitigation measures, and is not taking any actions that may limit the range of alternatives (e.g., anticipatory demolition).

This commenter also suggested that the Agency take responsibility for ensuring the lender has made certain that the borrower has complied and then asked: ''How will the Agency monitor such assurances?''

*Response:* The information provided by the lender in § 5001.16(h)(1) provides the Agency with the information necessary to evaluate compliance with the requirements specified in § 5001.16(h)(2) and (h)(3). Furthermore, as proposed, the rule reflects the current practices and operation employed by the Agency and has proven adequate to protect the interests of the government.

With regard to the comment concerning the monitoring of lender's assurances that the borrower has complied, if the Agency discovers that the lender's certifications are false, the Agency may pursue debarment.

Conflicts of Interest (§ 5001.16(i))

*Comment:* One commenter questioned how a lender would identify a conflict of interest and how the Agency would monitor this lender activity.

*Response:* Lenders would identify what the Agency considers to be conflicts of interest or appearance of conflicts of interest through guidance in a handbook to the rule. With regard to monitoring the lender's identification of conflicts of interest, the lender is required to submit a written summary of its origination policies and procedures, which would describe the process to be used to identify such conflicts. The Agency would then depend on the lender to notify the Agency of conflicts. Finally, through its monitoring of the lender, including during lender visits, the Agency may discover conflicts.

Lender Responsibilities—Servicing (§ 5001.17)

*Comment:* One commenter recommended that the Agency incorporate into the rule the requirement that a lender obtain financial statements from the borrower and submit them to the Agency within 120 days (or preferable 150 days) with their written analysis and comments, as found in the existing 7 CFR 3575.69(b).

Two commenters noted that there appears to be no requirements for the borrower to provide annual financial statements to the lender. One of these commenters suggested developing a section that requires annual financial statements from the borrower prepared by a certified public accountant in accordance with GAAP.

The other commenter suggested adding the following paragraph: ''(c) Borrower financial statements. The lender must obtain and forward to the Agency the financial statements required by the Conditional Commitment and Loan Agreement. The lender must submit annual financial statements to the Agency within 120 days of the end of the borrower's fiscal year. The lender must analyze the financial statements and provide the Agency with a written summary of the lender's analysis and conclusions, including trends, strengths, weaknesses, extraordinary transactions, other indications of the financial condition of the borrower, and the borrower's current loan classification.''

*Response:* The Agency agrees with the commenters that the proposed rule did not adequately address requirements for financial statements once the guaranteed loan is in place and that such a requirement needs to be provided for in the servicing section of the rule. The Agency has determined that the requirement for financial information on borrowers can be handled in a similar fashion for all of the programs included in this final rule. Specifically, the rule contains a provision for the submittal of financial reports once the loan is in place (see § 5001.17(d), Financial reports). This provision requires regulated or supervised lenders to submit the information that would be contained in financial reports required by the lender's appropriate regulatory institution. This information would be submitted to the Agency at the same time it should be made available to the appropriate regulatory institution, unless otherwise provided in the Conditional Commitment. For other lenders, the rule requires financial reports as specified in the Conditional Commitment.

Collateral (§ 5001.17(e) (Proposed § 5001.17(c))

*Comment:* Five commenters provided comments on the requirement to obtain prior approval from the Agency. Two of the commenters stated that the requirement is ''pretty loose'' because the Agency is guaranteeing the lender against loss on 60 to 90% of the loan, and recommended that prior Agency approval be required on all releases of collateral.

Another commenter stated that this requirement is ''overreaching'' Agency needs and should be further defined and limited. According to the commenter,

lenders and borrowers need to have clear understanding of their rights and responsibilities and must be free to run their business, service their loans, and conduct normal business transactions without Agency review. Above a point certain, defined early in the processing, sure, the lender should approach the Agency. But this section needs to identify what that demarcation line is, not leave it completely open-ended and unilateral.

One commenter stated that it is not clear how the lender is to know when prior Agency approval is required. Another commenter recommended a dollar threshold of $20,000 for when the Agency may require Agency approval prior to releasing collateral, and that any release for more that that would require prior Agency approval.

*Response:* In considering these comments, the Agency has rewritten parts of this paragraph to clearly identify those situations in which the Agency will not require prior approval. Those instances are where the proceeds are used to pay down debt in order of lien priority, or to acquire replacement equipment, or where the release of collateral is made under the abundance of collateral provision of the security agreement. In all other instances, the Agency will require written approval.

*Comment:* Two commenters stated that there are instances where a lender will take a lien on collateral as ''additional security'' to be released later without monetary consideration under certain specified conditions. Therefore, the commenters recommended that the rule allow a lender such flexibility subject to USDA's prior written concurrence. A third commenter stated that the proposed regulation on the release of collateral is too restrictive on the lender. This commenter suggested that maximum flexibility should be allowed for application of sale proceeds, as long as the lender and USDA can agree.

*Response:* In order to manage the risk inherent in the Agency's portfolio of guaranteed loans, the Agency has provided significant flexibility in certain instances as identified in the rule (§ 5001.17(e)) and will consider all other releases on a case-by-case basis and provide written approval as appropriate.

Transfers and Assumptions (§ 5001.17(f)) (Proposed § 5001.17(d))

*Comment:* One commenter recommended adding the following language to proposed § 5001.17(d)(2)(i): ''While a transfer and assumption is a loan servicing action, it is subject to an Agency review of its credit quality, and must be in compliance with published eligibility requirements set forth in this subpart. This would normally require submitting a new application; business plans with pro forma balance sheets, 2 years projected balance sheets and income statement, in addition to the lender's financial analysis of the new business and current guarantor financial statements.'' The commenter noted that, if this is not published, how will lenders know to submit this information when processing a transfer and assumption.

*Response:* As proposed and as retained in the rule, any time a third-party assumes a loan guarantee under this part, the loan guarantee will be processed and approved by the Agency as if it were a new loan guarantee application. This means that the assumption will be subject to a review of the credit quality and compliance with the eligibility requirements of the rule, just as would a new loan guarantee application. Therefore, there is no need to revise the rule as suggested by the commenter. The Agency will provide additional guidance on this point in the handbook to the rule.

*Comment:* One commenter recommended deleting the transfer and assumption fees because the loan guarantee program already obtains an annual renewal fee from each lender and an additional fee would be an undue burden on the lender.

*Response:* The Agency has not adopted the suggestion made by the commenter to delete the provision for transfer and assumption fees. The Agency notes that the rule does not require the Agency to charge such fees, but that they are optional. If, in the future, the Agency determines that such fees adversely affect the programs, the Agency will either stop charging such fees or make an adjustment to them.

Mergers (§ 5001.17(g)) (Proposed § 5001.17(e))

*Comment:* Ten commenters requested that the Agency not be allowed to withdraw the guarantee when a borrower participates in a merger.

Several commenters pointed out that current Business and Industry regulations establish that a borrower cannot participate in a merger without prior approval of the lender and USDA. One commenter stated that, under the existing regulation, lender documents contain language that the borrower cannot participate in a merger without prior approval by the Bank and USDA.

One commenter noted that it is possible for borrowers to participate in mergers without lender knowledge and suggested that a more reasonable and equitable solution would be to require prior Agency approval for mergers or the Agency would have a case for negligent servicing. The commenter also wondered why this action is being singled out.

One commenter stated that the merger of a company should not be grounds for the guarantee being withdrawn, and recommended that the current regulations requiring the lender to obtain approval from the Agency for a merger remain.

One commenter stated that if the Agency can withdraw the guarantee for something as simple as a borrower merger, the lender will fear the Agency can withdraw the guarantee at every chance it gets. The commenter pointed out that a borrower merger is out of the control of the lender and the lender cannot and should not be penalized if the borrower decides to merge with another company and not seek permission from the lender and USDA prior to the merger. According to the commenter, one withdrawal would ruin the reputation of the program and then asked ''What would become of the innocent holders in this scenario?''

Three commenters stated that this will be detrimental to the borrower, the lender, and the secondary market, is not borrower, lender, or secondary market friendly, and would reduce the number of borrowers, lenders, and investors interested in the programs.

Another commenter said that this is unduly harsh. According to the commenter, a borrower could merge without the permission or knowledge of the lender, notwithstanding contract requirements prohibiting such an act. The commenter stated that the risk that such an event could occur is one which is shared by both the lender and the guaranteeing agency and that the partnership between our bank and various agencies offering federal guarantees has always been one of partnership, with each of us assuming our share of the risks associated with lending. This provision represents a significant preference in favor of the guaranteeing agency, a circumstance which is a major departure from our historical sharing of risks and responsibilities.

One commenter stated that this provision would cause major problems with the lending and secondary market. The commenter noted that the guarantee is supposed to be a full faith in credit guarantee from the Agency to the secondary market note holder. According to the commenter, this proposed paragraph should be eliminated because no mergers can occur without the prior written consent

of the Agency or Lender and it places a great burden on lenders and secondary note holders.

*Response:* In considering the comments submitted, the Agency has revised the provision that would have allowed the Agency to withdraw a guarantee in situations where a borrower participates in a merger. This provision was intended to help ensure that the merger did not result in a less desirable borrower (i.e., one who might not be able to repay the loan). The Agency agrees that withdrawal of the guarantee is not the best way to help avoid this outcome. Instead, the Agency is requiring that both Agency and lender approval is required prior to a borrower participating in a merger. In this fashion, both the Agency and the lender will discuss the proposed merger and evaluate the quality of the new borrower.

In addition, the Agency recognizes that a borrower may participate in a merger without notifying its lender or the Agency. To help address this situation, the Agency has added a provision to the rule that requires the lender to accelerate the loan if a borrower merges without prior Agency approval, unless subsequently agreed to by the Agency in writing.

Subordination (§ 5001.17(h)) (Proposed § 5001.17(f))

*Comment:* Seven commenters expressed concern over the one-year time frame.

One commenter noted that most banks are now trying to set up operating lines of credit for two to three years, and to have to go back to the USDA every year would be counterproductive and inefficient. Another commenter stated that to have to approve subordinations every year for lines of credit is burdensome and that consideration should be given to extending this for a longer period.

One commenter pointed out that lines of credit are often extended for periods of three to five years and suggested that the rule allow for subordination on working assets (A/R and inventory) for more than up to at least three years. Another commenter recommended that the rule allow subordination on working assets for more than one year, noting that flexibility to approve multi-year subordinations is appropriate and beneficial to the borrower. Two commenters suggested that this provision should allow three to five years, with one commenter stating that the one-year limit may not allow the company to operate past the one-year time frame.

One commenter stated that limiting subordination of term debt to one year for a revolving line of credit has never been a good or workable policy. This commenter questioned if the lender can trust USDA to be reasonable with this, and if the subordination is not continued, what happens to the line of credit's lien position and what does this do to the borrower's ability to operate the business. The commenter stated that the subordination should be automatic if the line is renewed at the same level from year to year.

*Response:* After considering the reasons cited by the commenters, the Agency agrees that one year is too short a time frame. The Agency has replaced the one-year time frame in the rule such that the subordination of line of credit cannot extend the term of the line of credit and cannot be more than three years under any circumstances.

*Comment:* One commenter stated that it is reasonable for the Agency's financial interests to be maintained, but that it is not reasonable to require the Agency's financial interests to be enhanced by subordination. The commenter also stated that it is not reasonable to require the loan to remain adequately secured if it was not adequately secured before the subordination. According to this commenter, the Agency should not be in a worse position as a result of subordination.

A second commenter urged the Agency to incorporate the current regulation, which states that the subordination must enhance the borrower's business and the Agency, into the proposed rule.

*Response:* The Agency considered the two commenter's comments on the relationship of the subordination to the Agency's interest, including the provisions in the current regulation. The Agency agrees that the proposed provision that the Agency's financial interest be enhanced was not reasonable, but that the Agency should not be in a worse position as a result of subordination. The Agency has revised the rule to require that the subordination ''be in the best financial interest of the Agency.''

With regard to the comment concerning the proposed requirement that the loan ''remains adequately secured,'' the Agency has determined that this requirement does not need to be spelled out in the rule, because the relationship of collateral to the loan is inherent in the requirement that the subordination be in the best financial interest of the Agency. Thus, the Agency has removed this provision from the rule.

Repurchases From Holders (§ 5001.17(i)) (Proposed § 5001.17(g))

*Comment:* One commenter suggested adding language requiring Agency concurrence when a holder objects to selling its interest in a loan to the lender. The commenter noted that, in some cases, the holder is not asked if they would concur in the servicing action and that they have handled calls from holders that object to selling their interest so the lender can complete simple servicing actions that the holder would not oppose. The commenter stated that this becomes increasingly objectionable when the notes are repeatedly sold by the lender at a premium and repurchased at par.

*Response:* The Agency agrees with the concern expressed by the commenter about a holder who objects to selling its interest in a loan to the lender. The Agency has revised this provision to require that both the lender and the Agency (rather than either the lender or the Agency as was proposed) must determine that the repurchase is necessary to protect the loan. This change prevents a lender from making the sole determination of when to effect a repurchase and should adequately address the commenter's concern.

*Comment:* One commenter stated that provisions should be expressly added to the requirements for repurchases from holders that when a borrower cures the default and the loan returns to performing status, the Agency is allowed to resell the guaranteed portion back to the lender at par value, whereupon the guaranteed portion could be further sold by the lender back into the secondary market. The commenter believed that this would result in considerable administrative savings to the Agency.

*Response:* In considering this comment, the Agency discussed with the Treasury Department what, if any, constraints there are associated with the Agency reselling a repurchased loan. Based on this discussion, the Agency has found that it is prohibited from reselling any repurchased loan except under the Business and Industry guaranteed loan program. Therefore, the Agency has accepted the comment as it applies to the Business and Industry program, but cannot accept it for the other programs. The Agency has added a provision to subpart B of the rule (§ 5001.103(i)) to provide for the reselling of repurchased Business and Industry guaranteed loans, without recourse to third-party private investors. In making this provision, the Agency notes that its exposure is not increased because the Agency will pay to the

lender under the guarantee no more than the guaranteed principal and the guaranteed interest regardless of any advances made.

Additional Expenditures and Loans (§ 5001.17(j)) (Proposed § 5001.17(h))

*Comment:* Five commenters suggested dropping the requirement for Agency concurrence. Two of the commenters stated that the requirement for Agency approval on all additional expenditures is not needed unless the expenditure or loan will violate one or more of the loan covenants of the borrower's loan agreement.

Two other commenters stated that lenders should be allowed to extend unguaranteed loans without USDA concurrence, provided any USDA guarantee loan's collateral position is not altered and the borrower is current and performing as agreed. One of these two commenters added that the proposed requirement may limit the future growth and needs of the borrower, and the other commenter added that the requirement is cumbersome and intrusive.

Finally, the fifth commenter suggested that the Agency not be involved in a lender's decision to make additional loans to the borrower outside the guarantee by revising the rule by being silent on this issue. According to the commenter, a lender follows its own internal guidelines and prudent lending practices, and if the lender violates its own policies and procedures, the Agency would have a case of negligent servicing. In addition, the commenter believed that it would be difficult to support a decision to prohibit a lender from extending additional credit.

*Response:* The Agency agrees that Agency approval for all additional expenditures and loans is not required, but need only be required when such expenditures or loans would violate the borrower's loan agreement. Therefore, the Agency has revised the provisions to indicate that the lender may make additional expenditures without Agency approval unless the expenditure or loan will violate one or more of the loan covenants of the borrower's loan agreement. While the Agency agrees that making additional loans to the borrower outside the guarantee could serve as a basis for negligent servicing, the Agency disagrees that it is appropriate to be ''silent on this issue.'' By making the change to the rule as indicated, the Agency has narrowed the situations in which approval is required.

*Comment:* One commenter recommended revising this paragraph to require Agency approval only on loans involving large-scale expenditures or loans. According to the commenter, requiring Agency pre-approval on every single loan or increase on line of credit is an undue burden on the lender, the Agency staff, and the borrower.

*Response:* As noted in the response to the previous comment, the Agency has modified the provisions of this paragraph to require Agency approval only when the additional expenditure or loan would violate one or more of the loan covenants of the borrower's loan agreement and not for all additional expenditures and loans, as was proposed. As rewritten, the Agency believes its approval is necessary whenever a violation of the borrower's loan agreement would occur, regardless of the size of the additional expenditure or loan.

Lender Failure (§ 5001.17(k)) (Proposed § 5001.17(i))

*Comment:* One commenter asked if no successor entity can be determined in the event of a lender failure, does the Agency have the right or legal authority to enforce the provisions of the loan documents on the lender's behalf.

*Response:* The Agency agrees that the situation identified by the commenter was not adequately addressed in the proposed rule and should have been. Therefore, the Agency has revised the rule to address situations where the lender ceases servicing the loan.

Delinquent Loans (§ 5001.17(l)) (Proposed § 5001.17(j))

*Comment:* One commenter asked why the lender has to coordinate this with the Agency at this time and suggested that the lender should be allowed to service the loan and advise the Agency as to what is being done.

*Response:* The Agency agrees with the commenter that allowing the lender to implement appropriate curative actions for loans that are delinquent more than 30 days in accordance with its policies and procedures is sufficient and does not require coordination with the Agency and has removed this requirement from the rule. The Agency also revised the text to remove reference to coordination with the borrower because the text is unnecessary. The rule requires the lender to notify the Agency when a loan's classification has been downgraded (§ 5001.4(b)(3)(iii)) and the Agency believes that this is sufficient notice in adverse situations.

Protective Advances (§ 5001.17(m)) (Proposed § 5001.17(k))

*Comment:* Four commenters provided comments on the level at which Agency approval of protective advances would be required.

One commenter stated that, because protective advances are covered by the guarantee, this is a significant increase in risk to the government, and expressed concern that the subsidy calculations did not consider this additional exposure.

Another commenter also expressed concern about the increase in risk to the government, stating that allowing a lender to advance $200,000 of protective advances without concurrence from USDA is too large a sum, exposing the Government to significant additional losses. This commenter suggested that a more reasonable standard would be to require prior concurrence from USDA whenever cumulative advances exceed $25,000, and added that certain protective advances should be exempted from this cumulative total and should be authorized without USDA concurrence because they are clearly essential in preserving collateral (e.g., the payment of delinquent property taxes).

On the other hand, another commenter stated that increasing protective advance expenditures to $200,000 without pre-approval is a good change and should remain.

*Response:* In consideration of these comments, the Agency has not changed the level associated with protective advances for which Agency approval is required. Being a higher level than suggested by the commenter, there is no need to identify exceptions, such as the payment of delinquent property taxes. The Agency does not believe that the proposed levels increase Agency exposure because the Agency will pay to the lender under the guarantee no more that the guaranteed principal advanced to or assumed by the borrower and any interest due.

*Comment:* One commenter recommended that the following language should be added:

''(a) The maximum loss to be paid by the Agency will never exceed the original principal plus accrued interest regardless of any protective advances made.

(b) Protective advances and interest thereon at the note rate will be guaranteed at the same percentage of loss as provided in the Loan Note Guarantee.

(c) Protective advances must constitute an indebtedness of the borrower to the lender and be secured by the security instruments.''

*Response:* The Agency agrees with the commenter that these provisions are useful in ensuring protective advances are considered appropriately under this rule and has added these provisions to the rule. Specifically, the rule includes

the second and third suggestions in § 5001.17(m)(4) and (6). The Agency has incorporated the commenter's first suggestion in § 5001.17(m)(7), although this maximum loss provision is slightly different than as suggested.

Liquidation (§ 5001.17(n)) (Proposed § 5001.17(l))

*Comment:* One commenter stated that a much more detailed section on liquidation is needed, as the guidance provided is scattered and incomplete. The commenter recommended adopting the rules used by the USDA FSA's guaranteed loan program (see 2–FLP paragraph 14; 7 CFR 76.149), because, according to the commenter, FSA has had more experience with liquidations and loss claims and its regulations are more developed and thorough, as a result. The commenter then pointed out that FSA's rules are well-accepted by the agricultural lending community, which constitutes a significant share of Rural Development guaranteed lenders as well.

*Response:* As described earlier in this preamble, the Agency has added some additional requirements to this part of the interim rule. The Agency believes these additions, in conjunction with the Agency's intent to use the handbook to provide additional guidance on liquidation, are sufficient to meet the commenter's concerns.

*Comment:* Two commenters provided comments related to the last sentence in the introductory text to proposed § 5001.17(l). The commenters questioned that, if the Agency concludes that liquidation is necessary, why would the security instruments be assigned to the Agency, especially because the lender is required to liquidate the collateral. The commenters suggested that this section be rewritten.

*Response:* The proposed rule should have stated that, once the lender has assigned the security instruments to the Agency, the Agency, not the lender, will liquidate the loan. The Agency has modified proposed § 5001.17(l) accordingly (*see* § 5001.17(n)).

*Comment:* One commenter disagreed with the 30-day suspension period in proposed § 5001.17(l)(1), stating that rapid action is critical in liquidations. The commenter suggested that:

(1) Liquidation should be allowed upon approval of the liquidation plan by the Agency;

(2) The Agency should be required to approve or disapprove the lender's liquidation plan within five working days (not 30);

(3) Although liquidation appraisals should be required as part of the liquidation planning process, they should not be absolutely required for liquidation plan approval, provided they are obtained prior to the completion of the liquidation; and

(4) The Agency should continue the process of splitting the cost of liquidation appraisals and the authority for doing this should be spelled out here.

*Response:* The Agency considered each of the commenter's suggestions for revising the proposed requirements for the liquidation plan. The Agency agrees with each of the commenter's suggestions, except for the suggestion that approval or disapproval be provided with five working days, rather than 30 working days. The 30-day period proposed was not and is not intended to be a suspension period, but was proposed to allow the Agency sufficient time to review the final liquidation plan and to either approve or disapprove it. The Agency anticipates that its decision on liquidation plans could take less time and, when possible, will do so.

With regard to the commenter's other three suggestions, the Agency agrees and has modified the rule text to incorporate each suggestion. Specifically, if the outstanding principal loan balance including accrued interest is more than $200,000, the lender is required to obtain an independent appraisal report on all collateral securing the loan, which will reflect the current market value and potential liquidation value. All appraisals must meet the requirements set forth in the USPAP. If an environmental assessment of the property is necessary in connection with liquidation, the cost will be shared equally between the Agency and the lender.

Loss Calculations and Payment (§ 5001.17(p)) (Proposed 5001.17(n))

*Comment:* One commenter stated that the paragraph discussing loss calculations and payment needs expansion to enable the lender to liquidate the collateral to establish the final loss. The commenter pointed out that lenders take title to collateral through, but not limited to, foreclosure process, deed in lieu of foreclosure, and bankruptcy process. The lender then liquidates the collateral and prepares final loss settlement as per proposed § 5001.17(n)(3).

*Response:* The Agency disagrees with the commenter that § 5001.17(p) (in the rule), Loss calculations and payment, needs to be expanded as suggested. The text in § 5001.17(p) does not prohibit the lender from liquidating collateral (liquidation is covered in § 5001.17(n)). In addition, the methods identified by the commenter on how lenders may acquire title to collateral does not need to be addressed in the rule, but can be, as the Agency intends to do, covered in the handbook to the rule. Therefore, no changes have been made to the rule text in response to this comment.

*Comment:* Three commenters requested the Agency reconsider proposed § 5001.17(n)(3)(i) with regard to how the value of collateral obtained would be determined when calculating loss. Two of the commenters noted that the proposed rule states that the loss will be calculated based on the value of the collateral at the time the lender obtains title, but does not provide guidance on how the value of the collateral is to be determined. These commenters then asked: If an appraisal is obtained, would the Agency use the market value or liquidation value?

The third commenter stated that the statement that loss should be based on collateral value is too vague, and suggested that the loss should be expressly based on the appraised liquidation value.

*Response:* After considering these comments, the Agency has revised § 5001.17(p)(5)(i) to reflect that the collateral's value for purposes of determining loss claim will be based on the liquidation value of the collateral.

*Comment:* One commenter suggested that proposed § 5001.17(n)(3)(iii) state that the lender will request an estimated loss payment when liquidation is expected to exceed 90 days when a loss is anticipated. According to the commenter, such a provision would stop the interest accrual covered by the guarantee.

The other commenter stated that, except in the case of bankruptcy-related losses, estimated loss claims should be required on all liquidations that will take more than 90 days to complete.

*Response:* The Agency agrees with the suggestion that, when a loss is anticipated, the lender must submit an estimated loss claim to the Agency when liquidation is expected to exceed 90 days. In addition, the Agency has revised the rule to make clear that, once the liquidation plan has been approved by the Agency, no more than an additional 90 days of accrued interest will be payable.

Borrower Responsibilities (§ 5001.25)

*Comment:* One commenter suggested that § 5001.25(a)(3) be divided into two separate items. The commenter pointed out that consumer affairs is not related to protection of the environment, and, if anything, protection of the environment should be coupled with land use and zoning. The commenter stated that the

borrower should be prepared to supply both the lender and the Agency with a copy of all environmental permits and/or status of securing such permits as early in the planning process as possible.

*Response:* The Agency has not divided § 5001.25(a)(3) into two separate paragraphs as there is no substantive benefit obtained in doing so.

With regard to the comment concerning environment permits and the status of securing such permits, the rule requires borrowers to obtain all permits, which would include all applicable environmental permits, under § 5001.25(b). As the Agency has the right to request the permits at any time for any project if permits may be a concern, the Agency agrees that such permits should be obtained as early as possible, but that it is not necessary to include such language in the rule.

*Comment:* One commenter noted that, regarding § 5001.25(d), the Agency's contract is with the lender, not the borrower. The commenter questioned what gives the Agency the right to access the borrower's records, and also asked if the borrower shouldn't have to sign something acknowledging this?

*Response:* Because borrowers are, at a minimum, third-party beneficiaries, the Agency has the right to access the borrower's records. While it is normal Agency practice for the Agency to work through lenders, the Agency may find it necessary to go to the borrower's records, especially in the case of a NAD appeal brought by the borrower. Finally, Form RD 5001–3 contains borrower certifications, which include acknowledgement of records access.

**Basic Guarantee and Loan Provisions**

*General (§ 5001.30)*

*Conditions of Guarantee (§ 5001.30(b))*

*Comment:* One commenter noted they recognize that the proposed regulation has retained the requirement found in the existing programs that the guarantees issued will be ''guarantees of loss'' rather than ''guarantees of payment''. We observe that most commercial guarantees today guarantee payment, rather than performance, to attract lenders when guarantees are needed. While a guarantee of payment may not be generally suitable for the Agency's loan programs, the selective use of a guarantee of payment by the Agency should be considered.

*Response:* The Agency has not changed the rule as requested by the commenter. The rule implements current practice, which is the Agency's intent, and to modify it as suggested by the commenter would increase the cost to the program. Therefore, the Agency has not accepted the commenter's suggestion.

*Comment:* Twenty six commenters provided comments in opposition of the proposal that ''the guaranteed portion would be paid first and be given preference and priority over the unguaranteed portion'' of loans. These commenters stated that the Agency should continue its current regulation that establishes ''the unguaranteed portion of the loan will neither be paid first nor given any preference or priority over the guaranteed portion''. The commenters also expressed their belief that the ''first loss'' proposed change would likely effectively kill the Business and Industry and CF guaranteed loan programs. Two commenters stated that this ''pari passu'' issue negates any material value of the guaranty by putting the lender more at risk than the agency and that it would also cloud any decisions in the liquidation process in favor of the agency.

*Response:* The Agency agrees with commenters and revised the rule to adopt the prior methodology, which provides that the unguaranteed portion of the loan will neither be paid first nor given any preference or priority over the guaranteed portion.

Full Faith and Credit (§ 5001.30(c))

*Comment:* One commenter noted that § 5001.30(c)(1) states that any Loan Note Guarantee or Assignment Guarantee Agreement relating to a note which provides for payment of interest on interest is void. The commenter stated that this appears inconsistent with full faith and credit provisions.

Another commenter stated that USDA should better define the prohibition against payment of interest on interest to include elevated default interest charges that apply to the entire loan. The commenter stated that USDA should not include language that voids a guarantee on a note that contains such prohibited interest on interest charges. The commenter further stated that USDA should never threaten to void a guarantee for anything short of fraud and misrepresentation and that if prohibited interest on interest is found after the fact, the loss occasioned by the prohibited charges should be negotiated downward, but no one should have the right to void the guarantee for what could be an oversight of the lenders standard note language.

*Response:* In response to the comment that § 5001.30(c)(1) appears to be inconsistent with full faith and credit provisions, the Agency points out that full faith and credit only applies on terms that the Agency has agreed to guarantee and that the Agency has not agreed to insure interest-on-interest. Therefore, there is no inconsistency.

With regard to the comment concerning elevated default interest changes, the Agency does not consider elevated default interest charges to be interest-on-interest and, therefore, would not void the guarantee. As otherwise provided in the rule, the Agency requires all rates to be reasonable (reasonable rates and terms apply). The Agency does agree that the rule needs to be revised with regard to the voiding of the guarantee attached to or relating to a note that provides for payment of interest-on-interest. The Agency has revised the rule (see § 5001.30(c)(1)) to state that ''any claim against a Loan Note Guarantee or Assignment Guarantee Agreement attached to, or relating to, a note that provides for payment of interest on interest will be reduced to remove interest on interest.''

Soundness of Guarantee (§ 5001.30(d))

*Comment:* One commenter noted that § 5001.30(d) requires all loans to be financially sound and feasible, with reasonable assurance of repayment, and suggested adding a less subjective requirement by also requiring all loans to meet or exceed the characteristics of a loan classified Special Mention by the Uniform Classification System as defined by the Agency, with no consideration being given to the guarantee.

*Response:* The Agency does not accept the suggestion to replace the current language with a requirement that loans meet or exceed the characteristics of a loan classified as Special Mention. The Agency's intent is to provide general requirements in subpart A that will be common to all programs included in the rule as well as to programs that may be added in the future. In addition, the Agency believes that the commenter's suggestion is effectively provided for by revising subpart B for the Business and Industry guaranteed loan program in accordance with the following comment.

*Comment:* Two commenters stated that the last sentence of 7 CFR § 4279.101(b) should be added to § 5001.30(d) for Business and Industry loans. The sentence reads: '' It is not intended that the guarantee authority will be used for marginal or substandard loans or for the relief of lenders having such loans.''

*Response:* The Agency agrees with the commenters that this provision in the current Business and Industry guaranteed loan regulations should have

been included in this rule. Therefore, the Agency has modified subpart B for the Business and Industry program to include the suggested text (see § 5001.103(j)(1)).

*Reduction of Loss Claims Payable (§ 5001.30(f))*

*Comment:* One commenter stated that § 5001.30(f) appears to give USDA much more opportunity to reduce the guaranty once a loan is in liquidation; therefore, pushing more of the risk back to the lender. The commenter recommended the rule regarding reduction of loss claims not be changed and that the current rule of bad faith or gross negligence be retained.

Another commenter recommended deleting the negligent loan origination criteria and providing a clearer definition for loan origination. The commenter stated that the burden of possibly repaying the Agency for loss claims paid under the guarantee is of utmost concern for continuation by lenders in the program. The commenter further stated that a repayment to the Agency should be limited only to those instances where a lender commits fraud.

*Response:* With regard to the comment concerning the current rule of bad faith or negligence be retained, the Agency notes that there is no standard currently for bad faith or negligence.

With regard to the concerns expressed concerning negligent loan origination, as proposed, the only change that this paragraph made to existing rule text was to clarify that negligent loan origination can be a cause for reducing the guarantee. The proposed rule implements current practice and, thus, the Agency disagrees that this paragraph results in putting more risk back on the lender. To delete negligent loan origination from the rule would eliminate lender negligence as a cause for reducing the guarantee and the Agency disagrees with this result. Therefore, the Agency has retained this paragraph as proposed.

*Guaranteed Loan Requirements (§ 5001.31)*

*Interest Rates (§ 5001.31(a))*

*Comment:* One commenter suggested that USDA clarify that interest rates, interest rate caps, and incremental adjustment limitations will be negotiated between the lender and the borrower and will be subject to Agency concurrence. The commenter also suggested that the rule should state that interest rate caps (annual and lifetime) and incremental adjustment limitations are required by the Agency in order for the lender to offer some long term stability to the borrower and the proposed facility. The commenter stated that because the revenues of facilities operated by non-profit organizations and public bodies are quite often largely dependent on State and Federal payments and user fees that cannot be readily increased on short notice, it is vital to the success of these types of community projects that they have some built in parameters to prevent sudden or substantial long term interest rate increases.

Another commenter stated that prepayment penalties are a common practice in Business and Industry loans and suggested adding language stating that they are also a matter of negotiation between the lender and applicant.

*Response:* The Agency agrees with the commenter's suggestion that the interest rates, interest rate caps, and incremental adjustment limitations negotiated between the lender and the borrower be subject to Agency concurrence and has modified this paragraph in the rule accordingly. The Agency will also provide additional guidance in the negotiated rate section of the handbook for this rule.

With regard to the commenter's suggestion that the rule state that interest rate caps (annual and lifetime) and incremental adjustment limitations are required by the Agency in order for the lender to offer some long term stability to the borrower and the proposed facility, the Agency plans on addressing this in the handbook for the rule. Thus, no changes were made to the rule in response to this suggestion.

Lastly, with regard to the suggestion to add language stating that prepayment penalties are also a matter of negotiation between the lender and applicant, the Agency does not believe it is necessary to address this specific matter in the rule. The rule does not preclude the lender and the borrower from negotiating and adopting prepayment penalties and the Agency does not believe it is necessary to interject itself in such matters. Therefore, the Agency has not revised the rule in response to this suggestion.

*Comment:* One commenter noted that, currently, USDA guaranteed loans with a variable rate cannot vary more often than quarterly and that the proposed rule seemingly would allow daily variable rates. Another commenter stated that the Agency should allow for interest rate adjustments as often as the lenders desire; which is typically whenever the Prime rate changes (or other index used). Another commenter stated that variable interest rate adjustments due to changes in the base rate should not be allowed to occur more frequently than quarterly, while another commenter recommended that changes not be allowed more often than monthly.

*Response:* As proposed, the rule allowed the lender and borrower to negotiate interest rate adjustments as often as desired. The Agency has the opportunity to consider the rates, terms, frequency of adjustment, etc., when the Agency issues the Loan Note Guarantee. Thus, there is no need to provide a specific rate of adjustment in the rule and the Agency has not modified the rule to specify a specific rate of adjustment.

*Comment:* One commenter noted that § 5001.31 requires the lender to provide the Agency with the overall effective interest rate for the entire loan for variable rate loans and questioned why the Agency cares about the effective interest rate, and what would be done with the information.

*Response:* The Agency agrees that providing the overall effective interest rate does not need to be included in the rule and has removed this requirement from the rule.

*Interest Rate Changes (§ 5001.31(b))*

*Comment:* One commenter noted that proposed § 5001.31(b)(2) prohibits increases in interest rates except for normal fluctuations in variable rate notes. The commenter stated that the intent of this prohibition is not clear and questioned whether it is attempting to protect the borrower from lender actions. The commenter suggested not limiting or prohibiting customary lender practices, including increases in interest rates that are clearly disclosed in the loan documents and the lender underwriting and servicing policies and procedures.

*Response:* The Agency agrees that the proposed rule text was too limiting. The Agency has revised the rule to allow increases in interest rates that are permitted in the loan documents (see § 5001.31(b)(3)).

*Comment:* One commenter recommended amending the prohibition on the increase in interest rates. The commenter noted that there are times when a borrower continues to negotiate with the lender and a variable rate is changed to a fixed rate. A fixed rate option is generally at a higher initial rate; however, the borrower sometimes feels more comfortable for long-range planning with the fixed rate. This rule would prohibit what could be a borrower's request.

*Response:* The Agency agrees with the commenter and has revised the rule to allow the situation described by the commenter (§ 5001.31(b)(3)).

*Comment:* One commenter stated that interest rate sensitivity should have been considered in the project's evaluation by the Agency and, thus, there should be no requirement to get a written concurrence to adjust the rate when it was proposed and approved as variable. The commenter stated that this requirement is excessive, onerous, and unnecessary and that it subjects the Conditional Commitment to uncertainty as a rate change may not be approved by the Agency.

Two commenters stated that proposed § 5001.31(b) should state that normal variable rate fluctuations do not need to be approved by the Agency.

*Response:* The situations described by the commenters concern changes to variable interest rates. Variable interest rates are required in the rule to be tied to an index. When there is a change in the base rate of that index, the Agency agrees with the commenters that Agency concurrence is not needed—this is a normal fluctuation in the variable rate. Thus, the Agency has revised the rule to provide this exception to the requirement for Agency concurrence (§ 5001.31(b)(3)). The Agency still believes that it is necessary for it to provide concurrence if the change to the variable interest rate is, for example, from ''prime plus one'' to ''prime plus three.'' This type of change in the spread of the variable interest rate would still require Agency concurrence in the rule. In addition, changes in fixed interest rate loans would also still require Agency concurrence.

*Term Length (§ 5001.31(c))*

*Comment:* Three commenters stated that the term length provision is too flexible in allowing the lender to set the maximum term, ultimately only insisting that the term not exceed 40 years and that loan purposes should have stated maximum term limits, as they currently do in the Business and Industry program. Two commenters recommended: 30 years for real estate, 15 for machinery and equipment, and 7 for working capital. One commenter stated that loan terms for Business and Industry loans, except for those to municipalities, should be limited to 30 years. Another commenter recommended 7 years for working capital, 20 years for the useful life for equipment, and 40 years for real estate projects. This last commenter also stated that debt refinancing should be tied to the type of collateral used for the loan.

*Response:* The Agency has determined not to provide more specific term limits in the rule, as requested by the commenters, in order to provide flexibility. With regard to tying debt refinancing to the type of collateral used for the loan, the Agency believes that the rule is sufficient to allow the Agency to provide specifics in the handbook to the rule. Therefore, the Agency has not modified the rule in response to these comments.

*Loan Schedule and Repayment (§ 5001.31(d))*

*Comment:* One commenter noted that § 5001.31 requires the lender to incorporate the provision for adjustment of payment installments into the Note when variable rate notes are used. The commenter stated that this is, presumably, to eliminate the possibility of a balloon payment and the possibility that the Agency would have to pay a loss. The commenter suggested that balloon payments be permitted. The commenter also stated that if a lender is not satisfied with a borrower's performance at the end of the term, and wishes to call the note and possibly liquidate the collateral, it is not clear why the Agency should interfere. The commenter stated that this would likely expedite the acceleration and liquidation process, and possibly reduce loss exposure. The commenter also pointed out that FSA permits balloons, and has good experience with it.

*Response:* The agency remains concerned with allowing balloons under its guaranteed loan programs because balloons can cause hardship on the borrower/business and create agency risk and exposure. Therefore, the agency has not modified the rule as suggested by the commenter.

*Maximum Loan Amounts (§ 5001.31(e))*

*Comment:* Two commenters noted that § 5001.31(e) states the maximum amount that may be guaranteed will be determined on a program-by-program basis and will be published each year in the **Federal Register**. The commenters questioned the need to publish this information when the maximum loan amount is contained in proposed § 5001.101(e)(1) for Community Facilities and proposed § 5001.103(g)(3) for Business and Industry. A third comment similarly asked why publish in accordance with § 5001.31(e) when the limit is found in proposed § 5001.101(e)(1).

*Response:* The provisions in subpart B provide the ''default'' maximum loan amounts for these two programs. The program offices for these two programs may determine that they wish to impose a lower maximum loan amount in a given year. The provision for the annual **Federal Register** notice allows these two programs to reduce their maximum funding limits in any fiscal year. Therefore, the rule retains the paragraph questioned by the commenters.

*Maximum Percent of Guarantee (§ 5001.31(f))*

*Comment:* One commenter stated that, as proposed, if the low documentation application is from a lender who does not have preferred status, the maximum percent guarantee that the Agency will consider for that loan is 10 percentage points lower than for a full documentation application. The commenter stated that this change may have a negative effect in encouraging new lenders to participate in the program. According to the commenter, new lenders usually find the numerous requirements of the guarantee program to be intimidating and, with a reduction in guarantee, may consider the program too burdensome for participation. The commenter stated that the guarantee is attractive to lenders who may not be able to participate in certain projects, for a variety of reasons, even though they would be sound loans, and concluded that the reduction in guarantee will act as a deterrent in this situation.

*Response:* As noted in this preamble, the Agency has revised the rule to require all approved lenders to submit ''full documentation'' applications and, in addition, the Agency is removing the proposed rule provisions for ''low documentation'' applications. As a result, there is no longer a need for the accompanying 10% reduction in guarantee provision. The rule has been changed to reflect this.

*Comment:* One commenter stated that the guarantee percentages should be different when comparing the four programs because of the significance of infrastructure versus development; non-profit/municipality vs. for-profit. Another commenter recommended standardizing the guaranty percentages and suggested a consistent 80% regardless of loan size.

*Response:* With regard to the comment that the guarantee percentages should be different when comparing the four programs because of the significance of infrastructure versus development; non-profit/municipality versus for-profit, the Agency notes that the proposed rule did this and has been retained in the rule.

With regard to the comment recommending standardizing the guaranty percentages and suggesting a consistent 80% regardless of loan size, the Agency disagrees with the recommendation and suggestion. Because different projects have different risks, the Agency uses adjustments in guarantee percentage as a mechanism to address project risk. In the context of

managing risk inherent in individual loan programs, including changes to a program subsidy scoring, the Agency, therefore, rejects the comment and the suggestion.

*Fees (§ 5001.31(g))*

*Comment:* One commenter expressed concern that the renewal fee can be changed annually, with no parameters to limit the fees or the fee changes. The commenter stated that lenders will see renewal fees or, at the very least, renewal fees with no parameters as an unmanageable risk, thus limiting their interest in program participation. The commenter also stated that the use of a renewal fee will eliminate participation by a number of lenders.

*Response:* The Agency has revised the rule to clarify that any renewal fee applied by a program will be that fee rate established at the time the loan is obligated and, thus, will not change over time (*see* § 5001.31(g)(2)). The Agency understands that imposition of a renewal fee can create a disincentive to participate. However, the rule states that the provision for a renewal fee is ''as applicable,'' meaning that it will be applied on a program-by-program basis. It does not mean that each program will necessarily charge a renewal fee.

*Comment:* One commenter stated that § 5001.31(g)(2) indicates the fee rate is established ''at the beginning of the loan''. The commenter stated that this is ambiguous because the rate is tied to the fiscal year of the obligation. The commenter suggested the use of the following language: ''Renewal fee. As applicable, the renewal fee is assessed annually, is based on a fixed fee rate established at the time the loan is obligated, and will be calculated on the unpaid guaranteed principal balance as of close of business on December 31 of each year. The fee will be billed to the lender and may be passed on to the borrower.''

*Response:* The Agency agrees with the commenter's suggested language, which replaces ''at the beginning of the loan'' with ''at the time the loan is obligated,'' and has made this revision to the rule.

*Comment:* One commenter requested that Guaranteed Community Facilities be codified within the regulations at 1% of the guaranteed portion of the facility and also that the regulations reflect and codify no annual service fee for Guaranteed Community Facilities. The commenter explained that Community Facilities by definition are non-profits and public bodies. The commenter also stated that increasing fees, particularly in an environment by which the Combined Program Platform may not delineate between the successes and challenges of the individual programs, may inhibit the long-term success of Guaranteed Community Facilities. The commenter added that by placing the determinant of fees within the **Federal Register**, particularly the success of the four programs is based on the blended default rate of for-profit and non-profit borrowers, the fees may become cost prohibitive to Community Facilities and to Waste and Waste Disposal Facilities.

*Response:* The Agency reserves the right to modify the fees assessed for any guaranteed loan program, including the Community Facility program, based on a variety of factors, including Agency loss experience and the effect of such losses on a program's subsidy rate. Therefore, the Agency rejects the commenter's request to codify the guarantee fee at 1% for the Community Facility guaranteed loan program. In addition, as noted in a previous response, the Agency may determine it is desirable to implement a renewal fee for the Community Facility guaranteed loan program (or any other program) and reserves the right to do so. Therefore, the Agency similarly rejects the commenter's suggestion to codify no annual service fee for Community Facilities.

*Comment:* One commenter stated that fees should be different when comparing these programs because of the significance of infrastructure vs. development; non-profit/municipality versus for-profit.

*Response:* When implementing these programs under the rule, the Agency will consider fees on a program-by-program basis. This includes determining what guarantee fee levels to use for each program and whether to require a renewal fee and, if so, what level. Because the Agency will make these determinations on a program-by-program basis, it will take into account the differences noted by the commenter.

*Lender Fees (§ 5001.31(h))*

*Comment:* One commenter stated that the proposed rule prohibits late payment charges from being covered by the Loan Note Guarantee and that the lender would be prohibited from adding such charges to the principal and interested due under any guaranteed note. The commenter expressed concern that a borrower would read this and think that they are not required to pay any late fees. The commenter explained that this is public information and, if read literally, could be construed to say that USDA loans cannot have that fee. The commenter suggested that this should be reworded and revised.

*Response:* The Agency agrees with that commenter that this paragraph needs to make clear that lenders can have late payment charges, but that the Agency still wants to prohibit late payment charges from being covered by the Loan Note Guarantee. Thus, the Agency has modified this paragraph to explicitly state that lenders may ''levy reasonable, routine, and customary charges and fees, including late payment fees.'' In addition, the Agency has added language to this paragraph to specifically state, in part, that late payment charges are not covered by the Loan Note Guarantee.

*Comment:* One commenter stated that § 5001.31(h) needs to include ''make whole'' calculations for fixed rate funding. The commenter stated that when the lender provides a fixed rate to the borrower, which helps to mitigate the borrower's interest rate risk, the lender becomes exposed to potential funding losses if the loan does not go full term of the period of the fixed interest rate. The commenter suggested that this cost should be included as a collectable fee or cost in the case of default.

*Response:* The Agency disagrees with the commenter and has not revised the rule as suggested. The situation being described by the commenter is a normal part of their business practice that the lender can account for in their terms and conditions with the borrower when arranging the loan. The Agency will guarantee loans with or without a prepayment clause. If an approved loan contains a prepayment clause, the prepayment fees are not covered by the Loan Note Guarantee.

*Comment:* One commenter stated that it is common practice for lenders to increase the interest rate on loans in default and suggested that the language in this section be expanded to state that late payment charges and additional interest expense associated with default interest rates will not be covered by the Loan Note Guarantee. Another commenter also suggested that this paragraph be expanded to mention default penalty interest charges as well as not being covered by the guarantee.

The first commenter also suggested removing the language prohibiting these charges from being added to the principal and interest due under any guaranteed note, and that the lender be required to thoroughly disclose charges and fees in appropriate loan documents. The commenter explained that these charges are common practice, and the agency should not prohibit the practice when the agency risk is mitigated by not covering them under the guarantee.

The commenter suggested the following language for the section: ''(h) Lender fees. The lender may levy

reasonable, routine, and customary charges and fees for the guaranteed loan provided they are similar to those charged other applicants for the same type of loan for which a non-guaranteed borrower would be assessed. Late payment charges and additional interest expense associated with default interest rates will not be covered by the Loan Note Guarantee. The lender will thoroughly disclose charges and fees in appropriate loan documents.''

*Response:* The Agency agrees with the commenters that both default charges and additional interest expenses should not be covered by the Loan Note Guarantee and has modified this paragraph to reflect this. With regard to the suggestion that this paragraph also state that the ''lender will thoroughly disclose charges and fees in appropriate loan documents,'' the Agency does not believe this is necessary because such disclosures are required by current disclosure regulations and do not need to be restated in this rule.

*Conditional Commitment (§ 5001.32)*

*Comment:* Four commenters expressed varying levels of concern with the value of the Conditional Commitment and its relationship to the issuance of the Loan Note Guarantee and the closing and funding of the loan.

One commenter stated that commercial lending is a just-in-time business and the current six-working-day reservation of funds period is completely incompatible for this reality. This commenter recommended that Conditional Commitments be issued on a same-day-as-approved basis until funding is exhausted. The commenter then stated that the reservation of funds process should absolutely be eliminated, at the very least for Business and Industry guaranteed loans, and ideally for all other USDA guaranteed loans as well.

Two commenters expressed concern over the value of the Conditional Commitment and because of negative experiences over the last 12 months involving nearly $14 million over three loans (as detailed below) have implemented procedures whereby they will limit any future USDA loans to those where the Loan Note Guarantee is issued simultaneously with the closing and funding of the loan. The commenters point out that this will result in a dramatic decrease in the number of USDA loans that they will do in the future. One of the commenters stated that they would like to see the guarantee process handled the same way the SBA does to avoid these occurrences (see following paragraph) in the future.

One commenter provided detailed experience on three loans to support their comments as follows:

Over the past 12 months the Agency has denied issuing the Loan Note Guarantee on three loans totaling $13,700,000, which has been a serious matter for our company. In two of the loans, we relied on the Conditional Commitment issued by the Agency and disbursed loan proceeds in accordance with the Conditional Commitment. The disbursement period in each case was over several months. When the loans were fully disbursed, we requested the Loan Note Guarantee, but were denied because of an adverse change in the borrower. Although we, as the lender, did nothing wrong, the borrower's circumstances changed and we were denied the guarantee. In the third instance, we received a Conditional Commitment for a tug boat and two barges that were to be constructed in Oregon and Louisiana, respectively. We arranged for a local bank to provide the construction financing due to the long construction period and relied on the Conditional Commitment for the long term take out. Due to hurricane Katrina, the shipyards in Louisiana fell behind on their production and the delivery of the barges were delayed which caused the customer not meeting its projections for 2007, thus the Loan Note Guarantee was denied. This brought the credibility of Alaska Growth Capital into question with our local bank.

A fifth commenter suggested that Lenders should continue to be required to submit certifications listed in the current 7 CFR 3575.63(a)(1) through (14).

*Response:* With regard to the comment that commercial lending is a just-in-time business and the current six-working-day reservation of funds period is completely incompatible for this reality, the Agency points out that the Agency's reservation of funds is an internal fund administration policy that is not governed by the proposed rule. Thus, the Agency has not made any changes to the rule in response to this comment.

While the Agency understands the commenters concerns and frustrations with their recent experience, the Agency needs the ability to not issue the Loan Note Guarantee when there has been an adverse change. As stated in the Conditional Commitment: ''A Loan Note Guarantee will not be issued until the Lender certifies that there has been no adverse change in the Borrower's financial condition, nor any other adverse change in the Borrower's condition, for any reason, during the period of time from USDA's issuance of this Conditional Commitment to issuance of the Loan Note Guarantee regardless of the cause or causes of the change and whether the cause or causes of the change were within the Lender's or Borrower's control. The Lender's certification must address all adverse changes and be supported by financial statements of the borrower and its guarantors executed not more than 60 days before the time of certification. As used in this paragraph, the term ''Borrower'' includes any parent, affiliate, or subsidiary of the Borrower.''

Finally, with regard to the comment concerning the certifications found in 7 CFR 3575.63(a)(1) through (14), the Agency will identify required certifications in the handbook to this rule.

*Conditions Precedent to Issuing Loan Note Guarantee (§ 5001.33)*

*Comment:* One commenter stated that proposed § 5001.33(a) appropriately requires the lender to pay the guarantee fee.

*Response:* The Agency acknowledges the comment. This provision is now found in § 5001.34(b).

*Comment:* In reference to the requirement in proposed § 5001.33(b) that requires the lender to advise the Agency of plans to sell or assign any part of the loan, one commenter stated that it was unaware of any compelling reason to require this information in advance. The commenter stated that, if and when the Agency receives a lender's request to execute an Assignment Guarantee Agreement, the Agency acts on it.

*Response:* The Agency agrees with the commenter and this provision has been removed from the rule.

*Comment:* In reference to the requirement under proposed § 5001.33(c) to require the lender to certify that the prospective borrower or applicant has obtained all appropriate insurance, the commenter stated that, while this requirement is appropriate, it is not clear why this requirement was singled out.

*Response:* The Agency agrees with the commenter that it is unnecessary to single out this certification requirement. Instead, the handbook to this rule and the Conditional Commitment form will include the various lender certification requirements. Thus, this provision has been removed from the rule.

*Comment:* One commenter suggested a complete rewrite of proposed § 5001.33, including the lender certification, as follows:

*''§ 5001.33 Conditions Precedent to Issuance of Loan Note Guarantee.* The Loan Note Guarantee will not be issued

until the lender, including a preferred lender, has paid the guarantee fee, and certifies to the following.

''(a) All conditions of the Conditional Commitment have been met.

''(b) The lender's current classification of the loan is Special Mention or better under the Uniform Classification System as defined by Rural Development, with no consideration being given to the guarantee. The loan is classified _____.

''(c) The lender possesses and has analyzed the information specified in § 5001.12 and has identified in its credit evaluation all significant risks that could potentially jeopardize the timely repayment of the loan in full.

''(d) No major changes have been made in the lender's loan conditions and requirements since the issuance of the Conditional Commitment, unless such changes have been approved by the Agency in writing.

''(e) All truth-in-lending and equal credit opportunity requirements have been met.

''(f) The loan has been properly closed. The borrower has marketable title to all the collateral. The liens on the collateral have been perfected with the priority consistent with the requirements of the Conditional Commitment. No claims or liens of laborers, subcontractors, suppliers of machinery and equipment, or other parties have been or will be filed against the collateral and no suits are pending or threatened that would adversely affect the collateral when the security instruments are filed. Any exceptions must be thoroughly disclosed in the certification.

''(g) All loan proceeds have been disbursed for purposes and in amounts consistent with the Conditional Commitment and the application. A copy of the detailed loan settlement statement of the lender must be attached to support this certification. Appropriate lender controls were utilized to assure that all funds were properly disbursed, including funds for working capital.

''(h) All required personal, partnership, and corporate guarantees have been obtained.

''(i) All planned property acquisition has been completed. All development has been substantially completed in accordance with plans and specifications, and in conformance with applicable Federal, state, and local codes. The lender is to disclose any costs that exceeded the project costs identified in the Conditional Commitment and the application.

''(j) There has been neither any material adverse change in the borrower's financial condition nor any other material adverse change in the borrower, for any reason, during the period of time from the Agency's issuance of the Conditional Commitment to issuance of the Loan Note Guarantee regardless of the cause or causes of the change and whether or not the change or causes of the change were within the lender's or borrower's control. The lender must disclose any assumptions or reservations in the requirement and must disclose all adverse changes of the borrower, any parent, affiliate, or subsidiary of the borrower, and guarantors.

''(k) None of the lender's officers, directors, stockholders, or other owners (except stockholders in an institution that has normal stock share requirements for participation) has a substantial financial interest in the borrower and neither the borrower nor its officers, directors, stockholders, nor other owners has a substantial financial interest in the lender. If the borrower is a member of the board of directors or an officer of a Farm Credit System (FCS) institution that is the lender, the lender will certify that an FCS institution on the next highest level will independently process the loan request and act as the lender's agent in servicing the account.

''(l) Required hazard, flood, liability, worker compensation, and personal life insurance, when required, are in effect.

''(m) The Loan Agreement includes all measures identified in the Agency's environmental impact analysis for this proposal (measures with which the borrower must comply) for the purpose of avoiding or reducing adverse environmental impacts of the proposal's construction or operation.

''(n) If the lender is unable to provide any of this certification, provide a full explanation as a part of its certification.''

*Response:* The Agency appreciates the commenter's extensive suggestions on this section. In light of the commenter's suggestions and a reconsideration of the current programs' requirements, the Agency has decided to enumerate in the rule specific conditions to be met prior to the issuance of the Loan Note Guarantee. Many of these conditions are as suggested by the commenter. The disposition of each of the commenter's suggestions is discussed below.

Concerning the commenter's proposed § 5001.33(a), the Agency agrees with the concept, which was contained in proposed § 5001.33. In the rule, we have incorporated this in § 5001.33(a)(9). In addition, the Agency will provide further instruction in the handbook for the rule.

Concerning the commenter's proposed § 5001.33(b), the Agency, as noted in a response to an earlier comment, does not plan to incorporate in the rule the current classification of the loan as Special Mention or better. Therefore, the Agency is not incorporating this suggestion in the rule.

Concerning the commenter's proposed § 5001.33(c), the lender will have conducted their lender's analysis, which is required under § 5001.12, and will have submitted it to the Agency. The lender will, thus, already have in their possession this analysis. Therefore, the Agency does not believe it is necessary to include this suggestion as a requirement for the issuance of the Loan Note Guarantee.

Concerning the commenter's proposed § 5001.33(d) that no major changes have been made in the lender's loan conditions and requirements since the issuance of the Conditional Commitment, unless such changes have been approved by the Agency, the Agency agrees that this needs to be addressed and has included it in the rule (§ 5001.33(a)(1)).

Concerning the commenter's proposed § 5001.33(e) that all truth-in-lending and equal credit opportunity requirements have been met, even though the rule requires that lenders comply with all Federal law, which applies to both truth-in-lending and to equal credit opportunity, the Agency believes that stating this as part of the requirements for the issuance of the Loan Note Guarantee is useful (§ 5001.33(a)(4)).

Concerning the commenter's proposed § 5001.33(f), the Agency has included the provisions currently found in the Business and Industry guaranteed loan program, which are very similar to what the commenter recommended. The Agency did not accept the commenter's suggestion that the ''borrower has marketable title to all the collateral,'' because that language is not as effective in protecting the security as the current Business and Industry language. The Agency also did not accept the commenter's suggested language ''Any exceptions must be thoroughly disclosed in the certification'' because the Agency will not allow for any exceptions.

Concerning the commenter's proposed paragraphs (g) and (j) through (m), the Agency notes that these are the same as currently found in the Business and Industry guaranteed loan rule and the Agency has included these in the rule.

Concerning the commenter's proposed § 5001.33(h), the Agency has incorporated the corresponding provision found in the current Business and Industry guaranteed loan regulation, which is essentially the same as suggested by the commenter.

Concerning the commenter's proposed § 5001.33(i), the Agency has incorporated the corresponding provision found in the current Business and Industry guaranteed loan regulation, which is similar to what the commenter suggested except for the treatment of costs. The commenter suggested that the lender be required to disclose ''any costs that exceeded the project costs identified in the Conditional Commitment and the application,'' which is different from the current Business and Industry guaranteed loan rule which states ''costs have not exceeded the amount approved by the lender and the Agency.'' The Agency rejected the commenter's suggested alternative treatment of costs because this would notify the Agency after such costs were incurred and the Agency wants to know conditions before such excess costs are incurred.

Concerning the commenter's proposed § 5001.33(n), the Agency has incorporated the intent of the lender's suggested language in § 5001.33(b).

*Comment:* One commenter stated that the proposed rule is nearly silent on whether or not USDA will guarantee loans prior to the completion of construction—aside from prohibiting it for Section 9006 guarantees at § 5001.104(f)(1). The commenters stated that construction-related risks represent a major exposure to any guaranteed loan program, and currently the acceptance of such risks under the guarantee is discouraged. For example, 7 CFR § 4279.156(b) sets forth a set of practices expected to offset this risk. The commenter recommended that, at the very least, these should be incorporated into the new regulation.

The commenter also recommended that this should be accompanied by a policy of dropping the guaranteed loan percentage by 10 points if the guarantee will be issued prior to the completion of development work and a provision could then be included to increase the percent of guarantee by 10 points after the construction is successfully completed and the construction risk is over.

*Response:* The Agency has considered this issue with regard to each of the guaranteed loan programs included in the rule. The Agency has determined that it will guarantee loans prior to construction being completed only for the Business and Industry guaranteed loan program. The Agency will not guarantee loans prior to construction being complete for Community Facilities, Water and Waste Disposal Facilities, and Rural Energy for America programs. The Agency will also consider reducing the loan guarantee by 10 percentage points for Business and Industry loans, as discussed in the following paragraph.

For projects other than turnkey operations where the Loan Note Guarantee will be issued at the time of loan closing, there are added risks to the Agency. In considering the conditions under which the Agency will guarantee Business and Industry loans prior to construction being completed, the Agency will consider, during the review process, the added risk associated with issuing the Loan Note Guarantee prior to the substantial completion of the project. When negotiating the percent of guarantee with the lender, these risks will be considered in conjunction with the credit risks and the lender's experience in financing the type of project. The percent of guarantee will be reduced by a minimum of 10% where the Agency determines that this is warranted.

*Comment:* One commenter suggested adding a new paragraph to this section as follows: ''The lender has certified that the borrower has secured any and all necessary environmental permits and all Agency recommended mitigation measures have been adopted and implemented appropriate to the proposal.''

*Response:* The rule covers environmental requirements elsewhere in the regulation and the Agency does not see the need to repeat, or to move, them here. Therefore, the Agency has not implemented the commenter's suggestion.

*Issuance of the Guarantee (§ 5001.34)*

*Comment:* In reference to the proposed § 5001.34(a) requiring the lender's certification be provided at loan closing, one commenter stated that the lender should not be asked to provide its certification until it is requesting the guarantee because the borrower or lender may still be working out some agency imposed conditions, and that is okay.

*Response:* The Agency agrees with the commenter's suggestion that the lender's certification be submitted at the time the lender requests the guarantee. The Agency has incorporated this suggestion in the rule (see § 5001.34(b)).

*Comment:* In reference to the proposed requirement that the guarantee fee be paid at loan closing in proposed § 5001.34(a), one commenter stated the guarantee fee should be paid when the Loan Note Guarantee is being issued, not at loan closing. According to the commenter, if the fee is paid early, and then the borrower/lender cannot meet all conditions to issue the guarantee, the fee would/may have to be refunded, and § 5001.31(g) says the fees are not refundable.

*Response:* The Agency agrees with the commenter's suggestion that the guarantee fee not be paid at loan closing. The rule requires the guarantee fee to be paid when the lender requests the Loan Note Guarantee (see § 5001.34(b)).

*Comment:* One commenter referred to the portion of the last sentence in proposed § 5001.36(a) that reads ''except that a change in the legal entity may be approved when the borrower is replaced with substantially the same individuals or officers with the same interest as originally approved'' and asked if this is referring to ownership interest and if it is, then revise the language to say so.

Another commenter recommended deleting ''with the same interest'' in this same portion of the last sentence. According to the commenter, keeping ''with the same interest'' could require undue hardship on Agency personnel to process cancellations and reapplications, while not including it should still result in satisfactory protection of the interest of the Agency.

*Response:* With regard to the commenter's request for clarification on the ''exception'' language, the Agency agrees that as proposed this language was unclear as to its meaning. In the rule, the Agency has deleted this ''exception'' language and Agency approval is required for a substitution of borrower(s) or change in the form of legal entity. Note that the deletion of the ''exception'' clause removes the ''with the same interest'' phrase on which the second commenter expressed concern. The Agency will provide guidance in a handbook to address such issues as raised by both commenters.

*Sale or Assignment of Guaranteed Loan (§ 5001.37)*

*Comment:* Two commenters suggested that the Agency add a new section to incorporate RD AN 4240 to generate an agency form and certificate for lenders selling their excess servicing fee to a third party. The commenters suggested patterning this form after SBA's Confirmation of Originators Fee, but that USDA's form should be between the selling lender and the purchasing third party because the Agency has no centralized servicing agent like SBA. According to the commenters, a standardized form should make

secondary market sales of servicing fees uniform, encouraging more investors thereby generating lower rates for borrowers.

*Response:* Form RD 5001–6, Agency Assignment Guarantee Agreement, has a provision for servicing fees. Therefore, the rule does not need to have a section added as suggested by the commenters.

*Comment:* One commenter noted that proposed § 5001.37(a)(2) requires the lender to retain sufficient interest to perform its duties under this part and asked ''How much interest is sufficient?'' and ''How will this be enforced?''

*Response:* In response to this and comments made on proposed § 5001.37(a)(6), the Agency has rewritten § 5001.37(a)(2) to require that all lenders maintain a minimum 5% exposure to all loans. The revised paragraph no longer refers to ''retain sufficient interest.''

*Comment:* Nine commenters stated that all lenders should be required to have a minimum of 5% exposure on any guaranteed loan and recommended removal of the provision allowing preferred lenders not to have any exposure on a loan found in proposed § 5001.37(a)(6). The commenters gave several reasons for this recommendation.

Two commenters stated that allowing any lender to not have any exposure to the loan they are servicing will complicate servicing on a defaulted loan. According to the commenter, based on the commenter's experience, a lender will not want to spend the money to liquidate a loan in which they have no financial interest. The commenter also stated that there is no advantage to the business in allowing the lender to participate out the unguaranteed portion since there is no participant that will provide the types of rates and terms the secondary market makes available for the guaranteed portion.

One commenter stated that if preferred lenders are not required to retain any portion of the loan, there is little incentive for them to service the loan properly.

One commenter stated that the provision to sell 100% of the loan appears to ''cater to the nontraditional lender who is who is undercapitalized and probably not the best partner to have with a guaranteed loan portfolio, because most banks retain the entire unguaranteed portion of the loan anyway. The commenter suggested that this change should not be allowed to occur, but if it does go forward, the commenter suggested clarification concerning who can sell 100% of the loan.

Two commenters stated that all lenders should be required to retain 5% of the entire loan, which must be an unguaranteed portion because this keeps the lenders at risk. However, lenders in good standing should be able to securitize 95% of their loans.

One commenter stated that the provision to allow selling of 100% of the loan is not a prudent provision because it contravenes the fundamental guaranteed principle of share risk. Similarly, another commenter stated that this effectively eliminates any exposure on the part of the preferred lender and all lenders should be required to retain a minimum of 5% of the loan from the unguaranteed portion so the originating lender will share in the loan's risk.

Finally, one commenter was concerned that this provision, in conjunction with the low documentation application process, could lead to poor lending practices because the preferred lender would not have to risk its own capital on the project. According to the commenter, this could in turn lead to an increase in defaulted projects. The commenter further stated that such ''no risk'' lenders would have no incentive to monitor or service loans, a function that is vital to the success of the four guaranteed loan programs. The commenter expressed specific concern about the potential effect on a default on a project by a municipality, stating that the municipal finance industry is ultra conservative and a default by a municipality on a project has not only a detrimental effect on that entity but can cause a ripple effect throughout a state or region, resulting in higher borrowing costs for public entities.

*Response:* The Agency agrees with the commenters that all lenders should be required to maintain a minimum 5% exposure and that the proposed provision to allow preferred lenders to have no exposure on a loan is unnecessary and could lead to increased risk. Therefore, the rule requires all lenders to maintain at least a 5% interest in all loans.

*Comment:* One commenter requested that the last sentence of proposed § 5001.37(a)(6), which reads ''Lenders may sell the remaining amount of the un-retained amount of the loan [un-guaranteed portion], only through participation'' be changed. According to the commenter, this language is acceptable for loans but incorrect for bonds. Bonds would typically be sold, whether guaranteed or un-guaranteed portions. The un-guaranteed portions would be clearly defined as not being guaranteed.

*Response:* While the Agency agrees with the commenter that the phrase ''only through participation'' is appropriate for loans and not for bonds, making this and other changes to the rule, this paragraph is no longer required. Thus, the Agency has removed this paragraph from the rule.

*Comment:* Two commenters stated that the first sentence in proposed § 5001.37(b), which reads ''The lender's servicing fee will stop when the Agency purchases the guaranteed loan portion of the loan from the secondary market,'' is misleading because the lender's servicing fee actually stops at the time of the last principal payment by the borrower. This is true because, according to the Lender's Agreement, the lender cannot charge the Agency a servicing fee, and when the Agency purchases the guaranteed portion from the holder it assumes the principal and accrued interest which cannot be charged a servicing fee. For instance, if the last principal payment by the borrower was July 1st and the Agency repurchased the guaranteed portion from the holder on October 1st, there is 3 months interest included that the lender cannot charge a servicing fee on because the Agency is the holder. So the servicing fee actually was stopped on July 1st not October 1st.

*Response:* The commenters are correct in pointing out that the first sentence is misleading for the reasons cited by the commenters. Therefore, the Agency has removed this sentence from the rule. The commenters are also correct in pointing out that the lender cannot charge the Agency for servicing fees. The Agency has revised and renamed this paragraph to address provisions associated with servicing fees, which includes, in part, this prohibition on charging servicing fees to the Agency. In addition, the revised paragraph states that such fees are not covered under the guarantee.

*Comment:* Three commenters were concerned about the second part of the sentence in proposed § 5001.37(b), which reads ''all loan payments and collateral proceeds received will be applied first to the guaranteed loan.''

One commenter stated that this language is not clear and asked what happens when the guaranteed loan is in a junior position.

One commenter stated that it is the word ''first'' that is confusing, asking ''Aren't all loan payments and collateral proceeds (net of liquidation costs) supposed to be applied against the guaranteed loan until it is paid in full?'' This commenter then referred to

comments submitted on § 5001.30(b)(1) concerning the payment of the guaranteed portion of the loan being paid first and given preference and priority over the unguaranteed portion.

One commenter recommended that this language be deleted because it will prevent most lenders and buyers of loans from participating in the guaranteed loan program. The commenter recommended instead the following language, which has been used in the past: Will be applied first to the guaranteed loan and, when applied to the guaranteed loan, will be applied on a pro rata basis.

*Response:* The Agency agrees with the commenters that the proposed language was not clear with regard to guaranteed loans in a junior position and the concern over the payment of loans. Therefore, the Agency has modified this provision (see § 5001.37(c)(3)) to state that all loan payments and collateral proceeds received will be applied to the guaranteed and unguaranteed portions of the loan on a pro rata basis.

*Community Facilities Program (§ 5001.101)*

*Comment:* One commenter requested that Community Facilities be removed from the combined platform. This commenter stated that underwriting and other aspects of lending to for-profit vs. non-profit organizations is very different, and merging the programs invites confusion in interpretation and in application of the programs.

*Response:* The Agency has intentionally developed a unified platform for the implementation of these guaranteed loan programs and for the incorporation of new authorized guaranteed loan programs in the future. The Agency understands that this results in the inclusion of guaranteed loan programs that have different characteristics, as indicated by the commenter. By using subpart A to identify common provisions and subpart B for program-specific provisions, the rule obtains, in part, an efficiency in the implementation of all guaranteed loan programs and minimizes the potential for confusion. Therefore, the Agency has retained the Community Facilities guaranteed loan program in the proposed rule.

*Project Eligibility (§ 5001.101(a))*

*Comment:* One commenter noted that wherever possible, the Agency should allow for refinancing of the current debt structure, up to 100% of the funds represented by the current request, and requested that the 50% limitation for refinance of existing indebtedness be restated as follows:

''(vi) Refinancing debts incurred by, or on behalf of, a community when all of the following conditions exist:

(A) The total debt service payments after refinance are less than the current total service payments without an extension of the maturity date,

(B) The debts were originally incurred for the facility or service being financed or any part thereof (such as interim financing, construction expenses, etc.), and

(C) The proposed refinance represents a legitimate transaction. Care must be taken to ensure the refinance is not coupled with a conversion from for-profit to non-profit with a management contract provided by the previous For-Profit owners or companies/subsidiary under control of the previous for-profit owners.''

*Response:* The Agency's experience with making guaranteed loans for community facilities is that there needs to be a balance between providing loan guarantees to new rural services and refinancing existing loans. The Agency does not believe that allowing 100% refinancing is consistent with the goal of providing new rural services. Limiting refinancing to 50% represents, based on Agency experience, the appropriate balance. Therefore, the Agency has not modified the provisions concerning the refinancing of the minority portion of the debt. The Agency notes that it has revised the refinancing requirements to include the commenter's second suggestion (i.e., debts incurred for the facility or service being financed or any part thereof (such as interim financing, construction expenses, etc.)).

*Comment:* One commenter stated that if hydroelectric generating facilities and natural gas facilities are eligible, then other power generating facilities should be included, especially if it is an alternative and/or clean/energy/green energy project.

*Response:* Other power generating facilities are eligible for a Community Facilities guaranteed loan if they are part of an improvement to an already eligible community facility. In such instances, the Agency plans to continue to fund alternative energy projects. The rule does not need to be revised in order for the Agency to continue to fund such projects. Therefore, no changes have been made to the rule in response to this comment.

*Comment:* One commenter requested that the criteria for leased space (proposed § 5001.101(a)(3)) be expanded to represent 75% utilization of the facility for benefit of community services based on shared/common space measured as a percentage of total square feet floor space, and shared/common time usage of the space measured as a percentage of annual usage.

*Response:* The suggestion by the commenter is essentially the same as what the rule requires, but would add to it the calculation of the ''shared/common time usage of space measured as a percentage of annual usage.'' To implement the commenter's suggestion would require the keeping of records of how often each space is used. The Agency does not have the administrative resources necessary to verify and monitor time usage. Therefore, the Agency does not believe that this suggestion is practical or necessary and has retained the provision in the rule as proposed.

*Comment:* Two commenters addressed the issue of demonstration of community support (proposed § 5001.101(a)(5)). Both commenters noted that the rule gives the option to either satisfy the cash equity requirement or demonstrate community support. One commenter believed that a community facility project should always demonstrate significant community support. Another commenter recommended revising the section as follows: ''Section 5001.101 (a)(5)(i)—Evidence of tangible community support such as community fund raising, assignments of tax revenues, or grants from other organizations and when required by § 5001.101 (a)(5)(ii) a certificate of support.''

*Response:* With regard to the comment that community facility projects should always demonstrate significant community support, the Agency believes that there is no increase in risk if a community facility project could demonstrate the equivalent financial metric (at proposal, this was cash equity; in the rule, it is debt-to-tangible net worth ratio). Therefore, the Agency believes that it is still reasonable to allow the option to demonstrate either.

With regard to the comment suggesting to revise § 5001.101(a)(6)(i), which reads ''Evidence of community support in the form of a certification of support for each project or facility from any affected local government body is required,'' the Agency believes that requiring evidence of ''tangible'' community support would eliminate too many viable and worthwhile projects. Therefore, the Agency has not accepted the commenter's suggested revision and has retained this paragraph as proposed in the rule.

*Unauthorized Projects and Purposes (§ 5001.101(b))*

*Comment:* One commenter stated that the proposed definition of conflict of interest limits the award of a contract to another party only when they will retain an interest in the borrower; the language would not include a member of the board of directors awarding a contract during the origination phase and then withdrawing from the board of directors. According to the commenter that, while the definition actually indicates that it includes but is not limited to, it may also provide a supportable defense when the person clearly intends to withdraw prior to contract ratification. Therefore, the commenter proposed amending the proposed regulation as follows: ''§ 5001.101(b)(7) Any project where an individual, or membership of another organization sponsors the creation of a nonprofit organization with the intent to control negotiations for employment or contracts that provide financial benefit to the sponsoring organization, affiliate organization, or a subsidiary organization of the sponsoring individuals or organization.''

*Response:* The Agency agrees with the concern raised by the commenter and the rule addresses the commenter's concern. Rather than creating a new paragraph as suggested by the commenter, the rule relies simply on the concept that any project that creates a conflict of interest or an appearance of a conflict of interest is prohibited. The rule no longer defines ''conflicts of interest.'' Instead, the Agency will rely on guidance in the handbook to the rule to address conflicts of interest, including the situation posed by the commenter.

*Borrower Eligibility (§ 5001.101(c))*

*Comment:* One commenter stated that the proposed rule would allow lenders to make loans to for-profit borrowers without restrictions to distribution of profit. The commenter made three recommendations to remedy this:

(1) Require in the definition of an essential community facility that all community facilities be operated on a nonprofit basis;

(2) Require that eligible borrowers for an essential community facility be a public body or nonprofit corporation; and

(3) Require that all essential community facilities operate as though they were nonprofit entities.

*Response:* The Agency has revised the borrower eligibility requirements to focus on those borrowers that are the intended clients for the Community Facilities guaranteed loan program—public bodies, not-for-profit entities, and Indian tribes. This revision accommodates the commenter's second suggestion and main concern. The Agency does not believe it is necessary to implement the other two suggestions in order to target the Community Facilities program to its intended clients.

*Comment:* Two commenters recommended deleting the ''credit not available elsewhere'' requirement (proposed § 5001.101(c)(3)). One commenter stated that this is the one area that should follow the current Agency Guarantee Business and Industry procedure and not require this documentation from the lender or Agency determination. The other commenter requested that the requirement for Community Facilities to show proof of inability to obtain credit at reasonable pricing, terms, and conditions be deleted. According to this commenter, the requirement may be appropriate for Business and Industry (for-profit ventures), but is not relevant to non-profit and public organizations serviced through Community Facilities.

*Response:* The Agency cannot remove this provision from the Community facility program because it is a requirement under the program's authorizing statute.

*Comment:* One commenter stated that the credit not available elsewhere requirement conflicts with § 5001.16.

*Response:* The Agency disagrees with the commenter that there is a conflict between these two provisions. A borrower may be credit worthy as required under § 5001.16, but this does not mean that the borrower is able to receive a loan at reasonable rates and terms, which is the relevant test for ''credit not available elsewhere.''

*Comment:* One commenter requested more written examples of eligible community facilities, including rural health clinics, first responders, immediate care centers, assisted living facilities, nursing homes, roads, toll roads, bridges, ports, airports, charter schools, day care, YMCA, YWCA, Girl Scouts, Boy Scouts, university/college/technical schools for education/multipurpose, and community student housing.

*Response:* The list provided in the proposed rule was not intended to be an exhaustive list; other examples will be provided in the handbook to the rule. The organizations listed in the referenced paragraph do not meet the normal requirements of an eligible borrower. Therefore, the Agency has listed these four organizations separately to ensure that they continue to be eligible for Community Facilities guaranteed loans.

*Additional Application Documentation Provisions (§ 5001.101(d))*

*Comment:* One commenter stated that guidance should be provided that explains when a Feasibility Study is necessary (e.g., in a Staff instruction or Handbook).

*Response:* The Agency agrees with the commenter and will provide additional guidance and instruction on when a feasibility study is necessary within the handbook to the rule.

*Additional Guarantee- and Loan-Related Requirements (§ 5001.101(h)) (Proposed § 5001.101(e))*

*Comment:* One commenter requested that no limit be placed on Guaranteed Community Facilities, and that the State and Program Directors be allowed to administer funding for the greatest benefit rather than imposing a regulatory limit. According to the commenter, while the premise for the limit is credible, under the current economic environment Rural Development encourages joint efforts by rural communities to consolidate services, when reasonable and when services will not be compromised. In addition, county-wide or joint community projects may well exceed $50 million and may be fully justified.

*Response:* The Agency has not revised the rule as requested by this commenter. The funding limit allows the Agency to better diversify its portfolio, improve risk management, and provide for a greater geographic distribution of funds.

*Comment:* Two commenters expressed concern over the proposed parity lien requirements. One commenter recommended deleting the parity lien requirements, because this is an undue requirement for lenders since they will be harder to obtain approval from lender boards, especially considering non-profit status in addition to the other high risk factors. The other commenter stated that this requirement has hurt the promotion of the guaranteed CF loan program, and recommended that the loan approval officer be given the option to approve a Guaranteed CF in first lien position.

*Response:* The Agency disagrees with the recommendation to delete or modify this requirement, which implements current Agency policy, because to do so would reduce lender risk, which defeats the concept of shared risk, one of the goals of the new platform. In addition, such changes would have a negative effect on program costs and reduce the number of viable projects that the Agency can finance.

*Water and Waste Disposal Facilities (§ 5001.102) Borrower Eligibility (§ 5001.102(c))*

*Comment:* One commenter stated that the credit not available elsewhere requirement conflicts with § 5001.16.

*Response:* As noted in a previous response, the Agency disagrees with the commenter that there is a conflict between these two provisions. A borrower may be credit worthy as required under § 5001.16, but this does not mean that the borrower is able to receive a loan with reasonable rates and terms, which is the relevant test for ''credit not available elsewhere.''

*Business and Industry (§ 5001.103)*

*Comment:* One commenter suggested combining the cooperative stock requirements into one section, rather than mixing them in with general requirements in several sections.

*Response:* The Agency appreciates the commenter's suggestion, but has not revised the rule as suggested. Instead, the Agency will provide a section specific to requirements for cooperative stocks in the handbook for the rule.

*Project Eligibility (§ 5001.103(b)) (Proposed § 5001.103(a))*

*Comment:* Two commenters noted that the proposed rule does not address the eligibility of mixed use commercial buildings projects, which consist of a combination of commercial and residential use. One of the commenters stated that such projects should be expressly authorized given their importance in rural development.

*Response:* The Agency currently provides guaranteed loans under the Business and Industry program to such mixed-use projects and agrees that such projects should be eligible. Therefore, the Agency has specifically included in the rule a provision identifying such projects as being eligible, provided the residential real estate portion is not included in the loan (see § 5001.103(b)(xviii)).

*Comment:* Two commenters noted that currently Business and Industry assistance cannot be used to guarantee letters of credit and suggested that a Business and Industry guarantee for Industrial Development Bonds could be a useful tool and should be expressly permitted.

*Response:* Under the proposed rule, Industrial Development (ID) Bonds were not precluded, either by statute or by the rule, from the Agency guaranteeing such bonds. However, there may be tax implications affecting the tax free status of an ID bond when it is part of a loan guaranteed by the Agency. Regardless, the Agency does not believe it is necessary to add a specific provision to the rule addressing ID bonds.

*Comment:* Two commenters noted that the proposed rule no longer states that agricultural production guaranteed loans will be limited to the lesser of $1 million or 50% of the guaranteed loan when a value-added enterprise is associated with it. One commenter stated that many would argue that there is a need for guarantees on larger agricultural enterprises. The other commenter asked why this is being expanded.

Another commenter said that the proposed rule sets up a confusing new standard for agricultural operations, where the proposed rule would vaguely allow loans for ''agricultural production, with advance written approval from the Agency.'' This commenter asked what the criteria would be for the Agency to provide such advance written approval, and recommended retaining the current workable Business and Industry rules (§ 4279.113(h)).

*Response:* The Agency agrees with the commenters' observation that the rule would no longer impose a limit on guaranteed loans for agricultural production, thereby expanding the number of agricultural operations for which loans could be guaranteed. Instead of imposing the current regulations' monetary requirements for determining whether an agricultural project would be eligible, the Agency elected a more flexible approach of requiring prior written approval from the Agency. The criteria that the Agency will use in determining whether to issue that approval or not will be provided in the handbook to the rule.

*Comment:* Two commenters recommended eliminating refinancing as an eligible purpose. One commenter offered examples of the types of obligations that are often refinanced under the current regulations and stated that the proposed regulation would eliminate a substantial portion of the transactions currently undertaken in the Business and Industry program. It would shift the program to focus more on startup companies which would create direct competition with the SBA. In addition, the proposed regulations would have a discouraging effect on lenders, further reducing the number who are willing to deal with many of the issues that currently exist in the program(s). Examples included: Leases or other debt instruments that are often very expensive and onerous, Bank loans that are often ''over collateralized'' or improperly collateralized and have tied the borrowers' hands for expansion or recapitalization, Bank loans that are ''maxed out'' due to lending limitations of the local lender(s) which are preventing the borrower from growing, banking relationships which have become restrictive to the borrower and are preventing the company from growing due to an ''honest'' disagreement over risk, and planning for the sale of the business through an orderly transition of the business and assumption of the debt over a scheduled period of time.

One commenter noted that providing the lender with a guarantee on other existing lender debt has been a highly desired loan purpose under the program. It is a good marketing tool for the program and has been the primary loan purpose for the commenter's involvement with existing businesses.

One commenter also stated that a definition of ''refinance'' would be helpful in responding to this proposed regulation.

*Response:* The Agency has revised this provision to more closely follow the provision in the existing regulations and has restricted the proposed minority portion requirement to same lender debt refinancing (see response to the following comment).

*Comment:* Nine commenters expressed concern regarding the requirement limiting refinancing to 50% or less of the loan funds. One commenter noted that refinancing is a large part of the program, and as long as the refinancing helps the cash flow of the company and keeps the company profitable, it should be eligible.

One commenter stated that, if this requirement stands, it would eliminate this lender's ability to offer a valuable service that the lender has found to be a successful use of this program. This commenter requested that some qualifying language be added to allow loans such as monies for remodeling and refurbishment and for removal of looming balloon payments, to continue to be possible. Two commenters said that limiting refinancing of any debt to a minority portion of the loan will adversely affect many businesses attempting to restructure debt that was inappropriate to begin with. These commenters added that the commercial loan aspect of the Business and Industry Guarantee should not put unnecessary restrictions that can be better served with proper credit underwriting by the Agency.

One commenter stated that if refinancing of other loans would be limited to a minority portion of the guaranteed loan, debt refinancing that provides an improvement in cash flow or that allows a lender to obtain a needed lien position when financing a

new project would disrupt the business/banking relationship of the borrower and lender. One commenter said that limiting refinancing to less than 50% of the total project could disqualify some important transactions and that refinancing is frequently an integral part of a company's overall financial planning. Imposing this rule would remove a great deal of flexibility from the program, thereby diminishing its desirability for lenders and borrowers alike.

One commenter recommended continuing with the existing program and not limiting refinancing to 50% of loan funds, as this new arbitrary limit does not fit the real world of business and finance. The existing program is beneficial to businesses looking to expand and gives the lenders the ability to properly structure and secure debt for companies. Another commenter noted that current regulations allow the Agency to support projects to improve the cash flow and viability of some borrowers, enabling them to grow and provide benefit to their communities. Limiting this opportunity does not reduce Agency risk, but does reduce the program's potential effectiveness. One commenter stated that this proposed regulation limiting the refinancing should not even exist, as it limits a company's ability to refinance existing debts over better terms.

*Response:* The Agency agrees with the commenters that the 50% limit would unnecessarily limit refinancing as an eligible purpose. Therefore, the Agency has eliminated this provision with the exception for same lender debt refinancing. In the rule, same lender debt refinancing must be less than 50% of the new loan amount unless the amount of loan to be refinanced is already Federally guaranteed. If the amount of the loan to be refinanced is Federally guaranteed, then the 50% requirement does not apply.

*Comment:* Fourteen commenters recommended continuing with the current policy for refinancing.

One commenter noted the change from the old regulations and simply recommended using the policy in the old regulation. Three commenters said that USDA should continue with its current policy and delete the proposed change. According to these commenters, the proposed change will adversely impact many other good credit worthy rural businesses that need to refinance existing loans to improve cash flow to make their rural business more viable or that need to refinance loans that are ballooning with a loan that makes their rural business more viable.

Another commenter stated that current policy should be continued and that refinancing debt obtained during business startup is less risky and is often necessary to improve cash flow and allow a lender to obtain a senior lien position.

One commenter requested that the existing rule be retained and stated that rural America does not need to have more restrictions placed on it for financing. One commenter stated that this is the single-most detrimental provision to the Business and Industry program in the proposed rule. This commenter recommended continuing with the current Business and Industry regulations, and said that the proposed change is arbitrary and unhelpful.

One commenter stated the this change would severely impact the volume of loans that would be guaranteed by the Business and Industry program and said that current Business and Industry regulations permitting debt refinancing should be continued. According to this commenter, the ability to refinance debt is crucial when providing financial assistance to business, and this is one of the selling points of the Business and Industry programs. The commenter also noted that refinancing usually always strengthens a credit.

One commenter recommended retaining the current language and noted that limiting refinancing will eliminate a major draw for the Business and Industry program. To take this away, according to the commenter, will greatly reduce the demand for the Business and Industry guarantee program and remove a great tool from the lenders involved with the program. Two commenters recommended keeping the existing rules for refinancing in place or lose lenders.

One commenter stated that this section is confusing with regard to financing debt. The commenter pointed out that the proposed rule states that refinancing is an eligible use, but then specifies that any refinancing, except for Agency Direct loans, must be a minority portion of the loan. According to the commenter, this change would be detrimental to the Business and Industry program, as many loans are for refinancing. This commenter sees no reason to change the program from its current intent.

One commenter recommended making no changes to the old rule for refinancing. The commenter noted that by refinancing to a fixed rate product, borrowers are better served and provide a more sustained outlook for job retention and possibly job creation. Therefore, according to the commenter, a refinance into a fixed interest rate is a method for business owners to predict their expenses and make sound decisions for growth.

After referring to what the current program allows, one commenter suggested that the Agency expand this section to allow refinancing of existing Agency debt; excluding Agency direct loans, as long as the loan has been current for 12 months with no extensions, loan rewrites or debt forgiveness by the lender and the Agency. The commenter stated that lender debt should be allowed to be refinanced so long as the lender debt is less than 50% of Agency debt, excluding the unguaranteed portion of the guaranteed loan.

*Response:* As noted in the previous response, the Agency has revised the provision for refinancing in the rule. The rule incorporates essentially the same provisions found in the current regulations.

*Comment:* Two commenters addressed the issue of flexibility and refinancing. One commenter stated that the restriction should be relaxed since it prevents lenders who have not previously used the Business and Industry program from offering the benefits of the Business and Industry guarantee to its current portfolio of business borrowers. This commenter recommended allowing any and all Business and Industry guaranteed debt refinancing of loans already in a lender's portfolio, as long as they meet the following four criteria:

(a) There will be at least a 20% reduction in debt service cost on the debt after the refinance,

(b) The portfolio debt being refinanced has been in the lender's portfolio for at least 12 months,

(c) The portfolio debt being refinanced has been current (not due to deferral or other restructuring) for at least the past 12 months, and

(d) The portfolio debt being refinanced is classified at a level better than ''Doubtful''.

The other commenter stated that the proposed rule would severely limit Business and Industry debt refinancing, and said that more flexibility regarding debt refinancing would be beneficial to the borrower and is important to ensure the effectiveness of this program.

*Response:* As noted in previous responses, the Agency has revised this provision in the rule. In the rule, refinancing is allowed when the Agency determines that ''the project is viable and equal or better rates or terms are offered.'' The Agency believes that the revised provision allows the Agency flexibility in assessing each individual refinancing and to consider the risk for each proposed refinancing and that it is

unnecessary to incorporate the prescriptive conditions suggested by the commenter.

*Comment:* One commenter recommended allowing refinancing of the entire debt with another lender to be an eligible purpose and stated that this paragraph may not allow this. The commenter then requested clarification.

*Response:* The revised provision on refinancing in the rule allows the refinancing of any loan under certain conditions, except that same lender debt refinancing is limited to 50% unless the amount of the loan to be refinanced is already Federally guaranteed. The rule allows the refinancing of the entire debt with another lender provided the project is viable and equal or better terms are offered. The Agency does not believe it is necessary or appropriate to include this specific type of refinancing in the rule.

*Comment:* One commenter noted that the proposed provision for fees and packagers as an eligible purpose seems to contradict § 5001.7(h) and suggested that packager or broker fees may be considered ''professional services.''

*Response:* The Agency understands why the commenter thinks that allowing professional service fees appears to contradict the general prohibition in subpart A for packager and broker fees. Subpart A identifies packager fees and broker fees as ineligible, while subpart B further provides for what is eligible; in this case, professional service fees are eligible. Thus, the proper reading of the rule is that professional service fees are eligible, except for packager and broker fees. The Agency has revised subpart B to indicate clearly that where professional service fees are eligible costs, they do not include packager or broker fees.

*Comment:* One commenter identified a contradiction between proposed § 5001.103(a)(1)(xiii), which allows loans to tourist and recreational businesses, and § 5001.7 which prohibits loans to golf courses, racetracks, water parks, ski slopes, and similar recreational facilities, and recommended that this contradiction should be clarified.

*Response:* In response to another comment, the Agency has limited the specific paragraph reference in § 5001.7 to racetracks and other similar recreational facilities. Nevertheless, as noted in the previous response, subpart B lists those projects that are eligible for a Business and Industry guaranteed loan, while the recreational projects listed in subpart A will never be eligible for a Business and Industry guaranteed loan. If a recreational project is not listed in subpart A, then it would be eligible under subpart B for a Business and Industry guaranteed loan.

*Comment:* Two commenters asked for clarification as to what the ''certain restrictions'' are for housing development sites.

*Response:* The Agency will provide guidance on the restrictions in the handbook for the rule. In the rule, the Agency has rephrased this to read ''with Agency-approved restrictions.''

*Comment:* One commenter asked why the provisions in the 2002 Farm Bill for loan guarantees to cooperative organizations that were headquartered in an urban area as long as certain rural benefits/requirements were met, were omitted from the proposed rule.

Another commenter asked what ''assisting cooperative organizations'' means.

This commenter also asked whether housing cooperatives would be eligible and suggested that because cooperatives are already listed as an eligible entity for Business and Industry loans, this item could be eliminated here as redundant.

*Response:* The Agency agrees that loan guarantees to cooperative organizations that were headquartered in an urban area are eligible as long as certain rural benefits/requirements were met need to be part of the rule, and has added this provision to § 5001.103(d)(1)(v) concerning borrower eligibility. The Agency also agrees that the word ''assisting'' in proposed paragraph (d)(1)(xviii), as well as in paragraph (xvii), made those two paragraphs unclear in their meaning. The Agency also determined that it is not needed in either paragraph and thus has removed it from these two paragraphs in the rule. Finally, the Agency deleted proposed § 5001.103(xviii) in its entirety because cooperative organizations are eligible entities and it was redundant to identify cooperative organizations as an eligible purpose.

*Unauthorized Projects and Purpose (§ 5001.103(c)) (Proposed § 5001.103(b))*

*Comment:* One commenter stated that the proposed rule does not say anything about the eligibility of projects that 7 CFR part 4279, subpart B currently prohibits (charities, churches, fraternal organizations per 7 CFR § 4279.114(d) and lending, investment, and insurance companies per 7 CFR 4279.114(e). This commenter recommended that it would be best to continue with established Business and Industry practices in the new rule.

Another commenter stated that currently the Business and Industry program prohibits loan guarantees to insurance companies, lending institutions, charitable institutions, and businesses owned by Government employees, but that under the proposal these are no longer listed as ineligible. The commenter questioned why this was changed and stated that guaranteeing loans to insurance companies to pay claims or to lending institutions to make loans is extremely risky. The commenter further explained that if these type businesses cannot generate sufficient cash flow and have to resort to borrowing, it is an indication of an unsuccessful business.

*Response:* The Agency agrees with the commenters that the rule should have incorporated the current Business and Industry regulations pertaining to the ineligibility of lender, investment, and insurance companies. The rule includes these as ineligible purposes. However, it is not the intent of the Agency, as a policy matter, to preclude the eligibility of certain projects associated with charities, churches, and fraternal organizations. The Agency will provide guidance in the handbook for the rule concerning such projects.

*Comment:* One commenter did not believe that the intent of this rule was to prohibit financing of small businesses doing business from the owner's home, and suggested returning to the language in the old Business and Industry regulations. The commenter suggested using the following: ''Owner-occupied housing. Bed and breakfasts, storage facilities, et al., are eligible when the pro-rata value of the owner's living quarters is deleted from the value of the project.'' Another commenter stated that the proposed rule does not say anything about the eligibility of projects that RD Instruction 4279–B currently prohibits, including owner-occupied housing per § 4279.114(n)). This commenter recommended that it would be best to continue with established Business and Industry practices in the new rule.

*Response:* The Agency believes the provisions in both § 5001.103(b)(2)(xiii) and in § 5001.103(c)(1) adequately address owner-occupied housing, including bed and breakfast establishments, sufficiently to determine whether owner-occupied housing is eligible or not. The provision in § 5001.103(c)(1) is sufficiently broad to cover owner-occupied housing. The Agency will provide additional guidance in the handbook for the rule concerning businesses housed in private homes.

*Comment:* One commenter noted that the need to have the Department of Labor give its approval for any project that will be creating more than 50 jobs should be changed, because adding another layer of approval does not make

any sense and takes too much time. The commenter stated that this requirement needs to be changed and has no value to the whole system.

*Response:* The requirement referred to by the commenter is a statutory requirement and as such the Agency cannot change it within this rulemaking. However, the Agency has recast this provision to reference the statutory provisions as follows: Any project that does not meet the requirements of paragraphs (d)(2), (d)(3), and (d)(4) in 7 CFR part 1932.

*Comment:* One commenter suggested that with regard to interim financing the rule should be amended to allow for partial pre-applications or simple notifications of intent to use the program in cases where the borrower is unable to provide all of the information necessary to complete a pre-application.

*Response:* The Agency has not implemented the commenter's suggestions because interim financing is not an eligible purpose and, thus, there are no applicable pre-application or notification requirements.

*Comment:* One commenter stated that this provision as written would prohibit inter-family transfers of business ownership and needs to be fixed. A second commenter recommended replacing the term ''immediate family'' with ''close relative'' to use (and be consistent with) a definition established in § 5001.2. This commenter also noted that the term ''close relative'' is not defined.

*Response:* The Agency agrees with both suggestions. This provision in the rule now uses the term ''immediate family'' and specifically provides an exemption that allows for the inter-family transfer of business ownership.

*Comment:* One commenter noted that this rule does not define what ''Government Employees'' consist of in relationship to assistance to government employees. The commenter recommended that ''Government Employees'' should be qualified to mean any federal employee of the United States Federal Government. If the proposed regulation is not clarified, it would be unfair as some U.S. government employees would be eligible for guaranteed funding while others would not.

*Response:* Subpart A prohibits projects and purposes where there are conflicts of interest or appearances of conflicts of interest. The Agency believes that this subpart A provision is sufficient such that proposed § 5001.103(b)(6) is not required and this paragraph has been removed from the rule. With its removal, there is no need to define, within the rule, ''government employee.''

*Borrower Eligibility (§ 5001.103(d)) (Proposed § 5001.103(c))*

*Comment:* One commenter noted that eligible borrowers for Business and Industry loans will now include virtually any legally-organized entity, including purely charitable, fraternal and religious organizations, which is a difference from the existing regulations.

*Response:* The Agency agrees with the commenter's observation.

*Comment:* One commenter noted that true cooperatives are omitted as eligible borrowers.

*Response:* The Agency agrees that the proposed rule did not include true cooperatives as eligible borrowers. This was an oversight and the rule now includes true cooperatives as eligible borrowers. To effect this change, the Agency redefined cooperative organization.

*Additional Application Process Requirements (§ 5001.103(f)) (Proposed § 5001.103(d))*

*Comment:* Three commenters commented on the proposed priority scoring of Business and Industry applications. Two of the commenters stated that it makes no sense to require the Agency to publish its priority scoring process every year in the **Federal Register**. These commenters suggested reprinting the current scoring criteria from the 7 CFR part 4279, subpart B regulation.

The third commenter said that priority scoring should be eliminated, noting that commercial lending is a just-in-time business and the use of a priority scoring system ever in the delivery of loan guarantees is anathema. According to this commenter, the guarantees must be available on a first-come-first-served basis until funding is exhausted.

*Response:* In considering these comments, the Agency believes that the suggestion to eliminate priority scoring for guaranteed loan programs is appropriate in order to deliver the programs in line with commercial lending practices. Therefore, the Agency has revised the rule to eliminate references to scoring and has replaced scoring with a ''first in, first out'' basis; that is, the Agency will approve loan applications based on the date and time complete applications are received by the Agency. In determining the date and time for receipt of complete applications, the Agency will convert the date and time to Eastern time.

*Additional Application Documentation Provisions (§ 5001.103(g)) (Proposed § 5001.103(e))*

*Comment:* Six commenters expressed a variety of concerns on the proposed requirement for audited financial statements.

One commenter recommended that USDA continue its current Business and Industry guaranteed loan regulation regarding audited financial statements. The proposed regulation is unclear; however, if the intention is to require applicants for loans over $1 million to have audited financial statements for prior years, it will adversely impact many otherwise good, credit worthy potential rural businesses that need Business and Industry guaranteed loans.

Two commenters suggested deleting this requirement altogether. One commenter stated that this requirement is inappropriate for Business and Industry and should be eliminated. The commenter stated that:

(1) no allowance is made for startup businesses where there would be no audit available;

(2) if only annual audits are needed for risky projects over $3 million, so why are audits needed up front for a sound borrower and a $1 million project; and

(3) audits are expensive and burdensome and would be a significant hindrance to the Agency's ability to support many of its current borrowers. The other commenter questioned at whose discretion the audit would be required, the Agency or the loan officer. This commenter added that audited statements are a true financial hardship for the majority of borrowers and should be eliminated completely from the proposal requirements. This commenter also noted that the requirement for audited financial statements is not an industry norm.

Two commenters suggested using tax returns instead of audited financial statements. One commenter noted that the USDA needs to use the opportunity of this proposed rule to jettison its focus on GAAP financial statements in favor of tax returns, the financial tool now most widely used in business banking and the only financial statement that is uniformly and consistently available from all businesses. The other commenter stated that audited statements are expensive and not practical for many rural businesses, and suggested using tax returns, as it is more common and effective.

Another commenter noted that this seems to conflict with § 5001.12, and asked if they don't need an audit after they receive the loan, why require it

before they even apply. This commenter believed that the paragraph in this section is correct, and stated that an audit requirement should be up to the lender first and USDA should have the option to require one on the larger loans about $3 million.

*Response:* As noted in responses to other related comments, the Agency has removed the requirement for annual audited statements for projects over $3 million and has replaced it with a requirement for the submittal of financial reports, either as required by the lender's regulatory authority if the lender is regulated or supervised or as contained in the Conditional Commitment if the lender is an other lender (*see* § 5001.17(d), Financial reports).

In addition, provisions in the rule address the commenter's concern for startup businesses by allowing borrowers that have been in existence for less than one year to submit an Agency-authorized financial statement, which may be an unaudited statement, with the application.

*Comment:* Three commenters stated that the requirement for annual audited financial statements is a loan servicing requirement, not an application requirement, and suggested that it be part of either the Loan Agreement requirements or Conditional Commitment section.

*Response:* The Agency agrees with the commenters that the requirement for annual financial statements is not an application requirement. In the rule, the Agency is requiring the submittal of financial reports as part of lender servicing requirements under subpart A (see § 5001.17(d)).

*Additional Guarantee- and Loan-Related Requirements (§ 5001.103(j)) (Proposed § 5001.103(g))*

*Comment:* One commenter recommended that the current practice in 7 CFR 4279.181, of having the lender provide a certification that all of the requisite conditions are met prior to issuance of the guarantee should be incorporated here.

*Response:* The rule provides in § 5001.34(c) that the Agency will not issue the Loan Note Guarantee until all of the conditions specified in the Conditional Commitment have been met. This provision applies to all of the guaranteed loan programs covered by this rule. Thus, there is no need to repeat this requirement in subpart B for the Business and Industry program.

*Comment:* Four commenters provided comments on funding limits. Two commenters noted that the proposed rule has no change in the Business and Industry maximum funding limit and recommended increasing the maximum loan limit for Business and Industry loans to $40 million due to the capital needed in all types of businesses, not just cooperatives.

One commenter recommended that limits be established for the total borrower indebtedness and for total indebtedness of the owners, guarantors, related businesses, or parties. This commenter suggested the following language: ''Funding limits. The total amount of Business and Industry (Business and Industry) loans to any one borrower, including:

(1) the guaranteed and unguaranteed portions,

(2) the outstanding principle and interest balance on any existing Business and Industry loans, and

(3) new Business and Industry loan requests, must not exceed $25 million except that the total Business and Industry amount to a cooperative organization may not exceed $40,000,000 for rural projects processing value added commodities.''

*Response:* It is the Agency's intent to continue the current Business and Industry program's funding limitations and the Agency has not revised the maximum loan limit in the rule. If the Agency determines at a future date that such an increase is warranted, the Agency would consider revising the rule at such time.

With regard to the suggestion that the Agency limit the amount of Business and Industry guaranteed loans to one borrower, the Agency has incorporated a provision that would limit the amount a borrower could receive. Specifically, as stated in 5001.103(j)(5), ''the full amount of outstanding principal and interest balance associated with Business and Industry loans, including the amount of the loan being approved, cannot exceed $25,000,000 for any one borrower.'' For a cooperative organization, this limit is $40,000,000.

Lastly, the commenter also suggested that an upper limit be based on the amount of indebtedness that a borrower has to the Agency (''The total amount of Business and Industry (Business and Industry) loans to any one borrower''). The Agency disagrees that, if an upper limit were to be adopted, such an upper limit would be based only on the borrower's indebtedness to the Agency. There is no rational basis to differentiate between a borrower's indebtedness to the Agency and the borrower's total indebtedness.

*Comment:* One commenter stated that the 1% guarantee fee is available if the borrower is a high impact business, which is currently determined by using the Priority Scoresheet that the State Office prepares for each loan. The commenter then asked how this will be determined because the proposed rule eliminated the Priority Scoresheet.

One commenter recommended that the 2% fee needs to be reduced to 1% and the annual servicing fee needs to be reduced to 0.125%.

*Response:* The Agency will determine if a business is a ''high impact'' business on the basis of whether it meets the definition of ''high impact business,'' which has been rewritten to make it clearer when a business is a high impact business. The Agency will provide additional guidance in the handbook for the rule to assist in making such determinations. The Agency does not see any need to reduce the guarantee fee further than provided for in the rule for high impact businesses. The rule does not specify a maximum annual servicing fee and the Agency will publish the applicable rate when such a fee will be assessed in a fiscal year.

*Comment:* Two commenters stated that the percentage of guarantee should be a constant at 80% on Business and Industry loans, and not decreased as the loan size increases. The commenters added that this would make the Business and Industry program more attractive to lenders and better enable the small and medium banks to handle and serve their customers.

A third commenter stated that the 60% guarantee amount and $25,000,000 loan amount limit the usefulness of the guarantee on larger projects. This low of a guarantee is very difficult to sell in the marketplace.

*Response:* The Agency has not revised the rule as requested by the commenters. The provisions on the level of the guarantee are based on the Agency's strategy for managing risk and the Agency believes that the percentage of guarantees as proposed are reasonable.

*Comment:* One commenter stated that the asterisk to the chart should read ''Per § 5001.103(g)(3), the maximum * * * is $25 million except for a rural cooperative organization producing a value added commodity for which the maximum is $40 million.'' See 2002 Farm Bill.

*Response:* While the commenter is correct, the Agency has removed the table from the rule and thus there is no correction to make.

*Rural Energy for America Program (§ 5001.104)*

*Application Documentation (§ 5001.104(d))*

*Comment:* Two commenters stated that the certification should be corrected

to specify that the prospective borrower is an agricultural producer (not a ''small'' agricultural producer) or rural small business. The commenters pointed out that there is no limitation in the 9006 program to assisting only ''small agricultural producers'', and this should not be imposed now. According to the commenters, to limit the 9006 guaranteed loans to producers grossing $600,000 or less would restrict the program only to the smallest of farmers.

*Response:* The Agency did not intend to change this certification from what the current program requires and thus agrees with the commenters. Therefore, the Agency has revised the rule to drop ''small'' in reference to agricultural producer. A conforming change was also made to the definitions section by dropping the term ''small agricultural producer'' as that term no longer appears in the rule.

*Comment:* Three commenters expressed concern as to who would review technical reports for renewable energy projects. One commenter suggested requiring the technical report to flow through USDA for submission to DOE. Another commenter also preferred to be able to coordinate this activity through the USDA as part of the USDA program. One commenter asked if the proposed process is actually possible and if the National Renewable Energy Laboratory (NREL) is agreeable. This commenter suggested requiring a technical report as part of any application for any loan over a certain size, and leave it up to USDA to arrange for the technical review.

*Response:* The Agency agrees that it should be responsible for ensuring that these technical reports are reviewed by the appropriate entity and has modified the rule to indicate that these reports are to be submitted to the DOE for review unless otherwise stated in a **Federal Register** notice. Beyond that, the Agency will provide guidance in the handbook to the rule to ensure the proper entities are engaged in reviewing the technical report.

*Comment:* One commenter suggested that the technical report threshold of a ''loan guarantee of more than $200,000'' should be changed from ''loan guarantee'' to either eligible project costs or the total loan amount, regardless of the percent of guarantee. According to the commenter, tying the $200,000 to the amount of the loan guarantee is confusing and is not a measure commonly used by USDA anywhere else and would surely cause problems.

Another commenter also suggested that this requirement be tied to total project cost rather than the size of the guaranteed loan. This commenter further suggested that the threshold be lowered to $50,000 because renewable energy projects are complex, even when they are small, since they rely on such factors as interconnection, resource availability, technology, etc.

*Response:* The Agency agrees with the two commenters that the criterion to determine when the technical report is required should be based on total eligible project costs and not on the loan guarantee amount. The Agency has made this change in the rule. However, the Agency disagrees that the threshold needs to be reduced and has retained the threshold at $200,000.

*Comment:* One commenter recommends that energy assessments/audits should only be required on energy efficiency projects costing in excess of $100,000.

*Response:* The Agency disagrees that the threshold for requiring an energy assessment or audit needs to be changed from the current level of $50,000, and has retained this threshold in the rule to ensure that loans of more than $50,000 are having an impact on energy savings.

*Comment:* One commenter noted that, unlike with renewable energy projects discussed in § 5001.104(d)(2), there is no mention of any NREL or other technical review for energy assessment and audits in § 5001.104(d)(3). The commenter asked what is intended, and said that this should be spelled out.

*Response:* As noted in the response to a similar comment on the technical reports required under this program, the Agency will ensure that the proper review of energy assessment and energy audits performed will take place, but that it is not necessary to identify in the rule who will perform such reviews.

*Comment:* One commenter noted that the limit for energy assessment/audit refers to eligible project costs greater than $50,000, compared to seeking a loan guarantee of $200,000 for the renewable energy technical report or the feasibility study required under § 5001.104(d)(4). The commenter recommended consistency, stating that the different amounts are confusing, and using different measures will be problematic.

*Response:* The Agency agrees, in part, with the commenter that the same measure for determining when an energy assessment or audit is required should be used for when a technical report is required. Thus, the Agency has modified the rule such that in both instances total eligible project costs is the measure. However, for determining when a feasibility study is required, the Agency is maintaining the proposed measure of the size of the loan guarantee because it is a better measure of risk than total eligible project costs and the Agency has direct control over the loan guarantee amount and not the project cost. The Agency believes that these requirements are clear enough that confusion will not be an issue.

*Comment:* One commenter suggested that the regulation simply require a feasibility study and that it may be appropriate for the applicant to obtain the study. The commenter noted that this would be more consistent with the language used for the Business and Industry program. The commenter suggested the following language be used: ''Feasibility study. A feasibility study by a qualified independent consultant is required for each project seeking a loan guarantee greater than $200,000.''

*Response:* The Agency agrees with the commenter that the text of this paragraph should simply state that a feasibility study is required and not to refer to the lender obtaining the study. The rule reflects the language suggested by the commenter. The Agency has not included in the rule who is responsible for obtaining the feasibility study as this is unnecessary.

*Comment:* One commenter noted that the requirement for a feasibility study does not currently apply to energy efficiency projects under section 9006 guarantees, and recommended that this exception should not be revoked as is proposed here.

*Response:* The Agency agrees with the commenter. It was not the intent in the proposed rule to require feasibility studies for energy efficiency projects and the rule has been modified to require feasibility studies only for renewable energy systems, as is found in the current regulations for this program.

*Comment:* One commenter questioned whether it is necessary to have a feasibility study on proven, ''cookie-cutter'' projects such as large wind, even if they cost more than $200,000.

*Response:* The Agency disagrees with the commenter's suggestion. The Agency believes that all renewable energy projects with guaranteed loan amounts of greater than $200,000 require a feasibility study because even ''cookie-cutter'' projects can have project- and site-specific issues.

*Comment:* Regarding the language that says that the Agency ''may'' require a feasibility study, one commenter suggested that guidance should be provided that explains when a feasibility study is necessary (e.g., in a staff instruction or handbook).

*Response:* The Agency reviewed the proposed rule and, as proposed,

feasibility studies for projects under this program would be required; the proposed rule did not say that the Agency ''may require'' a feasibility study. Thus, no change is required to the rule in response to this comment. The Agency notes that the Agency ''may require'' feasibility studies for other programs and has addressed this same comment elsewhere.

*Comment:* One commenter noted that the proposed rule is silent on the annual financial statements requirement for Section 9006 borrowers, but then there is a reference to audited financial statements on loans over $3 million. The commenter stated that USDA needs to use the opportunity of this proposed rule to jettison any focus on GAAP financial statements in favor of tax returns, the financial tool now most widely used in business banking and the only financial statement that is uniformly and consistently available from all agricultural producers and small businesses.

*Response:* The financial statement requirements applicable to all programs under this part, including the Rural Energy for America Program, are found in subpart A in § 5001.12(a)(10). Under the rule, Agency-authorized financial statements may be used for businesses that have been in existence for less than one year regardless of the amount of the guaranteed loan request. If the guaranteed loan is for less than $3 million, borrowers that have been in existence for one or more years may submit either the most recent audited or Agency-acceptable financial statements of the borrower. Thus, for these set of borrowers, the rule allows for flexibility in the type of statement submitted. However, the Agency continues to believe that requiring audited financial statements is the best method for addressing risk for borrowers that have been in existence for one or more years that are seeking guaranteed loans of $3 million or more, unless alternative financial statements are authorized by the Agency.

*Additional Guarantee- and Loan-Related Requirements (§ 5001.104(g)) (Proposed § 5001.104(f))*

*Comment:* Two commenters noted that the proposed rule disallows issuance of the guarantee until after the Section 9006 project is complete and operating up to specifications. The commenters pointed out that the current regulations are vague as to what constitutes an operating cycle, and this requirement is too conservative to promote the Section 9006 program's goal of encouraging new projects. The commenters suggested allowing the issuance of the guarantee prior to development for all energy-efficiency projects and for renewable energy projects using commercially available, as opposed to pre-commercial technology. The commenters added that this will allow additional project opportunities as the construction phase is typically the highest risk period to the lender and the guarantee will help mitigate this risk and promote quality projects.

*Response:* The Agency disagrees with the commenters' suggestion to allow the issuance of the guarantee for projects under this program prior to completion because of the risk associated with the technologies associated with renewable energy projects. The rule continues current Agency policy with regards to projects under this program. With regard to current regulations being vague as to what constitutes an operating cycle, the Agency will provide guidance in the handbook to the rule.

*Comment:* One commenter said that, to be a serious contender in the energy-financing field, the program must let lenders loan more than 50% of eligible project costs. The commenter recommended raising the limit to 75% combined total between energy grants and guaranteed loans to allow for a larger percentage loan if no grant is involved in the project.

*Response:* The 2008 Farm Bill has raised this limit to 75%. Therefore, the Agency has revised the interim rule accordingly, raising the limit from 50% to 75%.

*Comment:* One commenter noted that the proposed rule does not limit the size of individual energy loans or the total indebtedness of the borrower, owners, or related entities, and suggested that established limits be considered. Another commenter asked if there is a maximum loan size specified in this regulation.

*Response:* The commenter is correct in that unlike the current regulation, which limits the amount of a loan to any one borrower to $10 million, the proposed rule did not include this limit. However, the 2008 Farm Bill has a provision that limits the maximum loan guarantee under this program to $25 million. Therefore, the Agency has added this limit to the rule. In addition, the interim rule applies this limit on a per borrower basis, stating that ''at the time of loan approval, the full amount of outstanding principal and interest balance associated with Rural Energy for America Program loans, including the amount of the loan being approved, cannot exceed $25 million for any one borrower.''

*Comment:* One commenter requested that the proposed rule clarify that customary lender fees associated with the loan and the section 9006 guaranteed loan fee are eligible purposes.

*Response:* It is the Agency's policy that each loan guarantee be attributed to hard project costs and not fees. Thus, no change was made to the rule in response to this comment.

**List of Subjects**

*7 CFR Part 1779*

Guaranteed loans, Loan programs, Waste treatment and disposal, Water supply.

*7 CFR Part 3575*

Community facilities, Guaranteed loans, Loan programs.

*7 CFR Parts 4279 and 4280*

Loan programs—Business and industry—Rural development assistance, Economic development, Energy, Direct loan programs, Grant programs, Guaranteed loan programs, Renewable energy systems, Energy efficiency improvements, Rural areas.

*7 CFR Part 5001*

Business and industry, Community facility, Energy efficiency improvement, Loan programs, Renewable energy, Rural development, Rural areas, Water and waste disposal.

■ For the reasons set forth in the preamble, under the authority at 5 U.S.C. 301 and 7 U.S.C. 1989, Chapters XVII, XXXV, and XLII of title 7 of the Code of Federal Regulations are amended and Chapter L is established as follows:

**CHAPTER XVII—RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE**

## PART 1779—[REMOVED]

■ 1. Part 1779 is removed and reserved.

**CHAPTER XXXV—RURAL HOUSING SERVICE, DEPARTMENT OF AGRICULTURE**

## PART 3575—[REMOVED]

■ 2. Part 3575 is removed and reserved.

**CHAPTER XLII—RURAL BUSINESS—COOPERATIVE SERVICE AND RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE**

## PART 4279—GUARANTEED LOANMAKING

■ 3. The authority citation for part 4279 is revised to read as follows:

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1989.

## Subpart B—Business and Industry Loans

■ 4. Subpart B of part 4279 is removed and reserved.

## PART 4280—LOANS AND GRANTS

■ 5. The authority citation for part 4280 continues to read as follows:

**Authority:** 7 U.S.C. 8106.

## Subpart B—Renewable Energy Systems and Energy Efficiency Improvements Program [Amended]

### §§ 4280.121–4280.160 [Removed and Reserved]

■ 6. Section B of Subpart B of part 4280, consisting of §§ 4280.121 through 4280.160, is removed and reserved.

■ 7. Section 4280.193 of subpart B of part 4280 is amended by revising the introductory text and paragraphs (a), (b)(1), (c) through (e), and (f)(2) to read as follows:

### § 4280.193 Combined funding.

The requirements for a project for which an applicant is seeking a combined grant and guaranteed loan are defined as follows:

(a) *Eligibility.* Applicants must meet the applicant eligibility requirements specified in § 4280.107. Projects must meet the project eligibility requirements specified in §§ 4280.108. Applicants may submit simplified applications if the project meets the requirements specified in § 4280.109.

(b) * * *

(1) The amount of any combined grant and guaranteed loan must not exceed 75% of total eligible project costs. For purposes of combined funding requests, total eligible project costs are based on the total costs associated with those items specified in §§ 4280.110(c) and 5001.104(g)(3) of this chapter. The applicant must provide the remaining total funds needed to complete the project.

* * * * *

(c) *Application and documentation.* When applying for combined funding, the applicant must submit separate applications for both types of assistance (grant and guaranteed loan). Each application must meet the requirements, including the requisite forms and certifications, specified in §§ 4280.111, 5001.12, and 5001.104(d) of this chapter. The separate applications must be submitted simultaneously. The applicant must submit at least one set of documentation, but does not need to submit duplicate forms or certifications.

(d) *Evaluation.* The Agency will evaluate each application according to applicable procedures specified in §§ 4280.112, 5001.11, and 5001.104(c) of this chapter.

(e) *Interest rate and terms of loan.* The interest rate and terms of the loan for the loan portion of the combined funding request will be determined based on the procedures specified in § 5001.31 of this chapter for guaranteed loans.

(f) * * *

(2) All other provisions of 7 CFR part 5001 shall apply to the guaranteed loan portion of the combined funding request.

■ 8. Chapter L consisting of parts 5000 through 5099 is established and a new part 5001 is added to read as follows:

## CHAPTER L—RURAL BUSINESS—COOPERATIVE SERVICE, RURAL HOUSING SERVICE, AND RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE

## PART 5001—GUARANTEED LOANS

### Subpart A—General Provisions

Sec.
5001.1 Purpose and scope.
5001.2 Definitions.
5001.3 Agency authorities.
5001.4 Oversight and monitoring.
5001.5 Forms, regulations, and instructions.

**Basic Eligibility Provisions**

5001.6 Project eligibility.
5001.7 Unauthorized projects and purposes.
5001.8 Borrower eligibility.
5001.9 Participation eligibility requirements.
5001.10 [Reserved]

**Basic Guarantee Application Provisions**

5001.11 Guarantee application process.
5001.12 Application for loan guarantee content.
5001.13–5001.14 [Reserved]

**Basic Lender Provisions**

5001.15 Lender responsibilities—General.
5001.16 Lender responsibilities—Origination.
5001.17 Lender responsibilities—Servicing.
5001.18—5001.24 [Reserved]

**Basic Borrower Provisions**

5001.25 Borrower responsibilities.
5001.26–5001.29 [Reserved]

**Basic Guarantee and Loan Provisions**

5001.30 General.
5001.31 Guaranteed loan requirements.
5001.32 Conditional commitment.
5001.33 Conditions precedent to issuance of loan note guarantee.
5001.34 Issuance of the guarantee.
5001.35 Alterations of loan instruments.
5001.36 Reorganizations.
5001.37 Sale or assignment of guaranteed loan.
5001.38 Termination of loan note guarantee.
5001.39–5001.100 [Reserved]

**Subpart B—Program Specific Provisions**

5001.101 Community Facilities Program.
5001.102 Water and Waste Disposal Facilities Program.
5001.103 Business and Industry Program.
5001.104 Rural Energy for America Program.
5001.105–5001.199 [Reserved]
5001.200 OMB control number.

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1926(a); 7 U.S.C. 1932(a); and 7 U.S.C. 8106.

### § 5001.1 Purpose and scope.

(a) *General.* The purpose and scope of this part is to simplify, standardize, and improve the making, guaranteeing, holding, servicing, and liquidating of Rural Development guaranteed loans. This part applies to those guaranteed loan programs specified in subpart B of this part.

(b) *Relationship between subpart A and subpart B requirements.* All guaranteed loan programs subject to this part are subject to the requirements specified in subpart A, unless there is a program specific provision in subpart B that overrides the corresponding subpart A provision. Such as subpart B provision may modify the scope of or replace entirely the corresponding subpart A provision.

### § 5001.2 Definitions.

The following definitions are applicable to the terms used in this part.

*Agency.* The Rural Housing Service; the Rural Utilities Service; and the Rural Business-Cooperative Service or the successors for the programs it administers.

*Agricultural producer.* An individual or entity directly engaged in the production of agricultural products, including crops (including farming); livestock (including ranching); forestry products; hydroponics; nursery stock; or aquaculture, whereby 50% or greater of their gross income is derived from the operations.

*Approved lender.* A lender that the Agency has determined meets the criteria specified in § 5001.9(a) through (c), as applicable, of this part.

*Arm's length transaction.* A transaction between ready, willing, and able disinterested parties who are not affiliated with or related to each other and have no security, monetary, or stockholder interest in each other.

*Assignment guarantee agreement.* A signed, Agency-approved agreement between the Agency, the lender, and the holder setting forth the terms and conditions of an assignment of a guaranteed portion of a loan or any part thereof.

*Assurance agreement.* A signed, Agency-approved agreement between the Agency and the lender that assures the Agency that the lender is in compliance with and will continue to be

in compliance with Title VI of the Civil Rights Act of 1964, 7 CFR part 15, and Agency regulations promulgated there under.

*Biomass.* Any organic material, excluding paper that is commonly recycled and unsegregated solid waste, that is available on a renewable or recurring basis, including agricultural crops; trees grown for energy production; wood waste; wood residues; plants, aquatic plants and grasses; natural fibers; animal waste and other waste materials; and fats, oils, and greases, including recycled fats, oils, and greases.

*Borrower.* The person that borrows, or seeks to borrow, money from the lender, including any party or parties liable for the guaranteed loan except guarantors.

*Business plan.* A comprehensive document that clearly describes the borrower's ownership structure and management experience including, if applicable, discussion of a parent, affiliates, and subsidiaries; a discussion of how the borrower will operate the proposed project, including, at a minimum, a description of the business and project, the products and services to be provided, pro forma financial statements for a period of 2 years, including balance sheet, income and expense, and cash flows, and the availability of the resources necessary to provide those products and services.

*Collateral.* The asset(s) pledged by the borrower in support of the loan.

*Commercially available.* A system that has a proven operating history of viability of at least one year, specific to the proposed application. Such a system is based on established design, and installation procedures and practices. Professional service providers, trades, large construction equipment providers, and labor are familiar with installation procedures and practices. Proprietary and balance of system equipment and spare parts are readily available. Service is readily available to properly maintain and operate the system. An established warranty exists for parts, labor, and performance.

*Community support.* Sufficient evidence of the area to be served that there is enough demand and support for the service or facility to make the project economically viable.

*Conditional commitment.* An Agency-approved form of commitment to the lender that the loan guarantee the lender has requested is approved subject to the completion of all conditions and requirements contained in the commitment as set forth by the Agency.

*Cooperative organization.*

(1) Any entity that is legally chartered as a cooperative.

(2) Any entity that is not legally chartered as a cooperative, but is owned and operated for the benefit of its members, including the manner in which it distributes its dividends and assets, provided those members are not employees of the organization.

*Day.* Calendar day, unless otherwise stated.

*Debt coverage ratio.* The ratio obtained when dividing the realistically projected earnings and cash injection before interest, taxes, depreciation, and amortization by the annual debt service (principal and interest).

*Default.* The condition that exists when a borrower is not in compliance with the promissory note, the loan agreement, or other related documents evidencing the loan.

*Delinquent loan.* A loan for which a scheduled loan payment has not been received by the due date or within any grace period as stipulated in the promissory note and loan agreement.

*Eligible project costs.* Those expenses approved by the Agency for the project.

*Energy assessment.* A report conducted by an experienced energy assessor, certified energy manager or professional engineer assessing energy cost and efficiency. The report identifies and provides a savings and cost analysis of low-cost/no-cost measures, estimates overall costs and expected energy savings from the funded improvements, and dollars saved per year and provides an estimate of the anticipated weighted average payback period in years.

*Energy audit.* A report conducted by a Certified Energy Manager or Professional Engineer that focuses on potential capital-intensive projects and involves detailed gathering of field data and engineering analysis. The report will provide detailed project costs and savings information with a high level of confidence sufficient for major capital investment decisions similar to but in more detail than an energy assessment.

*Energy efficiency improvement.* A product or process installed in a facility, or building, that reduces energy consumption.

*Essential community facility.* The physical structure (including machinery and/or equipment) financed or the resulting service provided to primarily rural residents that combined or severally must:

(1) Perform or fulfill a function customarily provided by a local unit of government;

(2) Be a public improvement needed for the orderly development of a rural community;

(3) Benefit the community at large;

(4) Not include commercial or business undertakings (except for limited authority for industrial parks); and

(5) Be within the area of jurisdiction or operation for eligible public bodies or a similar local rural service area of a not-for-profit corporation.

*Existing business.* A business that has been in operation for at least one full year. Mergers, changes in the business name, or legal type of entity of a currently operating business, or expansions of product lines are considered to be existing businesses as long as there is not a significant change in operations.

*Feasibility study.* An analysis by a qualified consultant of the economic, market, technical, financial, and management capabilities of a proposed project or business in terms of its expectation for success.

*Future recovery.* Funds collected by lender after final loss claim.

*Guaranteed loan.* A loan made and serviced by a lender for which the Agency has issued a Loan Note Guarantee.

*High Impact Business.* A business that is part of an industry that has 20% or more of its sales in international markets; offers high value, specialized products and services that command high prices; and creates jobs with an average wage exceeding 125% of the Federal minimum wage.

*Holder.* The person or entity, other than the lender, who owns all or part of the guaranteed portion of the loan with no servicing responsibilities.

*Immediate family.* Individuals who are closely related by blood, marriage, or adoption, or live within the same household, such as a spouse, domestic partner, parent, child, brother, sister, aunt, uncle, grandparent, grandchild, niece, or nephew.

*Interim financing.* A temporary or short-term loan made with the clear intent that it will be repaid through another loan, cash, or other financing mechanism.

*Lender.* An entity that has been approved by the Agency to originate and service loans guaranteed under this part.

*Lender's agreement.* The Agency-approved signed form between the Agency and the lender setting forth the lender's loan responsibilities under an issued Loan Note Guarantee.

*Lender's analysis.* The analysis and evaluation of the credit factors associated with each guarantee application to ensure loan repayment through the use of credit document procedures and an underwriting process that is consistent with industry standards and the lender's written policy and procedures.

*Lending entity.* An entity that originates and services a loan that has not been approved to originate loans under this part.

*Loan agreement.* The Agency-approved agreement between the borrower and lender containing the terms and conditions of the loan and the responsibilities of the borrower and lender.

*Loan classification.* The process by which loans are examined and categorized by degree of potential loss in the event of default.

*Loan note guarantee.* The Agency-approved form containing the terms and conditions of the guarantee of an identified loan.

*Loan-to-value ratio.* The ratio of the dollar amount of a loan to the dollar value of the collateral pledged as security for the loan.

*Local government.* A county, municipality, town, township, village, or other unit of general government below the State level. The term also includes tribal governments when tribal lands are within the service area.

*Market value.* The amount for which property would sell for its highest and best use at a voluntary sale in an arm's length transaction.

*Material change.* Any change in the purpose of the loan, the financial condition of the borrower, or the collateral, that might jeopardize loan performance.

*Monetary default.* A loan is in monetary default if payment is not made within 30 days after the payment due date.

*Negligent loan origination.*

(1) The failure of a lender to perform those services that a reasonably prudent lender would perform in originating its own portfolio of unguaranteed loans; or

(2) The failure of the lender to perform its origination responsibilities in accordance with its origination policies and procedures in use by the lender at the time the loan is made.

(3) The term includes the concepts of failure to act, not acting in a timely manner, or acting in a manner contrary to the manner in which a reasonably prudent lender would act.

*Negligent loan servicing.*

(1) The failure of a lender to perform those services that a reasonably prudent lender would perform in servicing and liquidating its own portfolio of unguaranteed loans; or

(2) The failure of the lender to perform its servicing responsibilities in accordance with its servicing policies and procedures in use by the lender at the time the loan is made.

(3) The term includes the concepts of failure to act, not acting in a timely manner, or acting in a manner contrary to the manner in which a reasonably prudent lender would act.

*Other lending entity.* A lending entity who does not meet the definition of regulated or supervised lending entity.

*Participation.* Sale of an interest in a loan by the lender wherein the lender retains the note, collateral securing the note, and all responsibility for loan servicing and liquidation.

*Person.* Any individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, public body, or State or local government.

*Post-application.* The date that the Agency receives an essentially completed application. An ''essentially completed'' application is an application that contains all parts necessary for the Agency to determine borrower and project eligibility and to conduct the technical evaluation.

*Pre-application.* Information submitted to the Agency for which the applicant requests the Agency to make an informal eligibility assessment prior to submitting a full application. The information must be sufficient for the Agency to make a determination that the borrower and project are eligible.

*Pre-commercial technology.* Technology that has emerged through the research and development process and has technical and economic potential for commercial application, but is not yet commercially available.

*Preferred lender.* An approved lender that, as determined by the Agency, also meets the criteria specified in § 5001.9(d) of this part.

*Preliminary architectural report.* A document normally prepared by a professional, licensed architect that describes the existing situation and problem, analyzes alternatives, and proposes a specific course of action from an architectural and environmental perspective. Sufficient information must be provided to adequately assess the need for, the feasibility of, and the cost of the project.

*Preliminary engineering report.* A document normally prepared by the owner's consulting engineer that describes the owner's present situation, analyzes alternatives, and proposes a specific course of action from an engineering and environmental perspective.

*Promissory Note.* A legal instrument that a borrower signs promising to pay a specific amount of money at a stated time. ''Note'' or ''Promissory Note'' shall also be construed to include ''Bond'' or other evidence of debt where appropriate.

*Protective advances.* Advances made by the lender for the purpose of preserving and protecting the collateral where the debtor has failed to, and will not or cannot, meet obligations to protect or preserve collateral.

*Public body.* A municipality, county, or other political subdivision of a State; a special purpose district; or an Indian tribe on a Federal or State reservation or other Federally recognized Indian tribe or an organization controlled by any of the above.

*Qualified consultant.* An independent, third-party possessing the knowledge, expertise, and experience to perform in an efficient, effective, and authoritative manner the specific task required.

*Regulated or supervised lender.* A lender that is subject to examination or supervision by an appropriate agency of the United States or a State that supervises or regulates credit institutions.

*Renewable biomass.*

(1) Materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands (as defined in section 103 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702)) that:

(i) Are byproducts of preventive treatments that are removed to reduce hazardous fuels; to reduce or contain disease or insect infestation; or to restore ecosystem health;

(ii) Would not otherwise be used for higher-value products; and

(iii) Are harvested in accordance with applicable law and land management plans and the requirements for old-growth maintenance, restoration, and management direction of paragraphs (2), (3), and (4) of subsection (e) of section 102 of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6512) and large-tree retention of subsection (f) of that section; or

(2) Any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States, including:

(i) Renewable plant material, including feed grains; other agricultural commodities; other plants and trees; and algae; and

(ii) Waste material, including crop residue; other vegetative waste material (including wood waste and wood residues); animal waste and byproducts (including fats, oils, greases, and manure); and food waste and yard waste.

*Renewable energy.*

(1) Energy derived from a wind, solar, renewable biomass, ocean (including tidal, wave, current, and thermal), geothermal, or hydroelectric source;

(2) Hydrogen derived from renewable biomass or water using an energy source described in paragraph (1) of this definition.

*Renewable energy system.* A system that produces or produces and delivers usable energy from a renewable energy source.

*Report of loss.* An Agency-approved form used by lenders when reporting a loss under an Agency guarantee.

*Rural or rural area.*

(1) For the purpose of providing Community Facilities loan guarantees, rural and rural area are defined as any area not in a city, town, or Census Designated Place with a population of more than 20,000 inhabitants according to the latest decennial census of the United States.

(2) For the purpose of providing Water and Waste Disposal loan guarantees, rural and rural area are defined as any area not in a city, town, or Census Designated Place with a population in excess of 10,000 inhabitants, according to the latest decennial census of the United States.

(3) For purposes of providing Business and Industry and Renewable Energy/Energy Efficiency loan guarantees, rural and rural area are defined as any area of a State not in a city or town that has a population of more than 50,000 inhabitants, according to the latest decennial census of the United States, and the contiguous and adjacent urbanized area.

(4) Notwithstanding any other provision of this definition, in determining which census blocks in an urbanized area are not in a rural area, the Agency shall exclude any cluster of census blocks that would otherwise be considered not in a rural area only because the cluster is adjacent to not more than 2 census blocks that are otherwise considered not in a rural area under this definition.

(5) For the purposes of this definition, cities and towns are incorporated population centers with definite boundaries, local self government, and legal powers set forth in a charter granted by the State. For Puerto Rico, Census Designated Place, as defined by the U.S. Census Bureau, will be used as the equivalent to city or town. For the purpose of defining a rural area in the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands, the Agency shall determine what constitutes rural and rural area based on available population data.

*Small business.* An entity is considered a small business in accordance with the Small Business Administration's small business size standards by the North American Industry Classification System found in Title 13 CFR part 121. A private entity, including a sole proprietorship, partnership, corporation, cooperative (including a cooperative qualified under section 501(c)(12) of the Internal Revenue Code), and an electric utility, including a Tribal or governmental electric utility, that provides service to rural consumers on a cost-of-service basis without support from public funds or subsidy from the Government authority establishing the district, provided such utilities meet Small Business Administration's definition of small business. These entities must operate independent of direct Government control. With the exception of the entities described above, all other not-for-profit entities are excluded.

*Startup business.* A business that has been in operation for less than one full year. Startup businesses include newly formed entities leasing space or building ground up facilities in a new market area, even if the owners of the startup business own affiliated businesses doing the same kind of business. Newly formed entities that are buying existing businesses or facilities will be considered an existing business as long as the business or facility being bought remains in operation and there is no significant change in operations.

*State.* Any of the 50 States of the United States, the Commonwealth of Puerto Rico, the District of Columbia, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia, and the Republic of the Marshall Islands.

*State Bond Banks and State Bond Pools.* An entity authorized by the State to issue State debt instruments and utilize the funds received to finance projects that qualify for a guaranteed loan under this part.

*Tangible net worth.* Tangible assets minus liabilities.

*Total project cost.* The sum of all costs associated with a completed project.

*Transfer and assumption.* The conveyance by a debtor to an assuming party of the assets, collateral, and liabilities of the loan in return for the assuming party's binding promise to pay the outstanding debt.

*Water and waste disposal facility.* A physical structure or series of structures used to provide water and waste disposal services. Such structures include, but are not necessarily limited to, those for rural drinking water, sanitary sewage, solid waste disposal, and storm wastewater disposal.

*Working capital.* Current assets available to support a business' operations and growth. Working capital is calculated as current assets less current liabilities.

**§ 5001.3 Agency authorities.**

(a) *Exception authority.* Except as specified in paragraphs (a)(1) through (4) of this section, the applicable Administrator may, on a case-by-case basis, make exceptions to any requirement or provision of this part, if such exception is necessary to implement the intent of the authorizing statute in a time of national emergency or in accordance with a Presidentially-declared disaster, or when such an exception is in the best financial interests of the Federal Government and is otherwise not in conflict with applicable law.

(1) *Lender and borrower eligibility.* No exception to lender or borrower eligibility can be made.

(2) *Project eligibility.* No exception to project eligibility can be made.

(3) *Rural area definition.* No exception to the definition of rural area, as defined in § 5001.2, can be made.

(4) *Term length.* No exception to the maximum length of the loan term, as specified in § 5001.31(c), can be made.

(b) *Review or appeal rights.* A person has review or appeal rights in accordance with 7 CFR part 11.

**§ 5001.4 Oversight and monitoring.**

(a) *General.* The lender will cooperate fully with Agency oversight and monitoring of all lenders involved in any manner with any guarantee under this program to ensure compliance with this part, including ensuring lenders continue to meet the criteria for being an approved lender or a preferred lender. Such oversight and monitoring will include, but is not limited to, reviewing lender records and meeting with lenders. In addition, the Agency will review all approved and preferred lenders for eligibility at least every two years.

(b) *Reports and notifications.* The Agency will require lenders to submit to the Agency reports and notifications to facilitate the Agency's oversight and monitoring. These reports and notifications include, but are not necessarily limited to:

(1) Periodic reports, to be submitted semiannually, regarding the condition of its Agency guaranteed loan portfolio (including borrower status and loan classification) and any material change in the general financial condition of the

borrower since the last periodic report was submitted.

(2) Monthly default reports for each loan in monetary default using a form approved by the Agency.

(3) Notification within 15 calendar days of:

(i) Any loan agreement violation by any borrower, including when a borrower is 30 days past due or is otherwise in default;

(ii) Any permanent or temporary reduction in interest rate; and

(iii) Any downgrade in the loan classification of any loan made under this part.

(4) If a lender receives a final loss payment, an annual report on its collection activities for each unsatisfied account for 3 years following payment of the final loss claim.

### § 5001.5 Forms, regulations, and instructions.

Copies of all forms, regulations, and instructions referenced in this part may be obtained through the Agency.

## Basic Eligibility Provisions

### § 5001.6 Project eligibility.

To be eligible for a guaranteed loan under this part, at a minimum, a borrower and project, as applicable, must meet each of the requirements specified in paragraphs (a) through (c) of this section.

(a) The project must meet the requirements specified in subpart B of this part.

(b) The borrower must meet the financial metric criteria specified in paragraphs (b)(1) through (b)(3) of this section. These financial metric criteria shall be calculated from the realistic information in the pro forma statements or borrower financial statements, submitted in accordance with § 5001.12(a)(10), of a typical operating year after the project is completed and stabilized. For projects that the Agency deems to be more risky, such as racetracks and water parks, the Agency will require higher underwriting standards for such projects.

(1) A debt coverage ratio of 1.0 or higher;

(2) A debt-to-tangible net worth ratio of 4:1 or lower for startup businesses and of 9:1 or lower for existing businesses.

(3) A loan-to-value ratio of no more than 1.0.

(c) For projects that are determined by a service area, boundaries for the proposed service area must be chosen in such a way that no user or area will be excluded because of race, color, religion, sex, marital status, age, disability, or national origin. This does not preclude:

(1) Financing or constructing projects in phases when it is not practical to finance or construct the entire project at one time, and

(2) Financing or constructing facilities where it is not economically feasible to serve the entire area, provided economic feasibility is determined on the basis of the entire system or facility and not by considering the cost of separate extensions to, or parts thereof. Additionally, the borrower must publicly announce a plan for extending service to areas not initially receiving service. Also, the borrower must provide written notice to potential users located in the areas not to be initially served.

### § 5001.7 Unauthorized projects and purposes.

Loans guaranteed under this part must not be used for any projects other than those authorized in subpart B of this part. In addition, loan funds may not be used to finance:

(a) Investment or arbitrage, or speculative real estate investment.

(b) Golf courses or similar recreational facilities listed in the annual Notice of Funds Availability.

(c) Any business deriving more than 10% of its annual gross revenue from gambling activity, excluding State-authorized lottery proceeds and, for public bodies and for not-for-profit approved projects only, any other funds derived from gambling activity, as approved by the Agency, conducted for the purpose of raising funds for the approved project.

(d) Prostitution or businesses deriving income from activities of a prurient sexual nature.

(e) Any guarantee of a:

(1) Line of credit;

(2) Lease payment; or

(3) Loan made by other Federal agencies.

(f) Any project eligible for Rural Rental Housing and Rural Cooperative Housing loans under sections 515, 521, and 538 of the Housing Act of 1949, as amended.

(g) Finders', packagers', or loan brokers' fees.

(h) Any business deriving income from illegal drugs, drug paraphernalia, or any other illegal product or activity.

(i) To pay the borrower for the rental of equipment or machinery owned by the borrower.

(j) The payment of either a Federal judgment or a debt owed to the United States, excluding other Federal loans.

(k) Any project that creates, directly or indirectly, a conflict of interest or an appearance of a conflict of interest.

(l) Properties to be used for commercial rental when the borrower has no control over tenants and services offered except for industrial-site infrastructure development and limited sections of essential community facilities when the activity in the leased space is related to and enhances the primary purpose for which the facility is being established by the borrower.

(m) Any project located within the Coastal Barriers Resource System that does not qualify for an exception as defined in section 6 of the Coastal Barriers Resource Act, 16 U.S.C. 3501 *et seq*.

(n) Any project located in a special flood or mudslide hazard area as designated by the Federal Emergency Management Agency in a community that is not participating in the National Flood Insurance Program unless the project is an integral part of a community's flood control plan.

(o) Any other similar project or purpose that the Agency determines is ineligible for funding under this part and publishes in a **Federal Register** notice.

### § 5001.8 Borrower eligibility.

(a) *Eligible entities*. To be eligible, a borrower must meet the requirements specified in paragraphs (a)(1) and (2) of this section and in subpart B to this part, as applicable.

(1) *Citizenship*. Citizenship requirements are as follows:

(i) Individual borrowers must be citizens of the United States (U.S.), the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, or American Samoa, or reside in the U.S. after legal admittance for permanent residence.

(ii) Entities other than individuals must be at least 51% owned or controlled by persons who are either citizens as identified under paragraph (a)(1)(i) of this section or are legally admitted permanent residents residing in the U.S.

(2) *Legal authority and responsibility*. Each borrower must have, or obtain, the legal authority necessary to construct, operate, and maintain the proposed facility and services and to obtain, give security for, and repay the proposed loan.

(b) *Ineligible entities*. A borrower will be considered ineligible for a guarantee if either the borrower or any owner with more than 20% ownership interest in the borrower:

(1) Has an outstanding judgment obtained by the U.S. in a Federal Court (other than U.S. Tax Court),

(2) Is delinquent on the payment of Federal income taxes,

(3) Is delinquent on a Federal debt, or

(4) Is debarred or suspended from receiving Federal assistance.

**§ 5001.9 Participation eligibility requirements.**

Only lenders are eligible to participate in the guaranteed loan programs described in this part.

(a) *General requirements.* The requirements in this paragraph apply to all lending entities who wish to participate in the guaranteed loan programs described in this part.

(1) *Loan origination and servicing policies and procedures.* The lending entity must submit a written summary of its loan origination and servicing policies and procedures, addressing, at a minimum, the areas specified in paragraphs (a)(1)(i) through (ix) of this section. At the Agency's request, the lending entity must make available any or all of its loan origination and servicing policies and procedures.

(i) Internal credit review process.

(ii) Underwriting process.

(iii) Portfolio management.

(iv) Delinquent loan handling.

(v) Liquidation process.

(vi) Releases.

(vii) Termination.

(viii) Final loss claims.

(ix) Exceptions to loan policies and procedures and other information relevant to Agency guaranteed loans.

(2) *Audit and management control system.* The lending entity must maintain internal audit and management control systems to evaluate and monitor the overall quality of its loan origination and servicing activities.

(3) *Debarment and suspension.* The lending entity must not be otherwise debarred or suspended by the Federal government.

(b) *Regulated or supervised lending entities.* The requirements for a regulated or supervised lending entity that has no outstanding guaranteed loans with the Agency to be eligible to participate are identified in paragraph (b)(1) of this section. The requirements for a regulated or supervised lending entity that has at least one outstanding guaranteed loan with the Agency to be eligible to participate are identified in paragraph (b)(2) of this section.

(1) *No outstanding Agency guaranteed loans.* A regulated or supervised lending entity that does not have any outstanding guaranteed loans as of January 16, 2009 with the Agency must apply for lender approval.

(i) *Lender application.* If the lending entity is a state chartered entity, the lending entity must submit the application, and other required documentation, to the State in which it is chartered. If the lending entity is a federally chartered entity, the lending entity must submit the application, and other required documentation, to the State in which the entity's headquarters is located.

(ii) *Policies and procedures.* The lending entity must submit with the lender application a written summary of its loan origination and servicing policies and procedures, as specified in paragraph (a)(1) of this section.

(iii) *Lending history and experience.* The lending entity must submit with the lender application a description of its lending history and experience, including:

(A) Evidence of demonstrated expertise in loan origination, making, securing, servicing, and collecting loans;

(B) Length of time in the commercial lending business;

(C) Its experience with government guaranteed lending, particularly within any of the subject programs;

(D) The range and volume of its lending and servicing activity;

(E) The current status of its loan portfolio;

(F) Its commercial loan fee structure;

(G) The level of experience of its management, lending, and servicing staff; and

(H) Audited financial statements not more than 1 year old.

(iv) *Approval process.* The Agency will review the application, including the summary of the lending entity's loan origination and servicing policies and procedures, submitted under paragraph (b)(1) of this section, to determine whether the lending entity is approved for participation under this part. The Agency may request additional clarification or information as necessary in its determination of lender approval.

(A) The Agency will approve or disapprove the lending entity on the basis of the information in the application, including the information describing the lending entity's loan origination and servicing policies and procedures.

(B) The lending entity must be in good standing with its regulator to be approved for participation.

(2) *With outstanding Agency guaranteed loans.* A regulated or supervised lending entity that has at least one outstanding guaranteed loan with the Agency as of January 16, 2009 is required to certify to the Agency that the lending entity is in good standing with its regulator and to submit a written summary of its loan origination and servicing policies and procedures, as specified in paragraph (a)(1) of this section.

(i) The lending entity must submit this certification and description either with, or prior to, its first application for loan guarantee under this part.

(ii) Such lending entity is approved for participation under this part when the Agency receives the lending entity's certification that the lending entity is in good standing with its regulator and the written summary of the lending entity's loan origination and servicing policies and procedures, as specified in paragraph (a)(1) of this section.

(3) *Lender's agreement.* If approved, the lender may sign a Lender's Agreement with the Agency. If the Lender's Agreement is executed by the lender and the Agency, the lender may submit an application for guarantee in any State in which it is authorized to do business. Approval for participation constitutes approval to participate in all guaranteed loan programs described in this part.

(4) *Maintenance of approved status.* Approved status is maintained as long as the lender remains in good standing with its regulator, in conformance with this part, or until otherwise notified by the Agency. If a lender fails to maintain its status as a Lender or has no outstanding loans with the Agency for two consecutive years, it must reapply under this section for lender approval.

(c) *Other lending entities.* Any lending entity not eligible in paragraph (b) of this section that wishes to originate a new loan under this part may apply for approved status, as specified in paragraph (c)(2) of this section, provided it meets the criteria specified in paragraph (c)(1) of this section.

(1) *Criteria for submitting an application for lender approval.* An other lending entity may submit an application for lender approval provided the lending entity has:

(i) A minimum net worth of $2.5 million;

(ii) Liquid assets of at least $500,000;

(iii) Acceptable line(s) of credit that totals $5 million or more; and

(iv) Undergone an examination acceptable to the Agency.

(2) *Application for lender approval.* The lending entity must submit an application to the Rural Development State Office in the State in which the entity is chartered providing the information specified in paragraphs (c)(2)(i) through (viii) of this section.

(i) A written summary of its loan origination and servicing policies and procedures, as specified in paragraph (a)(1) of this section.

(ii) Evidence showing that it has the necessary capital, resources, and funding capacity to successfully meet its responsibilities.

(iii) Copies of any license, charter, or other evidence of its legal authority to engage in the proposed loan making and servicing activities.

(iv) Certificate(s) of good standing from the States in which the lender is licensed and intends to conduct business.

(v) A description of its lending history and experience, including:

(A) Evidence of demonstrated expertise in loan origination, making, securing, servicing, and collecting loans;

(B) Length of time in the commercial lending business;

(C) Its experience with government guaranteed lending, particularly within any of the subject programs;

(D) The range and volume of its lending and servicing activity;

(E) The current status of its loan portfolio;

(F) Its commercial loan fee structure;

(G) The level of experience of its management, lending, and servicing staff; and

(H) Its audited financial statements not more than 1 year old.

(vi) Documented sources of its funds for funding and closing loans.

(vii) Office location(s) and its proposed geographic lending area(s).

(viii) Results of the examination required under paragraph (c)(1) of this section.

(3) *Agency review.* The Agency will review the application, including the lending entity's loan origination and servicing policies and procedures, submitted under paragraph (b)(1) of this section to determine whether the lending entity is approved for participation under this part. The Agency may request additional clarification or information as necessary in its determination of lender approval. The Agency will approve or disapprove the lending entity on the basis of the information in the application, including the information describing the entity's loan origination and servicing policies and procedures.

(4) *Lender's agreement.* If approved, the lender may sign a Lender's Agreement with the Agency. If the Lender's Agreement is executed by the lender and the Agency, the lender may submit an application for guarantee in any State in which it is authorized to do business.

(5) *Maintenance of approved status.* Approved status is maintained as long as the lender meets or exceeds minimum Agency requirements. If the Lender fails to maintain its status as a lender or has no outstanding loans with the Agency for two consecutive years, it becomes a lending entity and must reapply under this section for lender approval.

(d) *Preferred lenders.* Approved lenders may apply to the Agency for preferred lender status for the Business and Industry (B&I) guaranteed loan program in subpart B of this part. In addition, this preferred lender status may be expanded to include other programs contained in this part pursuant to notice published in the **Federal Register**.

(1) *Criteria for receiving preferred lender status.* The lender must meet each of the requirements specified in paragraphs (d)(1)(i) through (vii) of this section to obtain preferred lender status.

(i) Have a lender loss rate not in excess of the maximum ''preferred lender'' loss rate established by the Agency and published in a **Federal Register** Notice.

(ii) Have made a minimum of 10 guaranteed Business and Industry loans, unless another minimum number is specified in a notice in the **Federal Register**.

(iii) Show a consistent practice of submitting applications for guaranteed loans containing accurate information supporting a sound loan proposal.

(iv) Have no more than one instance of Federal government negligent loan origination or servicing where a loss has been paid.

(v) Not be under any regulatory enforcement action, such as a cease and desist order, written agreement, or an appointment of conservator or receiver.

(vi) Demonstrated high standards of professional competence for the lender's staff, particularly key underwriting and servicing staff.

(vii) Adequate lender facilities to conduct its Agency business at a high level of performance.

(2) *Locations.* The lender must identify in its application for preferred lender status the States in which the lender desires to receive preferred lender status and its branch offices which the lender desires to be considered by the Agency for approval. The Agency will determine which branches of the lender have the necessary experience and ability to participate in the preferred lender program based on the information submitted in the lender application and on Agency experience.

(3) *Timeframe and renewal.* A lender who is determined to be eligible for preferred lender status will be granted such status for a period not to exceed four years from the date the Lender's Agreement is executed. A lender must submit a written request for renewal of a Lender's Agreement with preferred lender status which includes information:

(i) Updating the material submitted in the initial application; and

(ii) Addressing any new criteria established by the Agency since the initial application.

(4) *Revocation of preferred lender status.* The Agency may revoke a lender's preferred lender status at any time during the four-year term for cause. Any of the following instances constitute cause for revoking or not renewing preferred lender status:

(i) Violation of a term of the Lender's Agreement;

(ii) Failure to maintain preferred lender eligibility criteria;

(iii) Knowingly submitting false or misleading information to the Agency;

(iv) Basing a request on information known to be false;

(v) Deficiencies that indicate an inability to process or service Agency guaranteed loan programs loans in accordance with this part;

(vi) Failure to correct cited deficiencies in loan documents upon notification by the Agency;

(vii) Failure to submit status reports in a timely manner;

(viii) Failure to use forms, or follow its loan origination and servicing policies and procedures accepted by the Agency; or

(ix) Failure to reimburse the holder the amount of repurchase, with accrued interest, in accordance with § 5001.17(i)(1).

### § 5001.10 [Reserved]

## Basic Guarantee Application Provisions

### § 5001.11 Guarantee application process.

(a) *Beginning the process.* Any lender may submit a pre-application or a full application to begin an application for guarantee.

(1) *Pre-application.* Based on the information in the pre-application, the Agency will make an informal assessment of the eligibility of the borrower and project. The Agency will provide written informal comments regarding the pre-application's strengths and weaknesses. The Agency's assessment may change based on subsequently submitted information, is solely advisory in nature, does not obligate the Agency to approve a guarantee request, and is not considered a favorable or adverse decision by the Agency.

(2) *Guarantee application.* For each guarantee request, the lender must submit to the Agency an application that is in conformance with § 5001.12.

(b) *Guarantee application evaluation.* All loan guarantee applications will be evaluated according to this part.

(1) The Agency will notify the lender in writing of its decision.

(2) In the evaluation of the application, the Agency may require the lender to obtain additional assistance in those areas where the lender does not have the requisite expertise to originate or service the loan. For the purposes of this paragraph ''those areas'' mean:

(i) The type and complexity of the financing (e.g., asset based financing, cash flow financing, bond financing), and

(ii) The industries with which the lender has little or no origination and/or servicing experience.

(c) *Loan approval and issuing the guarantee*. Complete applications from preferred lenders will be approved, subject to the availability of funds, or rejected not later than 10 business days after receipt. For the purpose of determining the application processing timeframes, an application will not be considered complete until all information required to make an approval decision, including a completed environmental review, is received by the Agency.

**§ 5001.12 Application for Loan Guarantee Content.**

All loan guarantee applications must contain the information specified in paragraph (a) of this section for approved lenders and in paragraph (b) of this section for preferred lenders.

(a) *Approved lender loan guarantee applications*. Loan guarantee applications from approved lenders must contain the following:

(1) Agency-approved application forms;

(2) Lender's analysis and credit evaluation (conforming to § 5001.16(b));

(3) Environmental information required by the Agency to conduct its environmental reviews (as specified in § 5001.16(h));

(4) Technical reports, energy audits, and energy assessments (as specified in subpart B of this part);

(5) Appraisals acceptable to the Agency, if available;

(6) Business plan, unless the information is contained in the feasibility study or in the lender's analysis;

(7) Feasibility study (as specified in subpart B);

(8) If the application is for 5 or more residential units, including nursing homes and assisted-living centers, an Affirmative Fair Housing Marketing Plan that is in conformance with 7 CFR 1901.203(c)(3);

(9) Current credit reports or equivalent on the borrower and any other person liable for the debt, except for public bodies;

(10) Financial statements as follows:

(i) For borrowers that have been in existence for one or more years,

(A) The most recent audited financial statements of the borrower if the guaranteed loan is $3 million or more, unless alternative financial statements are authorized by the Agency; or

(B) The most recent audited or Agency-acceptable financial statements of the borrower if the guaranteed loan is less than $3 million.

(ii) For borrowers that have been in existence for less than one year, the most recent Agency-authorized financial statements of the borrower regardless of the amount of the guaranteed loan request.

(iii) Depending on the complexity of the project and the financial condition of the borrower, the Agency may request additional financial statements and additional related information; and

(11) Any other information as determined by the Agency is necessary to evaluate the application.

(12) If the lending entity is not yet an approved lender, the application for lender approval specified in § 5001.9(b) or (c), as applicable.

(b) *Preferred lender loan guarantee applications*. Loan guarantee applications from preferred lenders must contain the following:

(1) A copy of the Application for Loan Guarantee;

(2) Information sufficient for the Agency to confirm project and borrower eligibility;

(3) A copy of lender's loan evaluation and analysis;

(4) An internal loan approval document showing approval by in-house appropriate office/committee; and

(5) Environmental information required by the Agency to conduct its environmental reviews (as specified in § 5001.16(h)).

**§§ 5001.13–5001.14 [Reserved]**

## Basic Lender Provisions

**§ 5001.15 Lender responsibilities—General.**

(a) Lenders must ensure that proposals for facilities seeking a guarantee under this part comply with all Federal, State, and local laws and regulatory rules that are in existence and that affect the project, the borrower, or lender activities.

(b) Any lender involved in any manner with any guarantee under this part must cooperate fully with all oversight and monitoring efforts of the Agency or its representatives as specified in § 5001.4.

(c) Any action or inaction on the part of the Agency does not relieve the lender of its responsibilities to originate and service the loan guaranteed under this part.

(d) The lender must notify the Agency of any changes to its loan origination and servicing policies and procedures provided under § 5001.9(a). For any changes to the lender's loan origination and servicing policies and procedures that are inconsistent with the requirements of this part, the lender must notify the Agency in writing and receive written Agency approval prior to applying the changes to loan guarantees under this part.

(e) The lender must compile and maintain in its files a complete application for each guaranteed loan for at least one year after the final loss has been paid.

(f) The lender must maintain internal audit and management control systems to evaluate and monitor the overall quality of its loan origination and servicing activities.

**§ 5001.16 Lender responsibilities—Origination.**

(a) *General*. The lender is responsible for originating all loans in accordance with its loan origination policies and procedures at the time the loan is made and with the requirements of this part. Where a lender's loan origination policies and procedures address a corresponding requirement in this part, the lender must comply with whichever is more stringent, unless otherwise approved by the Agency.

(1) The Agency may require, at its discretion, an independent credit risk analysis (e.g., a credit rating or assessment).

(2) The lender must provide the Agency the lender's classification of the loan no later than 90 days after loan closing.

(b) *Credit evaluation*. For all applications for guarantee, the lender must prepare a credit evaluation that is consistent with Agency standards found in this part and with the policies and procedures of the lender submitting the application. Where a lender's policies and procedures address a corresponding requirement in this part, the lender must comply with whichever is more stringent, unless otherwise provided in paragraph (a) of this section. An acceptable credit evaluation must:

(1) Use credit documentation procedures and an underwriting process that are consistent with generally accepted commercial lending practices, and the lender's own policies, procedures, and lending practices, and

(2) Include an analysis of the credit factors associated with each guarantee application to ensure loan repayment,

including consideration of each of the following five elements.

(i) *Credit worthiness.* Those financial qualities that generally impel the borrower to meet its obligations as demonstrated by its credit history.

(ii) *Cash flow.* A borrower's ability to produce sufficient cash to repay the loan as agreed.

(iii) *Capital.* The financial resources that the borrower currently has and those it is likely to have when payments are due. The borrower must be adequately capitalized.

(iv) *Collateral.* The assets pledged by the borrower in support of the loan. Adequacy will be based on market value. For the purchase of cooperative stock, the lender must at least secure the loan with a lien on the stock acquired with loan funds, an assignment of any patronage refund, and the full and unconditional personal, partnership, or corporate guarantee of the borrower.

(v) *Conditions.* The general business environment and status of the borrower's industry.

(c) *Appraisals.* Lenders are required to provide real property and chattel collateral appraisals conducted by an independent qualified appraiser in accordance with the Uniform Standards of Professional Appraisal Practices or successor standards. Complete appraisals must be submitted to the Agency before loan closing.

(1) All appraisals used to establish the fair market value of the real property must not be more than 1 year old.

(2) All appraisals will include consideration of the potential effects from a release of hazardous substances or petroleum products or other environmental hazards on the market value of the collateral as determined in accordance with the appropriate ASTM Real Estate Assessment and Management environmental standards.

(d) *Personal, partnership, and corporate guarantees.*

(1) Secured, unconditional personal, partnership, and corporate guarantees may be used to determine the security of the loan. Unsecured, unconditional personal, partnership, and corporate guarantees will not be considered in determining whether a loan is adequately secured for loan making purposes.

(2) Agency-approved, unsecured personal, partnership, and corporate guarantees for the full term of the loan and at least equal to the guarantor's percent interest in the borrower, times the loan amount are required from those owning greater than a 20% interest in the borrower, unless the lender documents to the Agency's satisfaction that collateral, equity, cash flow, and profitability indicate an above-average ability to repay the loan. When warranted by an Agency assessment of potential financial risk, Agency-approved guarantees may also be required of parent, subsidiaries, or affiliated companies (owning less than a 20% interest in the borrower) and require security for any guarantee provided under this section. Exceptions to the requirement for personal guarantees must be requested by the lender and approved by the Agency on a case-by-case basis. The lender must document that collateral, equity, cash flow, and profitability indicate an above-average ability to repay the loan.

(3) The guarantors will execute an Agency-approved unconditional guarantee form.

(i) Any amounts paid by the Agency on account of liabilities of an Agency guaranteed loan borrower will constitute a Federal debt owed to the Agency by the guaranteed loan borrower. In such case, the Agency may use all remedies available to it, including offset under the Debt Collection Improvement Act of 1996, to collect the debt from the borrower.

(ii) Any amounts paid by the Agency pursuant to a claim by a guaranteed program lender will constitute a Federal debt owed to the Agency by a third-party guarantor of the loan, to the extent of the amount of the third-party guarantee. In such case, the Agency may use all remedies available to it, including offset under the Debt Collection Improvement Act of 1996, to collect the debt from the third-party guarantor.

(iii) In all instances under paragraphs (d)(3)(i) and (ii) of this section, interest charges will be assessed in accordance with 7 CFR 1951.133.

(e) *Design requirements.* The lender must ensure that all projects are designed utilizing accepted architectural and engineering practices, taking into consideration any Agency comments when the facility is being designed, and conform to applicable Federal, State, and local codes and requirements or other Agency-approved code. The lender must also ensure that the planned project will be fully constructed, within the approved budget, to facilitate completion of the loan purpose and will be suitable, once completed, for the borrower's needs in accordance with the borrower's loan application.

(f) *Monitoring requirements.* The lender must monitor the progress of construction and ensure that construction conforms to applicable Federal, State, and local code requirements and proceeds in accordance with the approved plans, specifications, and contract documents. The lender must also ensure that funds are used for eligible project costs. The lender must expeditiously report any problems in project development to the Agency.

(g) *Compliance with other Federal laws.* Lenders must comply with other applicable Federal laws including Equal Employment Opportunities, Americans with Disabilities Act, Equal Credit Opportunity Act, Fair Housing Act, and the Civil Rights Act of 1964.

(h) *Environmental responsibilities.* The lender must ensure that the borrower has:

(1) Provided the necessary environmental information to enable the Agency to undertake its environmental review process in accordance with subpart G of either 7 CFR part 1940 or 7 CFR part 1794 or successor regulations, including the provision of all required Federal, State, and local permits;

(2) Complied with any mitigation measures required by the Agency; and

(3) Not taken any actions or incurred any obligations with respect to the proposed project that would either limit the range of alternatives to be considered during the Agency's environmental review process or which would have an adverse effect on the environment.

(i) *Conflicts of interest.* The lender must report to the Agency all conflicts of interest and appearances of conflicts of interest.

(j) *Surety.* Surety will be required in cases when the guarantee will be issued prior to completion of construction unless the contractor will receive a lump sum payment at the end of work. Surety will be made a part of the contract, if the applicant requests it or if the contractor requests partial payments for construction work. In such cases where no surety is provided and the project involves pre-commercial technology, first of its type in the U.S., or new designs without sufficient operating hours to prove their merit, a latent defects bond may be required to cover the work.

**§ 5001.17 Lender's responsibilities—Servicing.**

(a) *General.* The lender is responsible for servicing the loan in accordance with the Lender's Agreement, this part, and its loan servicing policies and procedures. Where a lender's loan servicing policies and procedures address a corresponding requirement in this part or in the Lender's Agreement, the lender must comply with whichever

is more stringent, unless otherwise approved by the Agency.

(1) The lender must ensure that the borrower has obtained, and will maintain for the life of the loan, all necessary insurance coverage appropriate to the proposed project.

(2) If the Agency determines that the lender is not in compliance with its servicing responsibilities, the Agency reserves the right to take any action the Agency determines necessary to protect the Agency's interests with respect to the loan. If the Agency exercises this right, the lender must cooperate with the Agency. Any cost to the Agency associated with such action will be assessed against the lender.

(b) *Certification.* The lender will certify in the Lender's Agreement that it will service the guaranteed loan according to Agency requirements and the lender's servicing policies and procedures and that, where the lender's policies and procedures address corresponding requirements of this part, it will comply with whichever is more stringent, unless otherwise provided in paragraph (a) of this section.

(c) *Audits.* When applicable, the lender will require an audit of the borrower in accordance with Office of Management and Budget requirements.

(d) *Financial reports.* Lenders are required to submit financial reports of the borrower as specified in paragraphs (d)(1) and (d)(2) of this section.

(1) For regulated or supervised lenders, the information that would be contained in financial reports required by the appropriate regulatory institution. Unless otherwise provided in the Conditional Commitment, such information must be submitted at the same time it should be made available to the appropriate regulatory institution.

(2) For other lenders, financial reports as required in the Conditional Commitment.

(e) *Collateral inspection and release.* The lender must inspect the collateral as often as necessary to properly service the loan. The Agency will require prior approval of the release of collateral, except in those instances where the proceeds are used to pay down debt in order of lien priority, or to acquire replacement equipment, or where the release of collateral is made under the abundance of collateral provision of the applicable security agreement. Appraisals on the collateral being released will be required on all transactions exceeding $250,000 and will be at the expense of the borrower. The appraisal must meet the requirements of § 5001.16(c). The sale or release of collateral must be based on an arm's length transaction, unless otherwise approved by the Agency in writing.

(f) *Transfers and assumptions.*

(1) *General.* Any time that a third party assumes a loan guaranteed under this part, it shall be processed and approved by the Agency as if it were a new loan guarantee.

(2) *Processing transfers and assumptions.* Subject to Agency approval, the lender may release the transferor (including any guarantor) from liability, regardless of the amount of the loan being transferred or assumed.

(i) Loan terms cannot be changed unless previously approved in writing by the Agency with the concurrence of the holder and transferor (including guarantor if it has not been released from personal liability). Any new loan term cannot exceed those authorized in this part as measured from the date the loan was initially guaranteed.

(ii) In the case of a transfer and assumption of less than the outstanding balance, the lender (if holding the guaranteed portion) may file an estimated Report of Loss with respect to the difference.

(iii) The transferor, including any guarantor, may be released from liability only with prior Agency written concurrence and only when the value of the collateral being transferred is at least equal to the amount of the loan being assumed and is supported by a current appraisal and a current financial statement. The Agency will not pay for the appraisal. If the transfer is for less than the debt, the lender must demonstrate to the Agency that the transferor and guarantors have no reasonable debt-paying ability considering their assets and income in the foreseeable future.

(3) *Transfer fees.* The Agency may charge the lender a nonrefundable transfer fee at the time of a transfer application. The Agency will set the amount of the transfer fee in an annual notice of funds availability.

(g) *Mergers.* All borrower mergers require prior approval by the Agency and the lender. If a borrower merges without Agency approval, the lender must accelerate the loan unless subsequently agreed to in writing by the Agency.

(h) *Subordination of lien position.* A subordination of the lender's lien position must be requested in writing by the lender and concurred with in writing by the Agency in advance of the subordination. Agency concurrence requires that:

(1) The subordination be in the best financial interest of the Agency;

(2) The lien to which the guaranteed loan is subordinated is for a fixed dollar limit;

(3) Lien priorities remain for the portion of the loan that was not subordinated; and

(4) The subordination of line of credit does not extend the term of the line of credit and in no event exceeds more than 3 years.

(i) *Repurchases from holder(s).* The holder may make written demand on the lender or the Agency to repurchase the unpaid guaranteed portion of the loan in the case of borrower monetary default or failure of the lender to pay the holder its pro-rata share. When the lender and the Agency determine that repurchase is necessary to adequately service the loan, the holder must sell the guaranteed portion to the requesting entity.

(1) *Repurchases by lender.* The lender must respond to the holder's demand within 30 days and will notify the Agency in writing of its decision, including notifying the Agency in writing of all repurchases it makes. When repurchased, the lender will accept an assignment without recourse from the holder upon repurchase. All repurchases must be for an amount equal to the holder's interest in the unpaid principal balance of the guaranteed portion and accrued interest less the lender's servicing fee and cover the principal and interest on the guaranteed loan accruing only up to 90 days after the date of the demand by the holder.

(2) *Repurchase by Lender for Servicing.* If, in the opinion of the lender, repurchase of the guaranteed portion of the loan is necessary to adequately service the loan, the holder will sell the portion of the loan to the lender for an amount equal to the unpaid principal and interest on such portion less lender's servicing fee. The Loan Note Guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the demand letter of the lender or the Agency to the holder requesting the holder to tender its guaranteed portion.

(i) The lender will not repurchase from the holder for arbitrage purposes or other purposes to further its own financial gain.

(ii) Any repurchase will only be made after the lender obtains Agency written approval.

(iii) If the lender does not repurchase the portion from the holder, the Agency at its option may purchase such guaranteed portions for servicing purposes.

(3) *Repurchases by Agency.* When the Agency repurchases the loan, the holder must submit a specific written demand to the Agency, along with appropriate documentation. The Agency will be subrogated to all rights of the holder and, subject to satisfactory documentation, will purchase the unpaid principal and interest of the guaranteed portion to date of repurchase less the lender's servicing fee within 30 days after receipt of the demand. The lender may not charge the Agency any fees.

(i) The lender shall use a form approved by the Agency to send the guaranteed loan payments to the Agency on all loans repurchased by the Agency from holders.

(ii) Any purchase by the Agency does not change, alter, or modify any of the lender's obligations to the Agency arising from the loan or guarantee and does not waive any of the Agency's rights against the lender, borrower, or guarantor.

(iii) All repurchases must be for an amount equal to the holder's interest in the unpaid principal balance of the guaranteed portion and accrued interest less the lender's servicing fee and cover the principal and interest on the guaranteed loan accruing only up to 90 days after the date of the demand by the holder.

(j) *Additional expenditures and loans.* The lender may make additional expenditures or new loans to a borrower with an outstanding loan guaranteed under this part without obtaining prior written Agency approval unless the expenditure or loan will violate one or more of the loan covenants of the borrower's loan agreement.

(k) *Lender failure.* In the event a lending institution fails or ceases servicing the loan, the Agency will provide instruction to the successor entity on a case-by-case basis. Such instructions may include that the Agency may determine to service the entire loan or the guaranteed portion of the loan. In the event no successor entity can be determined, the Agency reserves the right to enforce the provisions of the loan documents on behalf of the lender or to purchase the lender's interest in the loan.

(l) *Delinquent loans.* The lender must service delinquent loans in accordance with the Lender's Agreement, its current servicing standards, and reasonable and prudent lending standards. If a borrower is delinquent more than 30 days, the lender must implement appropriate curative actions to resolve the problem. Any curative action that affects the return to the holder must receive the holder's concurrence. Any change in the repayment schedule must be limited to the remaining life of the collateral. Any loan performing in accordance with a curative action will no longer be delinquent.

(m) *Protective advances.* The following conditions apply to protective advances associated with guaranteed loans under this part.

(1) Protective advances are allowed only when they are necessary to preserve the value of the collateral and must be reasonable with respect to the outstanding loan amount and the value of the collateral being preserved.

(2) Protective advances will not include attorneys' fees or advances in lieu of additional loans.

(3) The lender must obtain written Agency approval for any protective advance that will singularly or cumulatively amount to more than $200,000 or 10% of the guaranteed loan, whichever is less.

(4) Protective advances must constitute an indebtedness of the borrower to the lender and be secured by the security instruments.

(5) Notwithstanding § 5001.7(j), upon Agency approval, protective advances can be used to pay Federal tax liens and other Federal debt.

(6) Protective advances and interest thereon at the note rate will be guaranteed at the same percentage of loss as provided in the Loan Note Guarantee.

(7) The maximum loss to be paid by the Agency will be determined according to the procedures specified in § 5001.17(p)(1) regardless of any protective advances made.

(n) *Liquidation.* The lender may liquidate a loan when one or more incidents of default or third party actions occur that the borrower cannot or will not cure or eliminate within a reasonable period of time. The Agency reserves the right to unilaterally conclude that liquidation is necessary and require the lender to assign the security instruments to the Agency and the Agency will then liquidate the loan.

(1) *Liquidation by the lender.* The lender must develop, in consultation with the Agency, a liquidation plan to determine the best course of action. The plan must include all aspects of liquidation, including, but not limited to reports to, the Agency, protection of collateral, loss payment, transmission of proceeds to the Agency, and future recovery.

(i) *Liquidation plan.* The lender must submit its liquidation plan to the Agency for approval at least 30 days before implementing the plan. The Agency will approve or disapprove the plan within 30 days. Upon approval of the liquidation plan by the Agency, the lender may implement the plan. The Agency must be notified of any changes to or deviations from the plan.

(ii) *Appraisals.* Liquidation appraisals must be a part of the liquidation planning process. They are not required for liquidation plan approval, provided they are obtained prior to the completion of the liquidation. If the outstanding principal loan balance including accrued interest is more than $200,000, the lender will obtain an independent appraisal report on all collateral securing the loan, which will reflect the current market value and potential liquidation value.

(iii) *Appraisal costs.* Any independent appraiser's fee will be shared equally by the Agency and the lender. If an environmental site assessment in accordance with the appropriate ASTM Real Estate Assessment and Management environmental standards of the property is necessary in connection with liquidation, the cost will be shared equally between the Agency and the lender.

(iv) *Rent.* Any net rental or other income that has been received by the lender from the collateral will be applied on the guaranteed loan debt.

(2) *Compromise settlement and release of personal guarantors.* A compromise settlement may be considered at any time. Before a guarantor is released from liability, the Agency must concur with the lender. Upon agreement, the lender may proceed to effect a compromise settlement.

(o) *Litigation.* In all litigation proceedings involving the borrower, the lender is responsible for protecting the rights of the lender or the Agency with respect to the loan, and keeping the Agency adequately and regularly informed, in writing, of all aspects of the proceedings. If the Agency determines that the lender is not adequately protecting the rights of the lender or the Agency with respect to the loan, the Agency reserves the right to take any legal action the Agency determines necessary to protect the rights of the lender, on behalf of the lender, or the Agency with respect to the loan. If the Agency exercises this right, the lender must cooperate with the Agency. Any cost to the Agency associated with such action will be assessed against the lender.

(p) *Loss calculations and payment.* Estimated losses are calculated from principal and accrued interest. From this amount deduct prior liens, net value of collateral, and other funds. Final losses include principal,

protective advances, and accrued interest minus any estimated loss paid.

(1) The maximum loss allowed is the lower of:

(i) Any loss sustained by the lender on the guaranteed portion including:

(A) Principal and interest indebtedness as evidenced by said notes or by assumption agreements, and

(B) Principal and interest indebtedness on secured protective advances for protection and preservation of collateral made with the Agency's authorization, including but not limited to, advances for taxes, annual assessments, any ground rents, and hazard or flood insurance premiums affecting the collateral, or

(ii) The guaranteed principal advanced to or assumed by the borrower under said notes or assumption agreements and any interest due thereon.

(2) Accrued interest will be handled as specified in paragraphs (p)(2)(i) through (iv) of this section.

(i) If the Agency conducts the liquidation of the loan, loss occasioned to the lender by accruing interest after the date the Agency accepts responsibility for liquidation will not be covered by the Loan Note Guarantee.

(ii) If the lender conducts the liquidation of the loan, accruing interest shall be covered by the Loan Note Guarantee to 30 days after liquidation of collateral when the lender conducts the liquidation expeditiously in accordance with the liquidation plan approved by the Agency.

(iii) Under no circumstances will the Agency pay more than 90 days of additional accrued interest once the liquidation plan is approved.

(iv) Upon payment of an estimated loss to the lender, interest accrual on the defaulted loan will be discontinued.

(3) During the course of any reorganization plan, the lender will request and revise estimated loss payments using Agency-approved forms. The estimated loss claim, as well as any revisions to this claim, will be accompanied by documentation to support the claim.

(4) In a chapter 9 or chapter 11 reorganization, the lender must obtain an independent appraisal of the collateral if so directed by the Agency. The Agency and the lender will share the appraisal fee equally.

(5) Final settlement of liquidation will be made with the lender after the collateral is liquidated (unless otherwise designated as a future recovery) or after settlement and compromise of all parties has been completed. The Agency retains the right to recover losses paid under the guarantee from any liable party.

(i) If the lender takes title to collateral, any loss will be based on the collateral value at the time the collateral is liquidated.

(ii) When the lender is conducting the liquidation and owns any of the guaranteed portion of the loan, the lender must submit an estimated loss claim when liquidation is expected to exceed 90 days.

(iii) Within 30 days after liquidation of all collateral, except for certain unsecured personal, partnership, or corporate guarantees as provided for in this section, the lender must prepare a final report of loss and submit it to the Agency. The Agency will not guarantee interest beyond this 30-day period other than for the period of time it takes the Agency to process the loss claim. Before Agency approval of any final loss report, the lender must account for all funds, disposition of the collateral, and costs incurred, and must provide any other information necessary for successful completion of the liquidation.

(iv) After a final loss has been paid by the Agency, any future funds recovered by the lender will be pro-rated between the Agency and the lender based on the original percentage of guarantee even if the Loan Note Guarantee has been terminated.

(v) In a bankruptcy, the lender will submit an estimated loss claim based on the final orders of the bankruptcy court's direction. The Agency will pay the lender the estimated final loss based on these directions.

(6) In response to a loss claim, the Agency may request and the lender must provide the Agency with a copy of the applicable loan origination and servicing policies and procedures in place for the loan.

(7) When the Agency finds the final report of loss to be proper in all respects, it will approve the final loss. If the loss is less than the estimated loss payment, the lender will reimburse the Agency for the overpayment plus interest at the note rate from the date of the estimated loss payment.

### §§ 5001.18–5001.24 [Reserved]

## Basic Borrower Provisions

### § 5001.25 Borrower responsibilities.

(a) *Federal, State, and local regulations.* Borrowers must comply with all Federal, State, and local laws and rules that are in existence and that affect the project including, but not limited to:

(1) Land use zoning;

(2) Health, safety, and sanitation standards as well as design and installation standards; and

(3) Protection of the environment and consumer affairs.

(b) *Permits, agreements, and licenses.* Borrowers must obtain all permits, agreements, and licenses that are applicable to the project.

(c) *Insurance.* The borrower is responsible for maintaining all hazard, flood, liability, worker compensation, and personal life insurance, when required, on the project.

(d) *Access to borrower's records.* Upon request by the Agency, the borrower will permit representatives of the Agency (or other agencies of the U.S. Department of Agriculture authorized by that Department or the U.S. Government) to inspect and make copies of any of the records of the borrower pertaining to any Agency guaranteed loan. Such inspection and copying may be made during regular office hours of the borrower or at any other time agreed upon between the borrower and the Agency.

### §§ 5001.26–5001.29 [Reserved]

## Basic Guarantee and Loan Provisions

### § 5001.30 General.

(a) *Underwriting.* All loans guaranteed by the Agency must be underwritten in accordance with the credit evaluation requirements specified in § 5001.16(b).

(b) *Conditions of guarantee.* A loan guarantee under this part will be evidenced by a Loan Note Guarantee issued by the Agency. Each lender will execute a Lender's Agreement.

(1) The entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan. The unguaranteed portion of the loan will neither be paid first nor given any preference or priority over the guaranteed portion.

(2) The lender will remain mortgagee or secured party of record notwithstanding the fact that another party may hold a portion of the loan.

(3) The holder of a guaranteed portion shall have all rights of payment, as defined in the Loan Note Guarantee to the extent of the portion purchased. The lender will remain bound by all obligations under the Loan Note Guarantee, Lender's Agreement, and Agency program regulations.

(4) The lender will receive all payments of principal and interest on the entire loan and will promptly remit to each holder a pro-rata share, less any lender servicing fee.

(5) No loan guaranteed by the Agency under this part will be conditioned on

any requirement that the borrower accept or receive electric service from any particular utility, supplier, or cooperative.

(c) *Full faith and credit.* A guarantee under this part constitutes an obligation supported by the full faith and credit of the United States and is not contestable except for fraud or misrepresentation by the lender or holder, as appropriate, when the lender or holder has actual knowledge, participates in, or condones such fraud or misrepresentation.

(1) A note that provides for the payment of interest on interest will not be guaranteed. Any claim against a Loan Note Guarantee or Assignment Guarantee Agreement that is attached to, or relating to, a note that provides for payment of interest on interest will be reduced to remove the interest on interest.

(2) The guarantee will not be enforceable by the lender to the extent any loss is occasioned by the violation of usury laws, negligent loan origination or servicing, or failure to obtain the required security regardless of the time at which the Agency acquires knowledge of the foregoing. Any losses occasioned by the lender will not be enforceable to the extent that loan funds are used for purposes other than those specifically approved by the Agency in its Conditional Commitment.

(3) When in the hands of a holder, the Loan Note Guarantee or Assignment Guarantee Agreement shall not cover interest accruing 90 days after the holder has demanded repurchase by the lender. When in the hands of a holder, the Loan Note Guarantee or Assignment Guarantee Agreement shall not cover interest accruing 90 days after the lender or Agency has requested the holder to surrender the evidence of debt for repurchase.

(4) The Agency will guarantee payment as follows:

(i) To any holder, 100% of any loss sustained by the holder on the guaranteed portion of the loan and on interest due on such portion.

(ii) To the lender, the lesser of:

(A) Any loss sustained by the lender on the guaranteed portion, including principal and interest evidenced by the notes or assumption agreements and secured advances for protection and preservation of collateral made with the Agency's authorization; or

(B) The guaranteed principal advanced to or assumed by the borrower and any interest due thereon.

(d) *Soundness of guarantee.* All loans guaranteed under this part must be financially sound and feasible, with reasonable assurance of repayment.

(e) *Rights and liabilities.* When a guaranteed portion of a loan is sold to a holder, the holder shall succeed to all payments of the lender under the Loan Note Guarantee to the extent of the portion purchased. A guarantee and right to require purchase will be directly enforceable by a holder notwithstanding any fraud or misrepresentation by the lender or any unenforceability of the guarantee by the lender, except for fraud or misrepresentation of which the holder had actual knowledge at the time it became the holder or in which the holder participates or condones. The lender shall not represent a Conditional Commitment as a guarantee. The Agency reserves the right to collect from the lender any payments made to the holder that would not have been payable to the lender had they been the holder.

(f) *Reduction of loss claims payable.* Negligent loan origination or servicing will result in reduction of loss claims payable under the guarantee to the lender if any losses have occurred as the result of such negligence. The extent of the reduction, which could be a total reduction, of the loss claims payable, will depend on the extent of the losses occasioned as the result of the negligent loan origination and servicing.

(g) *Write-downs.* Debt write-downs for an existing borrower where the same principals retain control of and decision-making authority for the business are prohibited.

**§ 5001.31 Guaranteed loan requirements.**

(a) *Interest rates.* Interest rates may be fixed or variable or a combination of both, as long as they are legal. Variable interest rates must be tied to an acceptable published index and the lender must incorporate the provision for adjustment of payment installments into the Note.

(1) *Negotiated rates.* Interest rates, interest rate caps, and incremental adjustment limitations will be negotiated between the lender and the borrower and will be subject to concurrence by the Agency.

(2) *Different rates on guaranteed and unguaranteed portion of the loan.* If the lender and borrower agree, the interest rate on the guaranteed portion of a loan may differ from the rate on the unguaranteed portion provided:

(i) The rate on the unguaranteed portion is equal to or below the market rate and does not exceed that currently being charged on loans for similar purposes to borrowers under similar circumstances; and

(ii) The rate on the guaranteed portion does not exceed the rate on the unguaranteed portion unless the rate on the guaranteed portion is fixed and the unguaranteed portion is variable.

(b) *Interest rate changes.*

(1) *General.* Any change in the interest rate between issuance of the Conditional Commitment and issuance of the Loan Note Guarantee:

(i) Must be approved in writing by the Agency, unless the only change is to the base rate of a variable interest rate;

(ii) Must be shown as an amendment to the Conditional Commitment; and

(iii) Are subject to the restrictions specified in paragraphs (b)(2) and (b)(3) of this section.

(2) *Reductions.* The borrower, lender, and holder (if any) may collectively effect a permanent or temporary reduction in the interest rate on the guaranteed loan at any time during the life of the loan by their written agreement, subject to the conditions specified in paragraphs (b)(1)(i) through (iii) of this section. The lender must keep sufficient records to allow the Agency to calculate any loss at the reduced interest rate. The lender must notify the Agency of all permanent interest rate reductions, as specified in § 5001.4(b)(3)(ii).

(i) After a permanent reduction, the Loan Note Guarantee will only cover losses of interest at the reduced interest rate.

(ii) In a final loss settlement when qualifying rate changes are made with the required written agreements and notification, the interest will be calculated for the periods the given rates were in effect. The lender must maintain records that adequately document the accrued interest claimed.

(iii) The lender is responsible for the legal documentation of interest-rate changes by an endorsement or any other legally effective amendment to the promissory note; however, no new notes may be issued. Copies of all legal documents must be provided to the Agency.

(3) *Increases.* Increases in interest rates are not permitted beyond what is provided in the loan documents. Increases from a variable interest rate to a higher interest rate that is a fixed rate are allowed, subject to concurrence by the Agency.

(c) *Term length.* The loan term will be based on the use of proceeds, the useful economic life of the assets being financed, and the borrower's repayment ability. In no event may the term exceed 40 years.

(d) *Loan schedule and repayment.* Repayment will be structured in accordance with this section and the Loan Agreement, and will be due and payable in accordance with the Note. Only loans that require a periodic

payment schedule that will retire the debt over the term of the loan without a balloon payment will be guaranteed. Lenders must ensure that the principal balance of a guaranteed loan is properly amortized within the prescribed loan maturity.

(e) *Maximum loan amounts.* The maximum amount that may be guaranteed will be determined on a program-by-program basis and will be published each year in the **Federal Register**.

(f) *Maximum percent of guarantee.* The maximum guarantee is specified in subpart B of this part for each guaranteed loan program covered by this part.

(g) *Fees.* Each year, the Agency will establish, and publish in a **Federal Register** notice, the guarantee fee and renewal fee for each guaranteed loan program. A guarantee fee and a renewal fee will be assessed on each loan, as specified in the **Federal Register** notice. Both the guarantee fee and the renewal fee are nonrefundable.

(1) *Guarantee fee.* The guarantee fee will be paid to the Agency by the lender at the time the lender requests the Loan Note Guarantee. The fee may be passed on to the borrower.

(2) *Renewal fee.* As applicable, the renewal fee is assessed annually, is based on a fixed fee rate established at the time the loan is obligated, and will be calculated on the unpaid guaranteed principal balance as of close of business on December 31 of each year. The fee will be billed to the lender and may be passed on to the borrower.

(h) *Lender fees.* The lender may levy reasonable, routine, and customary charges and fees, including late payment fees, for the guaranteed loan provided they are similar to those charged other borrowers for the same type of loan for which a non-guaranteed borrower would be assessed. Default charges, late payment charges, and additional interest expenses will not be covered by the Loan Note Guarantee. Such charges may not be added to the principal and interest due under any guaranteed note.

**§ 5001.32 Conditional commitment.**

Upon approval of a loan guarantee application, the Agency will issue a Conditional Commitment to the lender containing conditions under which the Loan Note Guarantee will be issued.

(a) The lender shall certify in the Conditional Commitment that:

(1) The lender will monitor construction in accordance with approved plans and specifications, and

(2) Project funds will be used only for Agency-approved project costs.

(b) The lender may propose alternate conditions for Agency consideration.

(c) The lender must complete and sign the Acceptance of Conditions and return a copy to the Agency.

**§ 5001.33 Conditions precedent to issuance of loan note guarantee.**

Each of the conditions specified in paragraphs (a)(1) through (17) of this section must be met prior to the Agency's issuance of a Loan Note Guarantee under § 5001.34.

(a) The lender must certify in writing to each of the following conditions.

(1) No major changes have been made in the lender's loan conditions and requirements since the issuance of the Conditional Commitment, unless such changes have been approved by the Agency in writing.

(2) All planned property acquisition has been or will be completed, all development has been or will be substantially completed in accordance with plans and specifications, conforms with applicable Federal, state, and local codes, and costs have not exceeded the amount approved by the lender and the Agency.

(3) Required hazard, flood, liability, worker compensation, and personal life insurance, when required, are in effect.

(4) All truth-in-lending and equal credit opportunity requirements have been met.

(5) The loan has been properly closed, and the required security instruments have been obtained or will be obtained on any acquired property that cannot be covered initially under State law.

(6) The borrower has marketable title to the collateral then owned by the borrower, subject to the instrument securing the loan to be guaranteed and to any other exceptions approved in writing by the Agency.

(7) When required, the entire amount of the loan for working capital has been disbursed except in cases where the Agency has approved disbursement over an extended period of time. In line of credit cases, if any advances have occurred, advances have been disbursed for purposes and in amounts consistent with the Conditional Commitment and line of credit agreements.

(8) When required, personal, partnership, or corporate guarantees have been obtained.

(9) All requirements of the Conditional Commitment have been met.

(10) Lien priorities are consistent with the requirements of the Conditional Commitment. No claims or liens of laborers, subcontractors, suppliers of machinery and equipment, or other parties have been or will be filed against the collateral and no suits are pending or threatened that would adversely affect the collateral when the security instruments are filed.

(11) The loan proceeds have been or will be disbursed for purposes and in amounts consistent with the Conditional Commitment and the Application for Loan Guarantee. A copy of the detailed loan settlement of the lender must be attached to support this certification. Appropriate lender controls were utilized to ensure that all funds were properly disbursed, including funds for working capital.

(12) There has been no material change in the borrower's financial condition and no other adverse material change in the borrower during the period of time from the Agency's issuance of the Conditional Commitment to issuance of the Loan Note Guarantee regardless of the cause or causes of the change and whether or not the change or causes of the change were within the lender's or borrower's control. The lender must address any assumptions or reservations in the requirement and must address all material changes of the borrower, any parent, affiliate, or subsidiary of the borrower, and guarantors.

(13) None of the lender's officers, directors, stockholders, or other owners (except stockholders in an institution that has normal stock share requirements for participation) has a substantial financial interest in the borrower and neither the borrower nor its officers, directors, stockholders, or other owners has a substantial financial interest in the lender. If the borrower is a member of the board of directors or an officer of a Farm Credit System institution that is the lender, the lender will certify that a Farm Credit System institution on the next highest level will independently process the loan request and act as the lender's agent in servicing the account.

(14) The Loan Agreement includes all measures identified in the Agency's environmental impact analysis for this proposal (measures with which the borrower must comply) for the purpose of avoiding or reducing adverse environmental impacts of the proposal's construction or operation.

(15) For loans exceeding $150,000, the lender has certified its compliance with the Anti-Lobby Act (18 U.S.C. 1913). Also, if any funds have been, or will be, paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United

States to guarantee a loan, the lender shall completely disclose such lobbying activities in accordance with 31 U.S.C. 1352.

(16) Where applicable, the lender must certify that the borrower has obtained:

(i) A legal opinion relative to the title to rights-of-way and easements. Lenders are responsible for ensuring that borrowers have obtained valid, continuous, and adequate rights-of-way and easements needed for the construction, operation and maintenance of a facility.

(ii) A title opinion or title insurance showing ownership of the land and all mortgages or other lien defects, restriction or encumbrances, if any. It is the responsibility of the lender to ensure that the borrower has obtained and recorded such releases, consents, or subordinations to such property rights from holders of outstanding liens or other instruments as may be necessary for the construction, operation and maintenance of the facility and to provide the required security. For example, when a site is for major structures for utility-type facilities (such as a gas distribution system) and the lender and borrower are able to obtain only a right-of-way or easement on such site rather than a fee simple title, such a title opinion must be requested.

(17) The minimum financial criteria for a program for which a loan application has been submitted, including those financial criteria contained in the Conditional Commitment, have been maintained through the issuance of the Loan Note Guarantee. Failure to maintain these financial criteria shall result in an ineligible application.

(b) If the lender is unable to provide any of the certifications in paragraphs (a)(1) through (17) of this section, the lender must provide an explanation satisfactory to the Agency as to why the lender is unable to provide the certification.

### § 5001.34 Issuance of the guarantee.

The Agency, at its sole discretion, will determine if the conditions within the Conditional Commitment have been met. The Agency, at its sole discretion, will determine whether or not to issue the guarantee.

(a) *Loan agreement*. The lender must submit to the Agency a copy of the loan agreement between the lender and the borrower prior to loan closing.

(b) *Requesting guarantee*. The lender must provide the lender's certification and the guarantee fee at the time it requests the Loan Note Guarantee.

(c) *Issuance*. Upon the lender's compliance with requirements of the Conditional Commitment and certification in accordance with § 5001.33(a), the Agency will issue the Loan Note Guarantee.

(d) *Refusal to execute Loan Note Guarantee*. If the Agency determines that it cannot execute the Loan Note Guarantee, the Agency will promptly inform the lender of the reasons and give the lender a reasonable period within which to satisfy the objections. If the lender satisfies the objections within the time allowed, the guarantee will be issued.

(e) *Replacement of Loan Note Guarantee or Assignment Guarantee Agreement*. If the Loan Note Guarantee or Assignment Guarantee Agreement has been lost, stolen, destroyed, mutilated, or defaced, the Agency may issue a replacement to the lender or holder upon receipt from the lender of a notarized certificate of loss and an indemnity bond acceptable to the Agency. If the holder is the United States, a Federal Reserve Bank, a Federal Government corporation, a State or Territory, or the District of Columbia, an indemnity bond is not required.

### § 5001.35 Alterations of loan instruments.

Under no circumstances shall the lender alter or approve any alterations of the Loan Note Guarantee or any other loan instrument without the prior written approval of the Agency.

### § 5001.36 Reorganizations.

(a) *Change in borrower prior to closing*. Any change in borrower ownership or organization prior to the issuance of the Loan Note Guarantee must meet program eligibility requirements and be approved by the Agency prior to the issuance of the Conditional Commitment. Once the Conditional Commitment is issued, no substitution of borrower(s) or change in the form of legal entity will be approved, unless Agency approval, in writing, is obtained.

(b) *Transfer of lender prior to issuance of the Loan Note Guarantee*. Prior to issuance of a Loan Note Guarantee, the Agency may approve the transfer of an outstanding Conditional Commitment to another lender, provided no material changes have occurred in the borrower, project, or loan agreement.

(1) The present lender must submit the requested transfer in writing to the Agency and the Agency must approve the transfer.

(2) The other lender must be approved under this part.

(3) The other lender must execute a new application for guarantee in conformance with this part. If the transfer is from a preferred lender to an approved lender, the approved lender must submit an application in accordance with the requirements specified in § 5001.12(a).

(c) *Substitution of lender after issuance of the Loan Note Guarantee*. After the issuance of a Loan Note Guarantee, the lender shall not be substituted without the prior written approval of the Agency. A substitution of the lender must be requested in writing by the borrower, the proposed substitute lender, and the original lender if still in existence. The Agency may approve the substitution of a lender if the new lender is Rural Development approved; agrees in writing to acquire title to any unguaranteed portion of the loan held by the original lender; and assumes all original loan requirements and lender responsibilities. The Agency will not pay any loss or share in any costs with a lender who is not in compliance with this section.

### § 5001.37 Sale or assignment of guaranteed loan.

(a) *General*. The lender may sell part of the guaranteed portion of the loan, subject to the conditions specified in paragraphs (a)(1) through (5) of this section.

(1) Any sale or assignment by the lender of the guaranteed portion of the loan must be accomplished in accordance with the conditions in the Lender's Agreement.

(2) The lender may obtain participation in the loan under its normal operating procedures; however, the lender must retain a minimum of 5% of the total loan amount in its portfolio. The amount required to be retained must be of the unguaranteed portion of the loan and cannot be participated.

(3) The lender must not sell or participate any amount of the guaranteed, or non-guaranteed, portion of the loan to the borrower or members of the borrower's immediate family, the borrower's officers, directors, stockholders, other owners, or a parent, subsidiary, or affiliate.

(4) Disposition of the guaranteed portion of a loan may not be made prior to full disbursement, completion of construction, and acquisition of real estate and equipment without the prior written approval of the Agency.

(5) If the lender desires to sell all or part of the guaranteed portion of the loan subsequent to loan closing, the loan must not be in monetary default.

(b) *Servicing fee.* The lender cannot charge the Agency a servicing fee and no such fees are covered under the guarantee.

(c) *Distribution of proceeds.* All loan payments and collateral proceeds received will be applied to the guaranteed and unguaranteed portions of the loan on a pro rata basis.

**§ 5001.38 Termination of loan note guarantee.**

Each Loan Note Guarantee issued under this part will terminate automatically upon:

(a) Full payment of the guaranteed loan; or

(b) Full payment of any loss obligation or negotiated loss settlement except for future recovery provisions and payments made as a result of the Debt Collection Improvement Act of 1996. After final payment of claims to lenders and/or holders, the Agency will retain all funds received as the result of the Debt Collection Improvement Act of 1996; or

(c) Written request from the lender to the Agency that the guarantee will terminate 30 days after the date of the request, provided that the lender holds all of the guaranteed portion, and the original Loan Note Guarantee is returned to the Agency to be canceled.

**§§ 5001.39–5001.100 [Reserved]**

## Subpart B—Program-Specific Provisions

**§ 5001.101 Community Facilities Program.**

(a) *Project eligibility.* To be eligible for a Community Facility guaranteed loan, the project must meet the criteria specified in paragraphs (a)(1) through (5) of this section and in § 5001.6, except as provided in paragraph (a)(6) of this section.

(1) *Eligible projects.* All loans guaranteed with community facility funding shall be for:

(i) Essential community facilities;

(ii) Community services or community-based social, recreational or cultural services;

(iii) Transportation infrastructure and support;

(iv) Hydroelectric generating facilities or supplemental and supporting structures for rural electrification only with advance written approval from the Agency;

(v) Natural gas distribution systems;

(vi) Acquisition of land and site preparation for industrial parks;

(vii) Refinancing debts (excluding working capital debt, operating or other debt whose repayment is scheduled to take place in one year or less). Refinancing debts incurred by, or on behalf of, an eligible borrower is allowed when all of the following conditions exist:

(A) The debts being refinanced are less than 50% of the total loan;

(B) The debts were incurred for the facility or service being financed or any part thereof (such as interim financing, construction expenses, etc.); and

(C) Arrangements cannot be made with the creditors to extend or modify the terms of the debts so that a sound basis will exist for making a loan; or

(viii) Notwithstanding § 5001.7(e), a leasehold interest is eligible for funding as determined by the Agency. At a minimum,

(A) The length of lease must be greater than or equal to loan term;

(B) There are no reverter clauses in the lease; and

(C) There are no restrictive clauses that would impair the use or value of the property as security for the loan.

(2) *Facilities for public use.* All facilities financed under the provisions of this section shall be for public purposes.

(i) Facilities will be installed to serve any user within the service area who desires service and can be feasibly and legally served.

(ii) The lender will determine that, when feasibly and legally possible, inequities within the proposed project's service area for the same type service proposed (e.g., gas distribution systems) will be remedied by the owner on, or before, completion of the project. Inequities are defined as unjustified variations in availability, adequacy, or quality of service. User rate schedules for portions of existing systems or facilities that were developed under different financing, rates, terms, or conditions do not necessarily constitute inequities.

(3) *Leased space.* A facility will remain eligible for Community Facility funding provided:

(i) The facility has less than 25% of its floor space occupied by ineligible organizations or activities; and

(ii) The ineligible organization and the ineligible commercial activity are related to and enhance the primary purpose for which the facility is being established by the borrower.

(4) *Facility location.* Facilities must be located in rural areas, except as follows:

(i) For utility services, such as natural gas or hydroelectric, serving both rural and non-rural areas, Agency funds may be used to finance only that portion serving rural areas, regardless of facility location.

(ii) For telecommunication projects, the part of the facility located in a non-rural area must be necessary to provide the essential services to rural areas.

(5) *Serve rural area.* The project must primarily serve a rural area.

(6) *Demonstration of community support.* A project may demonstrate community support in lieu of the debt-to-tangible net worth ratio required under § 5001.6(b)(2) and in lieu of the loan-to-value ratio required under § 5001.6(b)(3).

(i) Evidence of community support in the form of a certification of support for each project or facility from any affected local government body is required.

(ii) With the exceptions of essential community facilities owned by a local public body or a Federally-recognized Indian tribe serving local residents or tribal members, a certificate of support must be obtained from each affected local government within the service area of the facility. The certificate of support must be signed by an authorized official of the local government.

(iii) The certificate of support should include sufficient information to determine that a community facility will provide needed services to the community and will have no adverse impact on other community facilities providing similar services. The organization is required to provide sufficient information to affected local governments as may be needed to obtain the certificate of support.

(b) *Unauthorized projects and purposes.* Loan funds may not be used to finance:

(1) Facilities that are 25% or more for the purpose of housing Federal or State agencies;

(2) Community antenna television services or facilities;

(3) Telephone systems;

(4) Facilities that are not modest in size, design, and cost;

(5) Racetracks, water parks, and ski slopes.

(c) *Borrower eligibility.* In addition to the requirements specified in subpart A of this part, an eligible borrower must also meet the following requirements where applicable:

(1) *Borrowers.* An eligible borrower must be:

(i) A public body such as a municipality, county, district, authority, or other political subdivision of a State located in a rural area;

(ii) A not-for-profit entity such as an association, cooperative, or private corporation; or

(iii) An Indian tribe on Federal and State reservations and other federally recognized Indian tribes.

(2) *Other eligible borrowers.* The following organizations are also eligible borrowers under this subpart: The YMCA, YWCA, Girl Scouts, and Boy Scouts.

(3) *Community ties.* A private not-for-profit essential community facility (other than utilities) must have significant ties with the local rural community. Such ties are necessary to ensure to the greatest extent possible that a facility under private control will carry out a public purpose and continue to primarily serve rural areas. Ties may be evidenced by items such as:

(i) Association with, or controlled by, a local public body or bodies or broadly based ownership and controlled by members of the community.

(ii) Substantial public funding through taxes, revenue bonds, or other local government sources, or substantial voluntary community funding such as would be obtained through a community-wide funding campaign.

(4) *Credit not available elsewhere.* The Agency must determine that the borrower is unable to obtain the required credit without the loan guarantee from private, commercial, or cooperative sources at reasonable rates and terms for loans for similar purposes and periods of time.

(d) *Additional application documentation provisions.* In addition to the application requirements specified in § 5001.12, lenders shall submit the following as applicable:

(1) *Feasibility study.* A feasibility study by a qualified consultant may be required by the Agency.

(2) *Organizational documents.* A copy of the complete organizational documents of the borrower.

(3) *Board Members.* A complete list of governing board members of the borrower.

(4) *Management agreement and other legal documents.* A copy of the management agreement and other legal documents between the borrower and the proposed management company.

(5) *Preliminary architectural report.* A preliminary architectural report conforming to customary professional standards. This report may be submitted to the Agency prior to the balance of the application material if a preliminary review by the Agency is desired.

(e) *Additional application processing requirements—appraisals.* When a loan's collateral appraises at a level less than 100% of the loan amount, the Agency will consider community support in evaluating the application for guarantee.

(f) *Additional origination responsibilities—leasehold interest.* Subject to approval by the Agency, a leasehold interest may be used as collateral for loans under this section provided the leasehold interest meets each of the conditions specified in paragraphs (a)(1)(viii)(A) through (C) of this section.

(g) *Additional servicing responsibilities—financial reports.* Annual financial reports required shall conform to 7 CFR part 3052.

(h) *Additional guarantee- and loan-related requirements.*

(1) *Funding limit.* The principal amount of a Community Facility loan guaranteed under this section may not exceed $50 million.

(2) *Maximum percent of guarantee.* The maximum loan guarantee issued to a Rural Development approved lender with Community Facilities funding is 90%.

(3) *Parity lien requirements.* Whenever both a Community Facilities guaranteed loan and a Community Facilities direct loan are utilized to finance a single project, the Agency will require a parity lien, unless the lender cannot meet its regulatory requirements.

**§ 5001.102 Water and Waste Disposal Facilities Program.**

(a) *Project eligibility.* To be eligible for a Water and Waste Disposal Facilities guaranteed loan, the project must meet the criteria specified in paragraphs (a)(1) through (3) of this section and in § 5001.6, except as provided in paragraph (a)(4) of this section.

(1) *Eligible projects and costs.* All loans guaranteed with Water and Waste Disposal funding shall be for:

(i) A water, waste disposal, solid waste disposal or storm water facility;

(ii) Payment of other utility connection charges as provided in service contracts between utility systems; or

(iii) Refinancing any loan. Except for the refinancing of Agency direct loans, refinancing of other loans will be limited to a minority portion of the guaranteed loan.

(2) *Facilities for public use.* All facilities financed under the provisions of this section shall be for public purposes.

(i) Facilities will be installed to serve any user within the service area who desires service and can be feasibly and legally served.

(ii) The lender will determine that, when feasible and legally possible, inequities within the proposed project's service area for the same type service proposed will be remedied by the owner on, or before, completion of the project. Inequities are defined as unjustified variations in availability, adequacy, or quality of service. User rate schedules for portions of existing systems or facilities that were developed under different financing, rates, terms, or conditions do not necessarily constitute inequities.

(3) *Serve rural area.* The project must primarily serve a rural area.

(4) *Demonstration of community support.* A project may demonstrate community support in lieu of the debt-to-tangible net worth ratio required under § 5001.6(b)(2) and in lieu of the loan-to-value ratio required under § 5001.6(b)(3). Demonstration of community support shall be made as specified in § 5001.101(a)(6)(i) through (iii).

(b) *Unauthorized projects and purposes.* Loan funds may not be used to finance:

(1) Facilities that are not modest in size, design, and cost;

(2) The construction of any new combined storm and sanitary sewer facilities;

(3) Any portion of the cost of a facility that does not serve a rural area;

(4) That portion of project costs normally provided by a business or industrial user, such as wastewater pretreatment;

(5) Rental for the use of equipment or machinery owned by the borrower;

(6) Any project where an individual, or membership of another organization sponsors the creation of a nonprofit organization with the intent to control negotiations for employment or contracts that provide financial benefit to the sponsoring organization, affiliate organization, or a subsidiary organization of the sponsoring individuals or organization; or

(7) For other purposes not directly related to operating and maintenance of the facility being installed or improved.

(c) *Borrower eligibility.* To be eligible for a Water and Waste Disposal Facilities guaranteed loan, a borrower must meet the criteria specified in paragraphs (c)(1) and (2) of this section and in § 5001.8(a)(1) and (2).

(1) *Eligible entity.* The borrower must be one of the following types of entities:

(i) A public body such as a municipality, county, district, authority, or other political subdivision of a State located in a rural area;

(ii) An organization operated on a not-for-profit basis, such as an association, cooperative, or private corporation. The organization must be an association controlled by a local public body or bodies, or have a broadly based ownership by or membership of people of the local community; or

(iii) An Indian tribe on a Federal or State reservation or any other Federally-recognized Indian tribe.

(2) *Credit not available elsewhere.* The Agency must determine that the borrower is unable to obtain the required credit without the loan guarantee from private, commercial, or

cooperative sources at reasonable rates and terms for loans for similar purposes and periods of time.

(d) *Additional lender approval requirements.* The examination required under § 5001.9(c)(1)(iv) may be conducted by the Agency or a qualified consultant.

(e) *Additional application documentation provisions.* In addition to the application requirements specified in § 5001.12, lenders shall submit the following as applicable:

(1) *Feasibility study.* A feasibility study by a qualified consultant may be required by the Agency.

(2) *Preliminary engineering report.* Two copies of the preliminary engineering report are to be submitted. Preliminary engineering reports must conform to customary professional standards. Preliminary engineering report guidelines for water, sanitary sewer, solid waste, and storm sewer are available from the Agency. The preliminary engineering report may be submitted to the Agency prior to the rest of the application material if a preliminary review by the Agency is desired.

(3) *Organizational documents.* A copy of the complete organizational documents of the borrower.

(4) *Board Members.* A complete list of governing board members of the borrower.

(5) *Management agreement and other legal documents.* A copy of the management agreement and other legal documents between the borrower and the proposed management company.

(6) *Intergovernmental consultation.* Intergovernmental consultation comments in accordance with 7 CFR part 3015, subpart V, of this title.

(f) *Additional lender servicing responsibilities—financial reports.* Annual financial reports required shall conform to 7 CFR part 3052.

(g) *Additional guarantee- and loan-related requirements—maximum percent of guarantee.* The maximum loan guarantee issued to a Rural Development approved lender with Water and Waste Disposal Facility funding is 90%.

**§ 5001.103 Business and Industry Program.**

(a) *Definitions.*

*Locally or regionally produced agricultural food product.* Any agricultural food product that is raised, produced, and distributed in:

(i) The locality or region in which the final product is marketed, so that the total distance that the product is transported is less than 400 miles from the origin of the product; or

(ii) The State in which the product is produced.

*Underserved community.* A community (including an urban or rural community and an Indian tribal community) that has, as determined by the Secretary:

(i) Limited access to affordable, healthy foods, including fresh fruits and vegetables, in grocery retail stores or farmer-to-consumer direct markets; and

(ii) A high rate of hunger or food insecurity or a high poverty rate.

(b) *Project eligibility.* To be eligible for a Business and Industry guaranteed loan, the project must meet the criteria specified in paragraphs (b)(1) through (b)(3) of this section, as applicable, and in § 5001.6.

(1) The project must be located in a rural area.

(2) All loans guaranteed with Business and Industry funding shall be for:

(i) Business and industrial acquisitions when the loan will keep the business from closing, prevent the loss of employment opportunities, or provide expanded job opportunities;

(ii) Business conversion, enlargement, repair, modernization, or development;

(iii) The purchase and development of land, easements, rights-of-way, buildings, or facilities;

(iv) The purchase of equipment, leasehold improvements, machinery, supplies, inventory, start up costs, working capital, pollution control and abatement, or feasibility studies;

(v) Transportation services incidental to industrial development;

(vi) Agricultural production, with advance written approval from the Agency, when it is not eligible for Farm Service Agency farmer program assistance and when it is part of an integrated business also involved in the processing of agricultural products;

(vii) The purchase of membership, stocks, bonds, or debentures or, as allowed under paragraph (a)(3) of this section, cooperative stock;

(viii) Commercial fishing, aquaculture, commercial nurseries, forestry, hydroponics, or the growing of mushrooms;

(ix) Interest during the period before the first principal payment becomes due or when the facility becomes income producing, whichever is earlier;

(x) Refinancing any loan when the Agency determines that the project is viable and equal or better rates or terms are offered. Same lender debt refinancing will be additionally required to be less than 50% of the new loan amount unless the amount of the loan to be refinanced is already Federally guaranteed. Subordinated owner debt is not eligible;

(xi) Providing takeout of interim financing when the lender submits a pre-application or a complete application in which the interim financing is proposed, prior to extending any portion of the interim loan;

(xii) Fees and charges for professional services (except for packager and broker fees) and routine lender fees and the Agency guarantee fee;

(xiii) Tourist and recreation facilities, including hotels, motels, and bed and breakfast establishments when the owner's living quarters is not included in the guaranteed loan;

(xiv) Educational, training, or community facilities;

(xv) Housing development sites with Agency-approved restrictions;

(xvi) Community antenna television services or facilities;

(xvii) Industries adjusting to terminated Federal agricultural programs or increased foreign competition;

(xviii) Mixed use commercial and residential buildings on a pro-rata basis (residential real estate use portion not eligible);

(xix) Notwithstanding § 5001.7(e), operating lines of credit that are part of an overall guaranteed loan financing package under this section and that are used for the payment of one or more of the following:

(A) Annual operating/business expenses;

(B) Debts advanced for the current operating cycle, excluding carry-over debt from previous operating cycles;

(C) Scheduled, non-delinquent term borrower debt; or

(D) Closing costs; or

(xx) Leasehold improvements, provided the underlying lease meets the requirements specified in § 5001.101(a)(1)(viii);

(xxi) The purchase of preferred stock or similar equity issued by a cooperative organization or a fund that invests primarily in cooperative organizations, if the guarantee significantly benefits one or more entities eligible for assistance for the purposes described in paragraph (d) of this section; or

(xxii) Establish and facilitate enterprises that process, distribute, aggregate, store, and market locally or regionally produced agricultural food products to support community development and farm and ranch income.

(3) *Purchase of cooperative stock.* Loans may be made to individual farmers or ranchers for the purchase of cooperative stock. The entity to receive the proceeds from the stock sale must be a farmer or rancher cooperative

established for the purpose of processing agricultural commodities. Proceeds from the stock sale may be used to recapitalize an existing cooperative, to develop a new processing facility or product line, or to expand an existing production facility. The cooperative may contract for services to process agricultural commodities or otherwise process value-added agricultural products during the 5-year period beginning on the operation startup date of the cooperative in order to provide adequate time for the planning and construction of the processing facility of the cooperative.

(c) *Unauthorized projects and purposes.*

(1) Businesses housed in private homes, except when the pro-rata value of the owner's living quarters is not included in the guaranteed loan.

(2) Any project that does not meet the requirements of paragraphs (d)(2), (d)(3), and (d)(4) in 7 U.S.C. 1932.

(3) Interim financing.

(4) Distribution or payment to an individual owner, partner, stockholder, or beneficiary of the borrower or the immediate family of such an individual when such individual will retain any portion of the ownership of the borrower, unless the Agency has determined that the distribution or payment is a part of the transfer of ownership within:

(i) The immediate family; or

(ii) An Employee owned Cooperative.

(5) Loan guarantees to lending institutions, investment institutions, or insurance companies.

(6) The guarantee of lease payments.

(7) The guarantee of loans made by other Federal agencies.

(8) Loans made with the proceeds of any obligation the interest on which is excludable from income under 26 U.S.C. 103 or a successor statute. Funds generated through the issuance of tax-exempt obligations may neither be used to purchase the guaranteed portion of any Agency guaranteed loan nor may an Agency guaranteed loan serve as collateral for a tax-exempt issue. The Agency may guarantee a loan for a project that involves tax-exempt financing only when the guaranteed loan funds are used to finance a part of the project that is separate and distinct from the part which is financed by the tax-exempt obligation, and the guaranteed loan has at least a parity security position with the tax-exempt obligation.

(9) Loan funds may not be used to support inherently religious activities.

(d) *Borrower eligibility.* In addition to the criteria specified in § 5001.8(a)(1) and (2), a borrower must meet both of the criteria specified in paragraphs (d)(1) and (2) of this section to be eligible for a Business and Industry guaranteed loan.

(1) A borrower must be:

(i) A cooperative organization, corporation, partnership, or other legal entity organized and operated on a profit or not-for-profit basis;

(ii) An Indian tribe on a Federal or State reservation or other Federally recognized tribal group;

(iii) A public body; or

(iv) An individual.

(v) A cooperative organization housed in an urban area is eligible provided certain rural benefits and requirements are met.

(2) A borrower must be engaged in or proposing to engage in a business. Business may include manufacturing, wholesaling, retailing, providing services, or other activities that will:

(i) Provide employment;

(ii) Improve the economic or environmental climate;

(iii) Promote the conservation, development, and use of water for aquaculture; or

(iv) Reduce reliance on nonrenewable energy resources by encouraging the development and construction of solar energy systems and other renewable energy systems (including wind energy systems, geothermal energy systems, and anaerobic digesters for the purpose of energy generation).

(e) *Additional borrower requirements.* The recipient of a loan guarantee under paragraph (a)(2)(xxii) of this section shall include in an appropriate agreement with retail and institutional facilities to which the recipient sells locally or regionally produced agricultural food products a requirement to inform consumers of the retail or institutional facilities that the consumers are purchasing or consuming locally or regionally produced agricultural food products.

(f) *Additional application process requirements.*

(1) *Obligation of funds.* If funds are insufficient to cover all applications pending approval, the Agency will allocate funds based on the date and time, based on Eastern time, a complete application is received, with those received first being funded first.

(2) *Priority.* In making or guaranteeing a loan under paragraph (a)(2)(xxii) of this section, the Secretary shall give priority to projects that have components benefiting underserved communities.

(g) *Additional application documentation provisions.*

(1) *Applications.* In addition to the application requirements specified in § 5001.12, lenders shall submit the following as applicable:

(i) *Feasibility study.* A feasibility study by a qualified consultant may be required by the Agency for startup businesses or existing businesses when the project will significantly affect the borrower's operations. If a feasibility study of a cooperative is required, the feasibility study will determine the viability of the business and not the individual farm operators.

(ii) *Certification of Non-Relocation and Market Capacity.* If the loan does not meet the requirements of paragraphs (d)(2), (d)(3), and (d)(4) in 7 U.S.C. 1932, a form approved by the Agency concerning non-relocation and market capacity.

(iii) Intergovernmental consultation comments in accordance with 7 CFR part 3015, subpart V, of this title.

(2) *Simplified applications.* For applications for loan guarantees of $400,000 or less, the lender may submit an application in conformance with § 5001.12(b).

(h) *Additional Origination Responsibilities.*

(1) *Financial statements.* Consolidated financial statements shall be required for variable interest entities in accordance with the Financial Accounting Standards Board financial interpretation 46, Consolidation of Variable Interest Entities, and eliminating intercompany transactions.

(2) *Collateral.*

(i) *Cooperative stock.* At a minimum, for the purchase of cooperative stock, the lender must secure the loan with a lien on the stock acquired with loan funds, an assignment of any patronage refund, and the full and unconditional personal, partnership, or corporate guarantee of the borrower.

(ii) *Leasehold interest.* Subject to approval by the Agency, a leasehold interest may be used as collateral for loans under this section provided the underlying lease meets the requirements specified in § 5001.101(a)(1)(viii).

(iii) *Discounting collateral.* When evaluating collateral for loans under this section, the lender shall comply with the requirements specified in paragraphs (h)(2)(iii)(A) through (E) of this section.

(A) No value will be assigned to unsecured personal, partnership, or corporate guarantees.

(B) A maximum of 80% of current market value will be given to real estate. Special purpose real estate should be assigned less value.

(C) A maximum of 60% of book value to be assigned to acceptable accounts receivable; however, all accounts over 90 days past due, contra accounts,

affiliated accounts and other accounts deemed not to be collateral will be omitted. Calculations to determine the percentage to be applied in the analysis are to be based on the realizable value of the accounts receivable taken from a current aging of accounts receivable from the borrower's most recent financial statement.

(D) A maximum of 60% of book value will be assigned to inventory.

(E) Collateral value assigned to machinery and equipment, furniture and fixtures will be based on its marketability, mobility, useful life, and alternative uses, if any. Collateral value assigned to these types of security will not exceed 70%.

(3) *Payment and performance bond.* A payment and performance bond sufficient to mitigate Agency risk if the project is never completed must be provided.

(i) *Additional servicing requirements—repurchase.* Repurchased loans may be sold without recourse to third-party private investors.

(j) *Additional guarantee- and loan-related requirements.*

(1) *Marginal/substandard loans.* It is not intended that the guarantee authority will be used for marginal or substandard loans or for the relief of lenders having such loans.

(2) *Conditional Commitment.* For the purchase of cooperative stock, the Conditional Commitment shall require the cooperative to provide the lender with all required Federal, State, and local permits and other clearances involving the environmental aspects for review and approval.

(3) *Lines of credit.* Lines of credit are subject to the conditions identified in paragraphs (j)(3)(i) through (v) of this section.

(i) The maximum term of a line of credit is 7 years, or limited to the term of the other guaranteed loans approved under this subpart, whichever is less.

(ii) The total principal balance owed at any one time on line of credit advances may not exceed the line of credit ceiling. If a lender exceeds the credit ceiling, any loss payment will be reduced by the amount the credit ceiling was exceeded.

(iii) As part of the lender's annual review of the borrower's operation, and before funds are re-advanced, the lender will verify to the satisfaction of the Agency that the borrower is in compliance with the provisions of the lender's line of credit agreement and term loan agreement, income and loan proceeds for the previous operating cycle have been properly accounted for, and the borrower's projected cash flow for the borrower's upcoming operating cycle, using reasonable assumptions, indicates a reasonable chance of repayment. The total amount advanced will not exceed the projected credit needs for that operating cycle as indicated in the borrower's projections, unless the projections are revised and continue to reflect feasibility.

(iv) The lender must ensure that lines of credit remain adequately secured with any suitable collateral. At no time will advances be made when the outstanding principal balance exceeds the discounted value of the collateral securing the line of credit.

(v) Lines of credit must be retained by the lender; they cannot be assigned or sold on the secondary market.

(4) *Issuance of Loan Note Guarantee.*

(i) Paragraph § 5001.33(a)(2) notwithstanding, the Agency may, at its sole discretion, issue a Loan Note Guarantee prior to all planned property acquisitions having been completed and all development having been substantially completed in accordance with plans and specifications. In considering whether to issue a Loan Note Guarantee prior to construction being completed, the Agency will consider the added risk associated with issuing a Loan Note Guarantee under such conditions. When negotiating the percent of guarantee with the lender, the Agency will consider these added risks and the credit risks and the lender's experience in financing the type of project. Where the Agency determines it is warranted, the percent of guarantee will be reduced by a minimum of 10%.

(ii) If, for the purchase of cooperative stock, the lender requests the issuance of the Loan Note Guarantee before the cooperative becomes operational, the lender must certify to the Agency that the cooperative has all of the required Federal, State, and local permits and other clearances involving the environmental aspects for review and approval.

(5) *Funding limits.* At the time of loan approval, the full amount of outstanding principal and interest balance associated with Business and Industry loans, including the amount of the loan being approved, cannot exceed $25,000,000 for any one borrower, except that for a cooperative organization this limit shall be $40,000,000 for rural projects processing value added commodities or significantly benefits one or more entities eligible for assistance for the purposes described in paragraph (b) of this section.

(i) The total amount of Business and Industry loans made to cooperative organizations and guaranteed for a fiscal year with principal amounts that are in excess of $25,000,000 may not exceed 10% of the Business and Industry loans guaranteed for the fiscal year.

(ii) The principal amount of a Business and Industry loan made for the purchase of cooperative stock may not exceed $600,000.

(6) *Guarantee fee.* The maximum guarantee fee that may be charged is 2%. The guarantee fee may be reduced to 1% if the borrower is a high impact business and is located in an area of long term population decline and job deterioration as a result of persistent economic hardship, significant economic loss from a Presidentially-declared disaster, or a fundamental structural economic change. Each fiscal year, the Agency will establish a limit on the maximum portion of guarantee authority available for that fiscal year that may be used to guarantee loans with a guarantee fee of 1%. The limit will be announced by publishing a notice in the **Federal Register**. Once the limit has been reached, the guarantee fee for all additional loans obligated during the remainder of that fiscal year will be 2%.

(7) *Maximum percent of guarantee.* The maximum loan guarantees issued to a Rural Development approved lender with Business and Industry funding is:

(i) 80% if the guaranteed loan amount is $5 million or less;

(ii) 70% if the guaranteed loan amount $10 million or less, but greater than $5 million; or

(iii) 60% if the guaranteed loan amount is greater than $10 million.

**§ 5001.104 Rural Energy for America Program.**

(a) *Project eligibility.* To be eligible for a Rural Energy for America Program guaranteed loan, the project must meet the criteria specified in paragraphs (a)(1) through (a)(3) of this section and in § 5001.6.

(1) The project shall be for the purchase, installation, expansion and/or other energy-related improvement of a renewable energy system or to make energy efficiency improvements; and

(2) The project shall be for technology that is—

(i) Pre-commercial or commercially available, and

(ii) Replicable.

(3) The project must be located in a rural area.

(4) The project may include the refinancing of any loan when the Agency determines that the project is viable and equal or better rates or terms are offered provided that the debt being refinanced will be less than 50% of the new loan amount.

(b) *Borrower eligibility.* To be eligible for a Rural Energy for America Program

guaranteed loan, a borrower must be an agricultural producer or rural small business and must meet the criteria specified in § 5001.8(a)(1) and (2).

(c) *Additional application process requirements—obligation of funds.* If funds are insufficient to cover all applications pending approval, the Agency will allocate funds based on the date and time, based on Eastern time, a complete application is received, with those received first being funded first.

(d) *Additional application documentation provisions.* In addition to the application requirements specified in § 5001.12, lenders shall submit the following as applicable:

(1) *Certifications.* The lender must certify in the application that the project is able to demonstrate technical merit and that the borrower is an agricultural producer or rural small business.

(2) *Technical report.* For renewable energy system projects with total eligible project costs of more than $200,000, a satisfactory technical report that demonstrates that the project is commercially viable and can be installed and perform as intended in a reliable, safe, cost-effective, and legally compliant manner must be provided to the Department of Energy (DOE) for review, unless otherwise stated in a **Federal Register** Notice To determine the overall technical merit of the renewable energy system, the lender must submit its proposal to the Agency for review.

(3) *Energy assessment/audit.* For energy efficiency improvement projects, an energy assessment, with adequate and appropriate evidence of energy savings expected when the system is operated as designed, must be provided. For energy efficiency improvement projects with total eligible project costs greater than $50,000, an energy audit is required. The lender must submit energy assessments and energy audits to the Agency for review.

(4) *Feasibility study.* A feasibility study by a qualified consultant is required for each renewable energy system project seeking a loan guarantee of greater than $200,000.

(5) Intergovernmental consultation comments in accordance with 7 CFR part 3015, subpart V, of this title.

(e) *Additional Origination Responsibilities.*

(1) *Financial statements.* Consolidated financial statements shall be required for variable interest entities in accordance with the Financial Accounting Standards Board financial interpretation 46, Consolidation of Variable Interest Entities, and eliminating intercompany transactions.

(2) *Discounting collateral.* When evaluating collateral for loans under this section, the lender shall comply with the requirements specified in § 5001.103(h)(2)(iii).

(3) *Payment and performance bond.* A payment and performance bond sufficient to mitigate Agency risk if the project is never completed must be provided.

(f) *Additional servicing responsibilities—post-construction reporting requirements.* Once the project has been constructed, the lender must provide to the Agency annual reports from the borrower on the performance characteristics and results of the projects.

(1) *Schedule.* For renewable energy system projects, these reports are to be provided commencing in the first full calendar year after construction is completed and continuing for 3 full years. For energy efficiency improvement projects, these reports are to be provided commencing the first full calendar year following the year in which project construction was completed and continuing for 2 full years.

(2) *Contents.* Reports for renewable energy system projects must contain, at a minimum, information on output and sales and/or energy savings. Reports for energy efficiency improvement projects must contain, at a minimum, information on energy savings. Additional information to be included in these reports will be negotiated between the Agency and the lender/borrower prior to the execution of the Loan Note Guarantee.

(g) *Additional guarantee- and loan-related requirements.*

(1) *Issuance of Loan Note Guarantee.* In addition to the requirements specified in § 5001.34, for Rural Energy for America Program loans, the lender must certify that all planned property acquisitions and development have been performing at a steady state operating level in accordance with the technical requirements, plans, and specifications; the project conforms with applicable Federal, State, and local codes; and costs have not exceeded the amount approved by the lender and the Agency.

(2) *Funding considerations.*

(i) *Maximum loan guarantee.* At the time of loan approval, the full amount of outstanding principal and interest balance associated with Rural Energy for America Program loans, including the amount of the loan being approved, cannot exceed $25,000,000 for any one borrower.

(ii) *Loan guarantee amount.* In determining the amount of a loan guarantee, the Agency will take into consideration the following seven criteria:

(A) The type of renewable energy system to be purchased;

(B) The estimated quantity of energy to be generated by the renewable energy system;

(C) The expected environmental benefits of the renewable energy system;

(D) The extent to which the renewable energy system will be replicable;

(E) The amount of energy savings expected to be derived from the activity, as demonstrated by an Agency-approved energy audit;

(F) the expected energy efficiency of the renewable energy system; and

(G) The estimated length of time it would take for the energy savings generated by the activity to equal the cost of the activity.

(3) *Matching funds.* The amount of a Rural Energy for America loan guarantee, including any grants and direct loans made under this program, that will be made available to an eligible project will not exceed 75% of total eligible project costs. Eligible project costs are only those costs associated with the items identified in paragraphs (g)(3)(i) through (xi) of this section, as long as the items are an integral and necessary part of the renewable energy system or energy efficiency improvement.

(i) Post-application purchase and installation of equipment (new, refurbished, or remanufactured), except agricultural tillage equipment, used equipment, and vehicles.

(ii) Post-application construction or improvements, except residential.

(iii) Energy audits or assessments.

(iv) Permit and license fees.

(v) Professional service fees, except for application preparation, packager fees, and broker fees.

(vi) Feasibility studies and technical reports.

(vii) Business plans.

(viii) Retrofitting.

(ix) Construction of a new energy efficient facility only when the facility is used for the same purpose, is approximately the same size, and based on the energy audit will provide more energy savings than improving an existing facility. Only costs identified in the energy audit for energy efficiency improvements are allowed.

(x) Working capital.

(xi) Land acquisition.

(4) *Maximum percent of guarantee.* The maximum loan guarantees issued to a Rural Development approved lender with Rural Energy for America Program funding is:

(i) 85% if the guaranteed loan amount is $600,000 or less;

(ii) 80% if the guaranteed loan amount $5 million or less, but greater than $600,000;

(iii) 70% if the guaranteed loan amount is greater than $5 million but less than or equal to $10 million; or

(iv) 60% if the guaranteed loan amount is greater than $10 million.

**§§ 5001.105–5001.199 [Reserved]**

**§ 5001.200 OMB control number.**

Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; *see* 5 CFR part 1320), the information collection provisions have been submitted to the Office of Management and Budget (OMB) for approval as a new collection and assigned OMB number 0570–0054.

Dated: December 1, 2008.

**Thomas C. Dorr,**

*Under Secretary for Rural Development.*

[FR Doc. E8–29151 Filed 12–16–08; 8:45 am]

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# Part III

# Department of Transportation

## Federal Motor Carrier Safety Administration

## 49 CFR Parts 385, 386, 390, et al.

## Requirements for Intermodal Equipment Providers and for Motor Carriers and Drivers Operating Intermodal Equipment; Final Rule

**DEPARTMENT OF TRANSPORTATION**

**Federal Motor Carrier Safety Administration**

**49 CFR Parts 385, 386, 390, 392, 393, 396, and Appendix G to Subchapter B of Chapter III**

**[Docket No. FMCSA–2005–23315]**

**RIN 2126–AA86**

# Requirements for Intermodal Equipment Providers and for Motor Carriers and Drivers Operating Intermodal Equipment

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Final rule.

**SUMMARY:** FMCSA adopts regulations to implement section 4118 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). The regulations require intermodal equipment providers (IEPs) to: register and file with FMCSA an Intermodal Equipment Provider Identification Report (Form MCS–150C); establish a systematic inspection, repair, and maintenance program to assure the safe operating condition of each intermodal chassis; maintain documentation of their maintenance program; and provide a means to effectively respond to driver and motor carrier reports about intermodal chassis mechanical defects and deficiencies. The regulations also require IEPs to mark each intermodal chassis offered for transportation in interstate commerce with a U.S. Department of Transportation (USDOT) identification number. These new regulations, for the first time, make IEPs subject to the Federal Motor Carrier Safety Regulations (FMCSRs), and call for shared safety responsibility among IEPs, motor carriers, and drivers. Additionally, FMCSA adopts inspection requirements for motor carriers and drivers operating intermodal equipment. Improved maintenance is expected to result in fewer chassis being placed out-of-service (OOS) and fewer breakdowns involving intermodal chassis, thus improving the Nation's intermodal transportation system. Because inadequately maintained intermodal chassis create risks for crashes, this final rule will also help ensure that commercial motor vehicle (CMV) operations are safer.

**DATES:** *Effective Date:* This final rule becomes effective June 17, 2009.

*Implementation Date: Intermodal equipment providers must comply* with the requirements for establishing systematic inspection, repair, and maintenance programs, recordkeeping systems, and for submitting Form MCS–150C by December 17, 2009. Intermodal equipment providers must comply with the requirement to *mark their intermodal chassis* with a USDOT identification number by December 17, 2010.

*Deadline for Applications for Nonpreemption:* Any State that wishes to apply for a nonpreemption determination must submit the request to the FMCSA Administrator no later than June 17, 2009.

*Petitions for Reconsideration* of this final rule must be submitted to the FMCSA Administrator no later than January 16, 2009.

**ADDRESSES:** Please include the Docket ID Number FMCSA–2005–23315 or Regulatory Identification Number (RIN) 2126–AA86 in the subject line of your application or petition, and submit it by any one of the following methods:

- *Mail to:* Administrator, Federal Motor Carrier Safety Administration (MC–A), West Building—6th Floor, Room W60–308, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Courier or Hand-Deliver to:* The U.S. Department of Transportation, Docket Operations, West Building—Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal:* through the *Federal Docket Management System (FDMS) at http://www.regulations.gov.*
- *Public Access to the Docket:* You may view, print, and download this final rule and all related documents and background material on-line at *http://www.regulations.gov,* using the Docket ID Number FMCSA–2005–23315. These documents can also be examined and copied for a fee at the U.S. Department of Transportation, Docket Operations, West Building—Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Ms. Deborah M. Freund, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations (MC–PSV), Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; telephone (202) 366–4325.

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VI. The Final Rule

## I. Legal Basis

This final rule is based on the authority of the Motor Carrier Safety Act of 1984 (1984 Act) and the Motor Carrier Act of 1935 (1935 Act), both of which are broadly discretionary, and the specific mandates of section 4118 of SAFETEA–LU (Pub. L. 109–59, 119 Stat. 1144, at 1729, August 10, 2005, codified at 49 United States Code (U.S.C.) 31151).

The 1984 Act authorizes the Secretary of Transportation (Secretary) to regulate drivers, motor carriers, and vehicle equipment. Codified at 49 U.S.C. 31136(a), section 206(a) of the Act requires the Secretary to publish regulations on motor vehicle safety. Specifically, the Act sets forth minimum safety standards to ensure that: (1) Commercial motor vehicles (CMVs) are maintained, equipped, loaded, and operated safely [§ 31136(a)(1)]; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the

vehicles safely [§ 31136(a)(2)]; (3) the physical condition of CMV operators is adequate to enable them to operate the vehicles safely [§ 31136(a)(3)]; and (4) the operation of CMVs does not have a deleterious effect on the physical condition of the operators [§ 31136(a)(4)].

The final rule establishes a program to ensure that intermodal equipment (IME), mainly chassis [1] interchanged to motor carriers and used to transport intermodal containers, is safe and systematically maintained. An intermodal chassis meets the definition of a ''commercial motor vehicle'' in the 1984 Act [49 U.S.C. 31132(a)(1)] when used in interstate commerce because it ''has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds * * *.'' FMCSA considered all four of the safety standards included in the 1984 Act when developing this rule. The rule will ensure that IME is maintained, equipped, loaded, and operated safely [§ 31136(a)(1)]. Entities that interchange IME to motor carriers are required to establish a program systematically to inspect, repair, and maintain their equipment, if they do not already have such a program in place. The pre-trip inspection responsibilities imposed on drivers do not impair their ability to operate CMVs safely [§ 31136(a)(2)]. Maintaining IME to the level required by this rule will prevent some roadside repairs and thus reduce the risk both of equipment failure and of crashes when CMVs stop near traffic lanes. Both results may produce a marginal improvement in the physical condition of drivers [§ 31136(a)(4)]. This rule does not deal directly with the medical qualifications of CMV drivers [§ 31136(a)(3)].

The 1935 Act provides that the Secretary may prescribe requirements for (1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier [49 U.S.C. 31502(b)(1)], and (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation [§ 31502(b)(2)]. This final rule is based on the Secretary's authority to regulate the safety and standards of equipment of for-hire and private carriers.

Finally, this rule implements the provisions of section 4118 of SAFETEA–LU, entitled ''Roadability.'' Section 31151(a)(1) requires the Secretary to issue regulations ''to ensure that intermodal equipment used to transport intermodal containers is safe and systematically maintained.'' Section 31151(a)(3) specifies a minimum of 14 items to be included in the regulations, each of which is included in the final rule or existing Agency procedures. Departmental employees designated by the Secretary are authorized to inspect IME and copy related maintenance and repair records (§ 31151(b)). Any IME that fails to comply with applicable Federal safety regulations may be placed out of service (OOS) by Departmental or other Federal, State, or governmental officials designated by the Secretary until the necessary repairs have been made (§ 31151(c)). State, local, or tribal requirements inconsistent with a regulation adopted pursuant to § 31151 are preempted (§ 31151(d)). Specifically, any State requirement for the periodic inspection of intermodal chassis by IEPs that was in effect on January 1, 2005, is preempted on the effective date of this final rule (§ 31151(e)(1), but preemption may be waived upon application by the State if the Secretary finds the State requirement is as effective as the Federal requirement and does not unduly burden interstate commerce (§ 31151(e)(2)). All of the SAFETEA–LU roadability provisions are implemented by this final rule.

## II. Background

*December 21, 2006, Proposed Rule, and April 13, 2007, Notice of Public Listening Sessions and Reopening of Comment Period*

On December 21, 2006, FMCSA published a notice of proposed rulemaking (NPRM) (at 71 FR 76796) to implement section 4118 of SAFETEA–LU. The public comment period for the NPRM closed on March 21, 2007. FMCSA published a notice to advise the public that it was reopening and extending the comment period until May 21, 2007, for interested parties wishing to present oral statements at the public listening sessions (72 FR 18615, April 13, 2007). The listening sessions were held on April 27, 2007, in Norfolk, VA; May 3, 2007, in Port Newark, NJ; and May 18, 2007, in Long Beach, CA. Speakers included representatives of national and local motor carrier and intermodal industry associations, port operations organizations, a State agency, organized labor, and individual drivers and motor carriers. The issues and questions raised by speakers at the listening sessions were consistent with the issues raised in the written comments. Nevertheless, those oral presentations allowed FMCSA to learn more about the concerns of intermodal equipment providers and operators and to answer questions concerning FMCSA's proposals. Transcripts of the listening sessions are in the docket.

## III. Discussion of Comments Received on the Proposed Rule

FMCSA received 57 written comments from IEP, shipper, railroad, and motor carrier organizations, trade associations, State and local governments, State organizations, an industry consultant, labor unions, a safety advocacy group, a Canadian railroad, and private citizens. The commenters included the American Association of Port Authorities (*AAPA*), the Commercial Vehicle Safety Alliance (*CVSA*), the Association of American Railroads (*AAR*), the Institute of International Container Lessors, Ltd. (*IICL*), the Intermodal Association of North America (*IANA*), the National Association of Waterfront Employers (*NAWE*), the Ocean Carrier Equipment Management Association, Inc. (*OCEMA*), the U.S. Maritime Alliance (*USMX*), the American Trucking Associations (*ATA*), the Canadian Trucking Alliance, the Motor & Equipment Manufacturers Association, Clark Freight Lines (*Clark*), Den-El Transfer, Eagle Systems, Inc., Schneider National Inc. (*Schneider*), Cowan Systems, LLC (*Cowan*), Five Star Transport, All Ways Transportation, Inc., ConSurve, Ohio State Highway Patrol (*OHP*), California Highway Patrol (*CHP*), Maryland State Highway Administration (*Maryland*), Georgia Department of Public Safety (*Georgia*), and Public Utilities Commission of Ohio (*PUCO*), Advocates for Highway and Auto Safety (*Advocates*), International Brotherhood of Teamsters (*Teamsters*), International Longshore and Warehouse Union (*ILWU*), Owner-Operator Independent Drivers Association, Inc. (*OOIDA*), Virginia Intermodal Management, LLC (*VIM*), GE Equipment Services/Rail Services (*GE*), Pacific Maritime Association (*PMA*), Pacer Stacktrain (*Pacer*), Terminal Maintenance Company LLC, the Canadian National Railway Company (*CNRC*), and 19 individuals.

The following is a summary of the specific substantive issues raised by

[1] Intermodal chassis are specifically designed to transport cargo containers. See Figure 11 of 49 CFR 393.11 for an illustration. In theory § 31151 also applies to flatbed trailers which are occasionally used to transport containers, but is is very unlikely such IEPs would interchange such equipment to motor carriers; the maintenance of such equipment would almost certainly be the responsibility of the motor carrier, not the IEP. Loaded cargo containers are transported on ships and trains to ports and rail facilities in the U.S. and then transferred to chassis trailers for transportation by highway to their final destinations. Similarly, empty containers may be loaded at shippers' facilities in the U.S. and then transported on chassis trailers to ports and rail yards for subsequent movement to other destinations in the U.S. or abroad.

commenters, along with FMCSA's responses to them, grouped according to the relevant sections of the proposed rule.

*General*

Although many commenters support the idea of IEPs being subject to certain Federal Motor Carrier Safety Regulations (FMCSRs), they offered divergent views on both the statutory provisions and proposed regulatory policies. For example, Teamsters believe that the proposed rules represent a significant step toward improving IME safety, but contain significant gaps that could undermine the objective of improving equipment safety. Maryland believes that although the intent of the NPRM is good, its proposed implementation and execution are problematic. CNRC expressed concern over potential conflicts between Canadian and U.S. regulations that may have an adverse impact on trade between the two countries.

Pacer maintains that the recently amended Uniform Intermodal Interchange and Facilities Access Agreement [2] (UIIA) creates a market-based incentive for IEPs to ensure their equipment is properly inspected and maintained.

Pacer and USMX questioned the safety statistics used to justify the proposed regulatory action.

*FMCSA Response:* FMCSA acknowledges commenters' concerns about the implementation of 49 U.S.C. 31151. The Agency must implement the statute, and our previous analysis of roadside inspection data presented in the preamble of the 2006 NPRM provides an indication of the safety need for this rule. As discussed in the NPRM, FMCSA performed an analysis of roadside inspection data to compare the vehicle violation and OOS inspection outcomes of intermodal container chassis and non-intermodal trailers. The results of this analysis confirmed that the percentage of intermodal container chassis operated in an unsafe mechanical condition is greater than the percentage of non-intermodal semitrailers operated in an unsafe mechanical condition.

[2] The Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) is a standard interchange contract, administered by IANA, developed to promote intermodal productivity and operating efficiencies through the development of uniform industry processes and procedures governing the interchange of intermodal equipment between ocean carriers, railroads, equipment leasing companies and intermodal trucking companies.

*Part 385—Safety Fitness Procedures*

Advocates, Teamsters, ATA, and PUCO all expressed concern with the proposal to conduct roadability reviews of IEPs without FMCSA assigning safety ratings based on such reviews. Advocates argued that allowing an IEP to undergo the equivalent of a safety fitness evaluation while refusing to assign a rating does not advance motor carrier safety. Advocates also disagreed with FMCSA's use of the Agency's Safety Status Measurement System (SafeStat) database, because they believe SafeStat has inadequate and flawed data sources and no statistical basis for indicating high-risk motor carriers. Teamsters believe that assigning safety ratings would not be a burden to motor carriers and IEPs, since other entities that undergo compliance reviews receive safety ratings.

OCEMA and IICL stated that it is unclear from the proposed regulations what defines the roadability review, when a roadability review will be performed, or what criteria would trigger a review. OCEMA and IICL believe that a definition of ''roadability review'' should be added to § 385.3 and should include the criteria FMCSA will consider in deciding whether to initiate such a review. Likewise, IANA asked how FMCSA would decide whether there is a pattern of recordable crashes or noncompliance that would warrant enforcement. Teamsters commented that the rule should specify the frequency with which such reviews will be performed and that penalties for noncompliance should be mandatory. OCEMA and IICL also commented that the criteria in Appendix A to part 385 for evaluating the results of a roadability review are inapplicable to IEPs. These commenters recommended that the Agency amend Appendix A to clearly define the process applicable to IEPs or, in the alternative, add a separate appendix relating to IEPs.

PMA and USMX stated that as a result of a roadability review, an IEP might be prohibited from tendering equipment from multiple locations. These commenters believe that each site must be evaluated on its own merit and that such prohibitions should be limited to the offending site. Additionally, Pacer stated that any deficiencies in equipment found at the IEP's facility which the IEP does not intend to interchange should not be considered in a roadability review.

CHP stated that the agency has experienced situations where *intrastate* motor carriers of property whose permit for *intrastate* operations has been suspended lease their equipment to motor carriers that have an active *intrastate* permit. It recommends a provision to prevent IEPs from leasing or selling equipment to other IEPs or motor carriers, if they have been prohibited from tendering IME in interstate commerce for reasons related to the unsafe condition of equipment.

*FMCSA Response:* Because a roadability review is significantly limited in scope relative to a compliance review performed on motor carriers, as currently defined in 49 CFR 385.3, the Agency will not issue a ''safety rating'' to an IEP at the end of a roadability review. The roadability review focuses on an IEP's maintenance program, rather than a motor carrier's safety management controls. FMCSA has a full array of enforcement and compliance tools to measure and ensure an IEP's adherence to the FMCSRs, which includes, but is not limited to, roadability reviews, targeted roadside inspections, notices of violation, civil penalty proceedings, or imminent hazard OOS orders.

In a roadability review, FMCSA will assess an IEP's compliance with the safety requirements of this final rule, specifically 49 CFR parts 390, 393, and 396. If the results of the roadability review indicate that an IEP is not in compliance with the applicable regulations, the Agency will cite the IEP for noncompliance and may impose civil penalties. If an IEP's level of compliance with the FMCSRs is so poor that its continued operation constitutes an imminent hazard to the public, the Agency may prohibit the IEP from tendering its IME for interstate transportation.

In response to Teamsters' comment that other entities subject to a compliance review, such as motor carriers, hazardous materials (HM) shippers, and cargo tank facilities, receive a safety rating, FMCSA does not believe it is necessary to rate IEPs at this time. The Agency's goal is to identify IEPs that fail to establish effective inspection, repair, and maintenance programs and to take appropriate action to bring about improved levels of compliance. A rating of the IEP is not necessary to accomplish this safety objective. Additionally, FMCSA is developing a new safety compliance assurance model through its Comprehensive Safety Analysis (CSA) 2010 initiative where, among other things, FMCSA is considering the elimination of safety ''ratings'' for carriers, and to focus on the actual safety fitness determination.[3]

[3] The goal of CSA 2010 is to develop and implement more effective and efficient ways for

With respect to Advocates' criticism of FMCSA's use of SafeStat to identify IEPs for potential roadability reviews, and their reference to the findings of oversight organizations, FMCSA believes it is appropriate to use algorithms, such as SafeStat, to target IEPs for enforcement interventions. The algorithms do not, in and of themselves, represent an assessment of the IEPs' maintenance programs but identify at-risk IEPs that should be contacted by the Agency.

To determine if a given IEP should be prioritized for a roadability review, FMCSA will evaluate the IEP's violation rates of the applicable rules in 49 CFR parts 390, 393, and 396. The decision whether to take enforcement action will generally be based on the results of the review. If the IEP has significant compliance issues, it may be subject to the civil penalties outlined in 49 CFR part 386. Noting Teamsters' recommendation that penalties be mandatory, FMCSA will determine through its enforcement policies and procedures the circumstances under which civil penalty proceedings should be initiated against IEPs, the same as it does with motor carriers.

As to OCEMA's and IICL's comments about the definition of the term *roadability review*, it is defined in § 385.3 of the final rule (§ 385.501 in the NPRM). FMCSA will develop enforcement policies and procedures for record sampling rates and thresholds for pursuing enforcement cases based on the results of the roadability review process.

Concerning the frequency of roadability reviews, FMCSA may initiate a roadability review, for example: If an IEP is the subject of a non-frivolous complaint, if an item of its IME (as identified in a police accident report) is involved in a crash or HM incident, if an IEP has a higher-than-average OOS rate for its chassis, or as a routine safety oversight activity to determine its compliance with applicable regulations.

FMCSA agrees with the comments of Pacer and of a participant in the Long Beach listening session that IME that is held OOS and not intended for interchange, such as by being ''red-tagged'' or physically separated from other IME, should not be considered during the course of a roadability review. FMCSA already has policies and procedures in place for determining whether vehicle inspections should be conducted during an on-site visit of a regulated entity and guidelines for the selection of vehicles in this process. The Agency has revised the regulatory text in § 390.40(d) to clarify this issue. Regardless of the actual condition of the IEP's intermodal equipment, FMCSA will review some or all of its inspection, repair and maintenance files.

FMCSA agrees with PMA's and USMX's comments concerning the scope of a prohibition against tendering of IME from multiple locations. Section 385.503(c) clearly states that the Agency has the discretion to prohibit an IEP from tendering equipment from a particular location or from multiple locations. The scope of the prohibition would depend upon the nature and extent of the violations noted.

Responding to CHP's comment regarding IEPs that have been prohibited from tendering IME in interstate commerce, an IEP that gains possession or control of IME from an IEP that FMCSA has declared unfit assumes all responsibility for the chassis. Section 390.40 clearly designates IEPs as responsible for ensuring (1) all IME intended for interchange with motor carriers is in safe and proper operating condition (reference Section 390.40(d)), and (2) no IME is placed in service on the public highways if that equipment has been found to pose an imminent hazard, as defined in § 386.72(b)(1) (reference Section 390.40(j)).

*Part 386—Rules of Practice*

Maryland believes that an IEP that misses an installment payment on a civil penalty that has previously been assessed should correct this deficiency within 30 days, not the 90-day time frame proposed in § 386.83.

Advocates stated that they could not find any language in the proposed regulation to indicate that FMCSA is prepared to act immediately to stop the violation and place the equipment or the IEP OOS. They point out that, currently 49 CFR 386.72(b)(1) states that an ''imminent hazard'' means a violation of certain statutes and implementing regulations involving a vehicle, employee, or commercial motor vehicle operations that substantially increases the likelihood of serious injury or death if not discontinued immediately. Advocates urged FMCSA to state unequivocally in the final regulation that the Agency will act immediately to abate the hazard until adequate proof is provided that the hazard will not recur.

*FMCSA Response:* In response to Maryland's comment about IEPs that miss an installment payment on a civil penalty, the 90-day period proposed in the NPRM is consistent with the existing requirement in 49 CFR 386.83(a)(2) for CMV owners and operators.

With regard to Advocates' concern about roadside OOS orders to abate violations, there is a distinction between such orders and imminent hazard orders. FMCSA personnel and State officials have always had a process for placing unsafe vehicles, including IME, out-of-service. Although the SAFETEA–LU provision creating 49 U.S.C. 31151(c) gave the Agency explicit authority to place intermodal equipment out-of-service, the Agency opted not to include this provision in the NPRM, but has now included it in § 396.9. In § 396.9(d)(1), FMCSA changed the regulatory text to require the driver to provide the report of IME placed OOS to the motor carrier or IEP. In § 396.9(d)(2), a sentence has been added requiring that repairs of items of IME placed OOS must be documented in the maintenance records for such equipment.

*Part 390—Federal Motor Carrier Safety Regulations*

Section 390.5, Definitions

ATA and NAWE are in agreement with FMCSA's proposal to use the exact language of the statutory definition of ''intermodal equipment provider.'' Most other commenters, however, stated that this definition is ambiguous and confusing. IICL commented that contractors performing maintenance work are not classified as IEPs unless specifically identified as such in contract language. AAR commented that under this definition, more than one entity could qualify as an IEP. According to AAR, the entity with the written interchange agreement could be different from the entity with the contractual responsibility to maintain the IME, and through subcontracting efforts, more than one entity could have a contractual responsibility for maintaining the equipment. IANA estimates the UIIA governs the interchange of more than 90 percent of intermodal loads and believes the UIIA standard document should be incorporated by reference into the FMCSA rules. AAR and CNRC believe FMCSA should assign responsibility for compliance with the regulations to one IEP—the one whose USDOT and other identification number appears on the IME. Schneider recommended that if the owner of a chassis enters into a long-

FMCSA, its State partners and industry to reduce commercial motor vehicle crashes, fatalities, and injuries. CSA 2010 will help FMCSA and its State partners contact more carriers and drivers, use improved data to better identify high risk carriers and drivers and apply a wider range of interventions to correct high risk behavior. See *http://www.fmcsa.dot.gov/safety-security/csa2010/home.htm*.

term lease, the long-term lessee should be the IEP. GE suggests the party with direct physical control over the facility where the equipment is staged and made available to motor carriers is in the best position to comply with the requirements to maintain IME outlined in the proposed regulations.

Pacer and ConSurve commented that the definitions of *interchange* and *IEP* need to be clarified as they relate to equipment pools.

GE believes that the reference to ''trailers'' in the proposed definition of *intermodal equipment* could be misunderstood to include intermodal truck trailers in common use—even those not used to transport intermodal containers. To prevent confusion, GE contends that the definition of *intermodal equipment* be limited to trailers used to carry intermodal containers and intermodal container chassis. IICL made a similar comment.

*FMCSA Response:* On the question of whether a vendor performing maintenance could be considered an IEP, FMCSA acknowledges the difference pointed out by several commenters between the text of the preamble and the text of the proposed regulation. The text of the proposed regulation was correct because it reflected the statutory language in section 31151(f)(3); the NPRM preamble contained an error.

FMCSA agrees with IICL's statement that the IEP is the party responsible for ensuring performance of systematic inspection, repair, and maintenance rather than a vendor or operator who is performing local services on behalf of an IEP. FMCSA also agrees with GE's comment suggesting that the party with direct physical control over the facility where the equipment is staged and made available to motor carriers would be in the best position to comply with the requirements outlined in the proposed regulations. That is not necessarily the final answer, however.

The party responsible for the maintenance of the IME (for example, a long-term lessee) could be considered the IEP, as long as the entity: (1) Is the party interchanging the IME; and (2) also provides for its systematic inspection, repair, and maintenance. Indeed, the entity shown on an interchange agreement may contract with a third party to provide inspection, repair, and maintenance services. In some cases, such as in a port-wide chassis pool, the third party may be the one tendering the equipment, and thus would be the IEP. In others, the third party may provide maintenance services (e.g., by having maintenance technicians and their equipment at an IEP's facility), but does not itself tender IME to motor carriers. The intent of this final rule is to ensure that each intermodal chassis is systematically maintained by the entity that offers it for transportation in interstate commerce. When the owner of IME places its equipment in a pool and relinquishes its control to a pool operator that is contractually obligated to maintain the equipment, the pool operator would be considered the IEP.

The definitions for the terms ''Intermodal Equipment Agreement'' and ''interchange'' used in the NPRM were taken directly from 49 U.S.C. 31151(f)(2) and 31151(f)(4), respectively. Given the statutory language, FMCSA does not believe it is appropriate to consider IANA's request to include a reference to the existing standard industry procedures and definitions in the UIIA.

As for GE's comment that the reference to ''trailers'' in the proposed definition of *intermodal equipment* could be misunderstood to include intermodal truck trailers in common use, the definition for the term ''intermodal equipment'' was taken directly from the text of section 31151(f)(1). That definition, and the Agency's regulation, both include the phrase ''used in the intermodal transportation of containers over public highways in interstate commerce, including trailers and chassis.'' Thus, it is clear that the definition for ''intermodal equipment'' applies to trailers that are used in intermodal transportation and not those in common use.

Section 390.15, Assistance in Investigations and Special Studies

Teamsters, ATA, and CHP objected to the proposal to exempt IEPs from the requirement to maintain an accident register under § 390.15(b). Teamsters believe this requirement would undermine the effectiveness of the proposed rule because this information is important not only for assessing the effectiveness of the rule, but also as a tool to help FMCSA document patterns of noncompliance by IEPs, and as a guide for the industry and policy makers in the future. ATA commented that because documentation is a key element to ensure that chassis repairs are actually completed, IEPs should be required to maintain, and make available to inspectors, all records related to chassis damage and the subsequent repairs. Such documentation would also aid in compliance audits that will be undertaken pursuant to these regulations.

CHP recommended including a requirement for motor carriers involved in a recordable collision, while operating IME, to forward a copy of the report required pursuant to § 390.15(b) to the IEP and for the IEP to retain such reports in the same manner as required of the motor carrier.

*FMCSA Response:* FMCSA believes that the ability to track crashes involving IME does not require the IEP to maintain an accident register. The IEP is not likely to be made aware of a crash involving its IME unless a chassis unit is damaged and returned to the IEP in need of repair, or the motor carrier reports the crash to the IEP. Motor carriers are encouraged to document such crashes and report the information to FMCSA if they believe the mechanical condition of the IME contributed to the crash.

With respect to CHP's comment about motor carriers not having an incentive to report IME damage sustained in a collision, and ATA's comment concerning the IEP's responsibility to make available all records related to chassis damage and subsequent repairs actually made, the new requirement under § 396.12 requires motor carriers to report ''*any* damage, defects, or deficiencies'' [emphasis added], and would require IEPs to maintain inspection, repair, and maintenance records required under § 396.3(b).

Section 390.21, Marking of Self-Propelled CMVs and Intermodal Equipment

FMCSA proposed that each unit of IME be marked with a USDOT number but requested comment on what other unique identification numbers could serve the same purpose as the USDOT number. ATA, PUCO, OHP, Advocates, and Georgia believe using a USDOT number to mark IME is the best option. Other commenters disagreed, citing concerns about the practicality of this requirement.

Several commenters suggested, as an alternative, that the IEP could use the current unique identifiers approved by the American Association of Railroads and the Intermodal Equipment Register.

In addition to their individual comments, IICL, IANA, OCEMA, and AAR joined the AAPA, the NAWE, and the USMX (Consensus Group) to ''offer a consensus solution to the issue of intermodal equipment identification numbers * * *.'' The Consensus Group supported use of the 10-character alphanumeric identifier currently in use to mark IME. The Consensus Group stated that although SAFETEA–LU requires that IME be matched to an IEP through a unique identifying number,

there is no law specifying that a particular provider number be marked on a chassis.

To support its recommendation, the Consensus Group pointed out that: (1) The affected chassis are already marked with the unique 10-character identifier, (2) marking 850,000 chassis in service in the U.S. with a particular provider number would cause confusion and would take as much as two years to complete at substantial cost, and (3) the 10-character identifier is already used by State and local enforcement personnel.

The Consensus Group also recommended the establishment of a Web-based equipment registry through IANA to record and maintain IEPs and equipment identification numbers in an online database that would be accessible to Federal, State, and local enforcement authorities, as well as industry participants, on a real-time basis.

VIM supported the Consensus Group registry proposal; however, another alternative proposed by VIM is to use a sticker similar to those used to show compliance with the inspection process under part 396. The sticker could be designed to last at least 12 months and could display the name and contact information of the IEP. VIM proposed that such a sticker be used as a substitute for the Agency's proposed method of identification.

In some cases, motor carriers are also IEPs. CHP stated that its Biennial Inspection of Terminals (BIT) program requires motor carriers in California to have a carrier identification number issued by the CHP, and because 95 percent of these entities are motor carriers who are already required to mark their power units with their identification number, use of another identification number was not necessary.

*FMCSA Response:* SAFETEA–LU has two requirements regarding identification: (1) To identify IEPs responsible for inspection and maintenance, and (2) to match IME to an IEP through a unique identifying number.

As several commenters noted, each item of IME already has a unique ID number: The Standard Carrier Alpha Code (SCAC) code, consisting of a 4-character alphabetic field identifying the owner of the IME, followed by a 6-digit numeric field unique to the individual item of equipment. However, the SCAC code does not necessarily identify the IEP. As several commenters noted during the listening sessions, third parties (such as equipment pools) may have the responsibility for systematic inspection, repair, and maintenance of IME. In some cases, they might be responsible for a particular item of IME for months or years. However, as was stated at the Norfolk listening session, the Hampton Roads chassis pool ''loses'' about 400 chassis per month to other locations and ''gains'' about 400 per month from other ports.

Three main alternatives for physically identifying IME were offered by FMCSA and commenters:

1. Assign a USDOT number and require marking IME as proposed in the NPRM and in accordance with § 390.21 requirements. This has the advantage of being consistent with the current regulations concerning power units. It has the potential disadvantage of high costs because chassis would have to be re-marked when they are transferred to different IEPs, which can easily happen several times a year.

2. Do not mark IME with a USDOT number, but instead use a database, such as IANA proposed, to track the IEP according to the 10-character SCAC code on the IME. The advantages associated with this alternative would be that no new marking of IME would be required and there would be no new costs associated with the activity. However, the potential costs for IEPs to establish and participate in the database, and for FMCSA and its Motor Carrier Safety Assistance Program (MCSAP) partners to access it, are unknown. The potential disadvantages are that the 10-character number does not necessarily identify the IEP; rather, the 10-character number identifies the *chassis owner*. Thus, IEPs would need to continually update their lists of units of IME for which they are responsible to make the information useful to one another and to the safety agencies accessing it. IANA estimated it would need at least 9 months to establish the database and to provide access control.

3. Assign a USDOT number, but allow it to be used on an IEP-specific sticker, similar to a Periodic Inspection (PI) form. This alternative was suggested by VIM in both its comments to the docket and at the Norfolk listening session.

FMCSA believes the third alternative provides the IEP-specific identification called for by the legislation and does so in a far less time-consuming and costly manner than was proposed in the NPRM. Therefore, the final rule provides for the assignment of USDOT numbers to IEPs through the same FMCSA process (49 CFR 390.19) as used for motor carriers. However, instead of requiring marking of chassis in the manner currently specified by 49 CFR 390.21, the rule allows the IEP the following four options to identify its IME:

(1) Use a label or other method of marking that identifies the IEP. The label or other marking must be maintained in a manner that retains its legibility. Alternatively, it must be protected from moisture and other damage (e.g., by use of a weatherproof container on the IME of the kind currently used for vehicle registration documents).

(2) Identify the IME on the interchange agreement, if that document includes additional information to identify the specific item of IME (such as the Vehicle Identification Number (VIN) and the SCAC code and 6-digit unique identifying number). This second alternative is functionally similar to the identification requirements for rented CMVs, described in § 390.21(e)(2)(iii). A copy of the interchange agreement must be present while the vehicle is in transit. The IEP identification must be readily available and easily identifiable so it can be noted by a Federal, State, or local safety enforcement official during an inspection.

(3) Mark the IME with a USDOT number in the same manner required under § 390.21, except the marking will only be required on the curb side of the equipment in order to minimize costs to IEPs.

(4) Identify the IEP on trailer documentation carried in a weatherproof compartment attached to the item of IME. The document must include additional information to identify the specific item of IME, such as the VIN and the SCAC code and 6-digit unique identifying number. This alternative is similar to alternative (2) above, but provides another option that some IEPs might find preferable. As in alternative (2), the IEP identification must be clearly available and clearly identifiable so it can be noted by a Federal, State, or local safety enforcement official during an equipment inspection.

In order to provide IEPs sufficient time to inventory their equipment and implement procedures to identify their IME, the final rule allows IEPs until December 17, 2010 to comply with this requirement. FMCSA acknowledges the logistical challenges IEPs will collectively face in accounting for hundreds of thousands of chasses and implementing a system for marking such chassis. During the implementation period, IANA and its partners may continue their efforts to demonstrate the feasibility of their system for future consideration by the Agency. The Agency emphasizes that

IEPs must establish and implement maintenance programs much sooner than the marking requirements to ensure there are no delays in the efforts to improve safety.

Section 390.40, Responsibilities of IEPs

1. The Phrase ''Timely Manner''

OOIDA, Maryland, IICL, CNRC, USMX, PMA, Schneider, NAWE, OCEMA, ATA, and IANA expressed concern with the proposed language of § 390.40(h) that ''repairs or replacement must be made in a timely manner after * * *'' an IEP has been ''notified by a driver of such damage, defects, or deficiencies.'' The consensus of many of these commenters is that the phrase ''timely manner'' is vague, impractical, and thus possibly unenforceable. The recommendations offered by commenters to address the ambiguity range from deletion of the ''timely manner'' requirement (IICL), to requiring that the repair be made within 30 minutes (Schneider), to allowing up to 10 days (Teamsters) to comply with this requirement.

PMA, USMX, and NAWE, in a supplemental comment, emphasized two points: (1) That an artificial time frame sacrifices safety for speed; and (2) that this issue concerns a commercial operational and economic issue in which FMCSA should not be involved, because the mission of the FMCSA is truck safety. OCEMA also submitted a supplemental comment on the propriety of FMCSA adopting a regulation relating to the timeliness of repairs or replacements. An AAR supplemental comment expressed similar concerns.

Teamsters, OOIDA, and Maryland are concerned about the effect of the new rules on the amount of time a driver will spend waiting after a defect has been found in IME, as most drivers are paid only when they are driving. Teamsters recommended that the IEP either pay the driver for the waiting time or immediately provide alternate equipment in good condition. In addition, Teamsters recommended that the rules include provisions to protect drivers from carriers who are apt to retaliate against any driver who reports defects or damage to IME.

Similarly, OOIDA stated that drivers reporting deficient equipment to an IEP are routinely made to wait, uncompensated, for long periods of time for repairs to be made at IEP facilities. To help avoid long delays, it is common for drivers to carry tools and certain replacement parts, such as lights, and make minor repairs themselves.

OOIDA is concerned that the ''timely manner'' provision will not be enforced and the level or number of complaints required to trigger an investigation of IEP violations under § 390.40 is not defined.

*FMCSA Response:* In response to these concerns on the use of the phrase ''timely manner,'' one alternative FMCSA considered was to replace the word ''timely'' with a fixed period of time in § 390.40(h). This would address the concerns expressed by motor carriers and drivers who may be required to spend time waiting for an IEP to repair or replace IME if, for whatever reason, the IME was not in safe and proper operating condition beforehand. It would also eliminate the questions that are likely to arise from use of the NPRM's imprecise term, ''timely.'' However, FMCSA believes setting a specific time limit could have a number of negative consequences as well. For example, it could result in an overemphasis on the time element of the IME interchange process, leading to incomplete repairs by IEPs or to frivolous complaints by drivers and motor carriers when IEPs exceed the time limit.

The other alternative considered by FMCSA was to remove the word ''timely'' from the proposed § 390.40(h). Although this would satisfy the concerns of commenters who contend repair or replacement of IME is an operational issue outside of FMCSA's jurisdiction, removing the word ''timely'' could be viewed as allowing a continuation of the status quo for those IEPs tendering equipment in need of repairs to drivers and requiring them to decide between accepting it and risking delays (at best) and crashes (at worst).

FMCSA decided to remove the term ''timely'' from the final regulatory text. At the same time, the Agency adds a new provision to § 390.40(d) to require IEPs to ensure that equipment intended for interchange is in safe and proper operating condition.

These revisions to the regulatory language serve two purposes. First, the new text of § 390.40(d) reemphasizes the language of 49 U.S.C. 31151(a)(l) ''* * * equipment used to transport intermodal containers is safe and systematically maintained.'' The provision is intended to ensure IME is in proper working order and has been systematically maintained *before* it is interchanged with a motor carrier. Second, the Agency acknowledges that the word ''timely'' is a subjective description and it is not necessarily in the best interests of the tendering or receiving party to specify a time limit for making repairs or replacing IME.

Although OOIDA expressed concern that FMCSA would not ''act aggressively'' to address complaints of drivers being coerced to accept defective IME or to endure lengthy waits for repairs or replacements of defective IME, FMCSA will consider for appropriate handling each non-frivolous complaint. The Agency encourages drivers to call the Agency's Safety Violation Hotline (1–888–DOT–SAFT) if they believe IEPs have violated the FMCSRs. Non-frivolous complaints lodged against IEPs will be investigated and may result in a roadability review or other type of enforcement and compliance intervention. If the IME has defects or deficiencies that an IEP decides are not repairable, it is the IEP's choice as to how to address the IME situation. The IEP must not offer defective IME for interchange to the carrier for transport in interstate commerce.

SAFETEA–LU does not provide the Agency with statutory authority to establish rules concerning driver compensation. This issue is more appropriately addressed through contractual arrangements or other business agreements between motor carriers (or independent owner-operators) and an IEP.

With respect to implementing a requirement suggested by Teamsters to require replacement IME to be provided ''immediately,'' the Agency believes ''immediately'' would be just as difficult to translate into a consistent time period as ''timely.'' Additionally, drivers who believe they have been penalized by their employers for refusing to violate the FMCSRs are afforded statutory protections and may file a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (*see* 49 U.S.C. 31105).

2. Other Comments on § 390.40

Teamsters commented that the proposed requirements for reasonable space and repair-replace procedures in § 390.40(g) are a core element in ensuring that the existing driver pre-trip walk around inspection (requiring the driver to confirm that the equipment is in good working condition) will be made. CNRC is concerned that the proposal would impose significant space restraints on intermodal facility operators, particularly if more than one IEP required space in the facility to make repairs to damaged IME. CNRC also commented that the requirements would be impractical if repairs are needed at an intermodal terminal where the IEP does not offer IME for interchange. Similarly, OCEMA stated that the majority of chassis interchanges will occur at facilities not under the control of the equipment provider.

Finally, NAWE stressed that the equipment interchange may take place at a ''facility'' other than at a marine ''terminal.''

Advocates stated that they could not find any language in the proposed regulation that states FMCSA is prepared to act immediately to stop a violation of § 390.40(i), which prohibits placing IME in service if it poses an imminent hazard, and to place the equipment, or the IEP as a company, OOS. Advocates urged FMCSA to state unequivocally in the final regulation that the Agency will act immediately to abate any imminent hazard until adequate proof is provided that the hazard will not recur.

*FMCSA Response:* As to space constraints, nothing in the rule would prohibit IEPs or any repair or maintenance providers with which they may contract, from sharing their resources, including facility space, maintenance technicians, repair services, equipment, or parts to make repairs to defective IME. Individual IEPs and maintenance facilities are in the best position to negotiate and work together to improve the safety of intermodal equipment and establish reasonable space and repair-replace procedures for defective IME. In doing so, they may well find they are all able to achieve improvements in productivity and reductions in costs.

With regard to the Advocates' concern about FMCSA acting immediately to prevent IME in need of repairs from being interchanged, there are two issues to consider: The ability of FMCSA to abate an imminent hazard, and the amount of time for FMCSA to respond to a complaint of defective IME being tendered. The Agency adopts regulatory text under § 386.72 to describe the process by which it can take action against IEPs that constitute an imminent hazard, as authorized by 49 U.S.C. 521(b)(5)(A).

As discussed in the section concerning making repairs in a ''timely manner,'' the term ''immediately'' is subjective and would result in difficulties in enforcement. Therefore, FMCSA does not indicate a specific time frame for addressing these issues.

Section 390.42, Procedures To Correct Safety Records

OCEMA expressed concern about the proposed procedures for correcting safety records. It states that SAFETEA–LU provides a procedure under which motor carriers, drivers, and IEPs may seek correction of their motor carrier safety records, regardless of whether the data is released to the public. OCEMA argued that the language proposed by FMCSA limits the correction process required by the statute to the filing of questions and concerns about information released to the public, with no recourse for information that is not released to the public.

Teamsters are concerned that the proposed rules may allow IEPs and motor carriers to redirect a citation to a driver, who is usually classified as an independent contractor (a classification Teamsters dispute). Teamsters stated that if this is not FMCSA's intent, the rules should reflect that while motor carriers and IEPs may have their records corrected, the appropriate party to receive the citation should be either an IEP or a motor carrier, not a driver.

OCEMA further commented that challenges to data provided by State agencies must first be resolved with the appropriate State agency. As an example, OCEMA suggested a situation where a minor defect (e.g., a damaged mud flap or a burned out light) that should have been caught and fixed by the driver, or that occurred after the driver left the terminal, might be attributed to the IEP whose identifying number is on the side of the chassis, potentially leading to an unwarranted roadability review. OCEMA recommends structuring SafeStat such that certain minor violations are not included in that database. In addition, OCEMA believes that drivers are only required to conduct pre-trip inspections and be satisfied that components are in good working order before the equipment is operated on the road. OCEMA contends that there is no mandatory requirement to certify the equipment condition as having passed a pre-trip inspection. Thus, it is OCEMA's understanding that the failure of a driver to report a defect establishes a presumption that items on the inspection list were in good working order when the equipment left the IEP's facility and that the text of proposed § 390.42 should be revised to reflect that presumption. PMA agreed, and also suggested alternative rule language. Further, PMA commented that, to avoid frivolous complaints and unnecessary reviews under this section, roadability reviews based on driver complaints should require adequate evidentiary support for the complaint.

*FMCSA Response:* IEPs and motor carriers may seek corrections to any information they believe the Agency maintains about their operations, regardless of whether the information is made available to the public. The Agency does not intend to limit the data that IEPs and motor carriers may seek to correct, and has therefore removed the phrase ''data released to the public'' from the final rule. FMCSA routinely releases information to the public through its various Web sites, and to motor carriers and other parties in response to requests for data. Interested parties that are aware of inaccurate information are encouraged to contact the Agency to provide corrections to the information.

FMCSA considers non-frivolous complaints to be written allegations of a violation of the FMCSRs containing sufficient information, such as names of involved individuals or specific circumstances warranting further investigation. FMCSA has policies and procedures already in place for responding to such complaints involving motor carriers, and the same approach may be used for IEPs.

The final rule does not provide a process through which IEPs may redirect equipment citations from themselves to drivers. Generally, State and local enforcement agencies determine the entity to which citations for certain offenses will be issued. The Agency does not seek to resolve this particular issue by attempting to prescribe through regulation how individual State and local enforcement programs must be run. FMCSA's interest is to ensure that equipment safety violations found on trailing units and on power units be properly recorded so they can be addressed by the parties responsible for each CMV's systematic inspection, repair, and maintenance.

In response to comments by OCEMA and Teamsters, stating FMCSA should clarify the criteria for determining what types of defects should be considered detectable by the driver who will be transporting the IME, the Agency restates its intent that the implementing regulation ensure IEPs have in place systematic inspection, repair, and maintenance programs so the IME they tender to motor carriers is in safe and proper operating condition. The final rule includes a requirement for drivers to perform a pre-trip inspection to check the mechanical condition of the IME before it is operated on public roads. This is necessary because even IME maintained by the most safety-conscious IEP may have some defects or deficiencies that appear between the time the IME is reviewed at the end of one trip and the time it is tendered for its next trip.

Section 31151(a)(1) [49 U.S.C. 31151(a)(1)] requires FMCSA to issue regulations ensuring IME used to transport intermodal containers is safe and systematically maintained. The final rule establishes programmatic responsibility for IME maintenance.

However, the statute also carries the expectation FMCSA will issue regulations clearly indicating that a motor carrier accepting IME for transport will take seriously the requirement that the driver be satisfied that IME parts or accessories are in good working order. FMCSA recognizes that, although a driver is not generally in a position to perform an in-depth inspection of IME, the driver has a responsibility to assess whether IME components that can be inspected without going underneath the chassis (e.g., lighting devices and tires) are in good working order. The final rule includes this requirement in § 392.7(b).

FMCSA acknowledges OCEMA's concern that some drivers may fail to report a defect under the requirements of § 390.42(a). Although a driver is required to be satisfied the IME is in safe and proper operating condition before operating it, the Agency did not include a provision in the NPRM for carriers to adopt a particular method to document the visual or auditory inspections of the various components the driver would check. The Agency agrees with OCEMA that IEPs should not be held responsible for citations on equipment a motor carrier has ''certified as passing the pre-trip inspection'' under § 392.7(b).

There are many components and many potential defects a driver would not be able to see or hear during the pre-trip inspection. Essentially, IEPs are responsible for ensuring the safe and proper operating condition of the IME they are tendering to motor carriers for use in interstate commerce. This premise is clearly embedded in the roadability provisions of the statute.

In response to OCEMA's recommendations that FMCSA's SafeStat database not include ''certain minor defects,'' such as burned out lights and lamp problems, FMCSA disagrees. Approximately 50 percent of OOS violations in three of the four States analyzed by FMCSA represented such minor defects. FMCSA believes a pattern of violations, especially OOS violations, may point to serious gaps in an IEP's inspection, repair, and maintenance program.

This rule, for the first time, makes IEPs subject to the FMCSRs. Fundamentally, IEPs must systematically inspect, repair, and maintain IME (for both major and minor defects) that is intended for interchange with a motor carrier. The rule also imposes additional requirements on motor carriers and drivers operating IME, who must satisfy themselves that certain IME parts and accessories are in good working order before they operate it over the road. They must also report any known damage or deficiencies to the IEP at the time the equipment is returned. Compliance gaps could originate from IME defects not being reported to an IEP, the IEP not having a process in place to receive the reports, the IEP not taking action upon the reports it receives, or a combination of all of these scenarios. It might be necessary for FMCSA to perform a roadability review of an IEP's operations to determine the root causes for patterns of violations, and whether the causes could lead FMCSA to focus on a party other than the IEP.

The distribution of intermodal semitrailer violations described in Table 7 of the NPRM (71 FR at 76806) fell into 3 main categories: Lamps, tires, and brakes. Lamps accounted for 34 percent of the violations; tires, 12.2 percent; and brakes, 13.8 percent. The OOS violations described in Table 10 of the NPRM (71 FR at 76808–76809) fell into 4 main categories: Brakes, tires, lamps, and container securement. The distribution was brakes, 35.3 percent; lamps, 31.4 percent; container securement, 18.6 percent; and tires, 7.5 percent. In the aggregate, more than 90 percent of the OOS violations fell into these 4 categories, pointing to some relatively straightforward areas for IEPs to focus upon when establishing their intermodal equipment maintenance programs.

FMCSA agrees with OCEMA's statement that a driver's failure to report a defect establishes a presumption that items on the inspection list were in good working order when the IME departed the facility. The IEP is responsible for the systematic inspection, repair, and maintenance of the IME they tender to motor carriers. But drivers are also responsible for making an inspection of IME components before operating that equipment, and their failure to report a defect creates a presumption that items on the inspection list were in good working order when the IME departed the IEP's facility. This rule requires that the driver must be satisfied that the IME is in good working order before the equipment is operated over the road, and that drivers preparing to transport intermodal equipment must make a visual or auditory inspection, as appropriate, of certain components before operating the equipment over the road.

Section 390.44, Responsibilities of Drivers and Motor Carriers

A number of commenters expressed concern with the Agency's assignment of responsibility for compliance. Teamsters and OOIDA believe that the proposal does not ensure the IEP, and not the driver, will be held responsible in certain situations. OOIDA believes the discussion in the NPRM preamble gives deference to the UIIA, which it contends favors the IEPs. It is also concerned that a lack of discussion on responsibility for hidden IME defects will result in drivers being issued citations for those equipment violations. Teamsters believe the driver's responsibility to inspect and report IME defects or damage should be accompanied by a provision protecting drivers from retaliation from motor carriers and IEPs.

PUCO and OCEMA believe that the responsibility for IME should be shared between IEPs, motor carriers and drivers. In OCEMA's view, drivers are expected to make minor repairs to IME. Clark recommends that the rules should require the driver and the equipment owner's representative to both sign the pre- and post-trip inspection report to eliminate any possible dispute of the equipment condition and repairs noted on the Post Trip Inspection report. Pacer commented that the final rule should ensure responsibility for any defects not reported to the IEP remain with the motor carrier.

Some commenters suggest specific changes to the proposed inspection and reporting requirements. ATA recommends that when a driver discovers an equipment deficiency during the pre-trip inspection, documentation of both the deficiency and subsequent repair should be required. To facilitate implementation and standardization, ATA also recommends that FMCSA adopt the industry's interchange agreement, the UIIA, Exhibit A, as the basis for the pre-trip deficiency report. Similarly, Teamsters argue that §§ 390.44, 392.7(b), and 396.11(a)(2) impose three separate, but overlapping inspection requirements on drivers. Teamsters recommend these requirements be consolidated in one uniform list. Maryland recommends the language used in proposed § 390.44 be consistent with that contained in § 396.13.

AAR suggests FMCSA add a paragraph (c) in § 390.44 to ensure there is one company that has responsibility as an equipment provider for every piece of IME. Paragraph (c) would read as follows: A driver or motor carrier shall not transport intermodal equipment that is not marked with an identifying number pursuant to § 390.40(b).

*FMCSA Response:* These new regulations call for shared safety responsibility between IEPs, motor

carriers, and drivers. (Here, as elsewhere in this discussion, drivers are acting as agents for their motor carriers.) IEPs must have systematic inspection, repair, and maintenance procedures in place ensuring they provide IME in safe and proper operating condition. Drivers must assess the condition of specified IME parts and accessories, in order to satisfy themselves that they are in good working order. IEPs must have an operational process and space available to have equipment defects repaired or equipment replaced prior to the driver's departure. When IME is returned, the driver must report actual damage or defects on the IME to the IEP. Finally, the IEP must have a process to repair damage or defects reported to them and must document those repairs.

As for the processes for assessing the condition of IME and documenting IME deficiencies and repairs, FMCSA will address, in more specific terms, the matters of the pre-trip inspection under the comments for the proposed revision of § 392.7 and the documentation under the comments for the proposed revision of § 396.11.

Section 390.46, Preemption

Maryland, CHP, Advocates, and ILWU oppose FMCSA's proposal that States must apply for a non-preemption determination before the effective date of the final rule.

*FMCSA Response:* Section 31151(e)(2)(B) requires States to submit their applications for non-preemption to the Secretary before the ''effective date'' of the final rule. FMCSA acknowledges commenters' concerns that developing these requests to submit to the Secretary for determinations of non-preemption may be time consuming. The Agency also recognizes that its own timely action will be necessary in order to properly assess and make recommendations for disposition of such requests. Therefore, FMCSA will establish an effective date of June 17, 2009 to allow States additional time to apply for determinations of non-preemption. FMCSA believes a 6-month effective date period is appropriate to allow States time to prepare requests for non-preemption and for the Agency to act on these requests.

*Part 392—Driving of Commercial Motor Vehicles*

Section 392.7, Equipment, Inspection, and Use

ATA, Pacer, and OCEMA recommend the Agency adopt the industry inspection procedures by requiring the same list of inspection items as set forth in Exhibit A of the UIIA, which is used throughout the U.S. intermodal industry.

Maryland commented that proposed § 392.7(b) improperly instructed the driver to conduct an audible inspection, rather than an audible and visual inspection.

CNRC points out that FMCSA proposed drivers be given additional inspection duties with respect to IME, but nothing in the regulations provides for any driver qualifications for performing these inspections. CNRC states that, because the inspections could result in significant downtime for the IME, it is imperative the drivers know what they are looking for and provide accurate guidance to the IEP as to what safety issue requires attention.

Teamsters believe that, while drivers are in a good position to observe and report damage or defects to IME, the proposed regulations place the bulk of the responsibility for inspecting this equipment on drivers. Further, Teamsters argue that the components listed in proposed §§ 392.7(b) and 396.11(a)(2) are too broad, and recommend the regulations clarify the extent of the driver's responsibility (e.g., by stating whether the responsibility is limited to problems that are visually detectable).

*FMCSA Response:* FMCSA disagrees with commenters who contend the inspection checklist contained in the Appendix to the UIIA should form the basis of the FMCSA's proposed items for the driver's pre-trip review under § 392.7 and the driver-vehicle inspection report under § 396.11. First, the current edition of the inspection checklist contains a provision that is inconsistent with the FMCSRs. Exhibit A, Items 8b and 8d of the UIIA state that a tire should not have the following conditions present: ''Any tire with excessive wear (2/32nds or less tread depth), visually observable bump, or knot apparently related to tread or sidewall separation; * * * Seventy-five percent or more of the tread width loose or missing in excess of 12 inches (30 cm) in circumference.'' However, § 393.75(a)(2) of the FMCSRs prohibits operating a motor vehicle on any tire that ''has any tread or sidewall separation.''

Second, the UIIA checklist also contains items that are not included under 49 CFR part 393. These components would generally be required for the IME to be in safe and proper operating condition under 49 CFR part 396. FMCSA's comparison of the UIIA to the FMCSRs is provided below. The content of the FMCSA inspection checklist is specified in § 392.7(b). To the extent that the contents of any other inspection checklist are compatible with it, and do not otherwise conflict with FMCSR requirements, IEPs and motor carriers may continue to use them.

COMPARISON OF UIIA EXHIBIT A, 49 CFR 392.7(b), AND 49 CFR 396.11(a)(2)

| UIIA | Instructions | 392.7(b) | 396.11(a)(2) |
|---|---|---|---|
| 1. Chassis Twist locks, safety latches. | Engaged, properly secured | Locking pins, clevises, clamps, or locks. | Same. |
| 2. Slider pins | Engaged (sliding chassis) | Sliders or sliding frame lock | Same. |
| 3. Bolsters | Not bent, container can be secured. | Tie down bolsters | Same. |
| 4. Landing legs | 90 degree position, move up and down. | Not addressed | Not addressed. |
| 5. Sand shoes | Shoes or dolly wheels attached, secure. | Not addressed | Not addressed. |
| 6. Crank handles | Attached, secure, operable | Not addressed | Not addressed. |
| 7. Mud flaps | Whole, properly secured | Not addressed | Not addressed. |
| 8. Tires | | Tires | Tires. |
| a. Flat, underinflated, noticeable leak. | Check that condition not present | Good working order | Listed. |
| b. Excessive wear, 2/32" or less tread. | Check that condition not present | Good working order | Listed. |
| c. Mounted or inflated in contact with vehicle. | Check that condition not present | Good working order | Listed. |

COMPARISON OF UIIA EXHIBIT A, 49 CFR 392.7(b), AND 49 CFR 396.11(a)(2)—Continued

| UIIA | Instructions | 392.7(b) | 396.11(a)(2) |
|---|---|---|---|
| d. 75% or more of tread loose or missing in excess of 12 inches. | Check that condition not present | Good working order | Listed. |
| 9. Rims | Not cracked or bent | Not addressed | Wheels, rims, lugs, tires. |
| 10. Rear underride guard | In place, not bent under frame | Not addressed | Not addressed. |
| 11. Electrical wiring/lights | Lights are in working order | Lighting devices and reflectors | Lighting devices, lamps, markers, and conspicuity marking material. |
| 12. Reflectors/conspicuity treatments. | Check for reflector lenses, presence of conspicuity tape or bar. | Lighting devices and reflectors | Lighting devices, lamps, markers, and conspicuity marking material. |
| 13. Brake Lines, air hoses, glad hands. | Check for audible air leaks and proper pressurization only. | Service brakes, including trailer brake connections. | Air line connections, hoses, and couplers. |
| 14. Current license plate | Check to see that it is affixed | Not addressed | Not addressed. |
| 15. Proper display of HM cargo placards. | In accordance with shipping papers. | Not addressed | Not addressed. |
| 16. Display of non-expired Federal placards or stickers. | Check to see that it is affixed to equipment. | Not addressed | Not addressed. |

In response to Teamsters' comment concerning the level of detail of the inspection activity prescribed in § 392.7, the rulemaking does not change the nature of the equipment inspection and use requirement except to add the few items of equipment specific to IME. In fact, the FMCSRs have included a requirement for drivers to be satisfied vehicles are in safe and proper operating condition since the 1930's.

In response to several commenters who questioned the meaning of the phrase ''visual or audible inspection'' in proposed § 392.7(b), the Agency did not intend to suggest that the inspection be limited to a visual inspection when an auditory inspection or a combination of a visual and an auditory inspection may be more appropriate. For example, some components, such as support rails, call for a visual inspection. For others, such as locking pins, both visual and auditory inspections may be more appropriate.

Regarding a driver's responsibility to inspect the CMV's service brakes, the American Association of Motor Vehicle Administrators (AAMVA) Commercial Driver's License (CDL) Manual provides guidance concerning pre-trip inspection procedures applicants must demonstrate to obtain a CDL. The procedure for checking the service brakes is designed to help the driver determine whether the brakes are working correctly and that the vehicle does not pull to one side or the other. The CDL applicant should drive the CMV forward at 5 mph, apply the service brake, and attempt to stop the vehicle to determine: (1) If it pulls to either side, and (2) that it stops when the brakes are applied. A driver preparing to transport IME may use this procedure to check the IME's brakes.

Responding to commenters who expressed concern about (1) the documentation of IME defects and (2) how citations of equipment violations are assigned (to the IEP or to the motor carrier), the first is a matter to be addressed during the driver's pre-trip assessment of the IME. Drivers must document the results of their pre-trip assessment, and the IEP must have a process to receive that document and determine how to resolve deficiencies that are noted. Drivers operating CMVs currently must submit a driver vehicle inspection report to the motor carrier at the completion of each day's work on each vehicle operated. The new provision in 49 U.S.C. 31151(a)(3)(L) calls for an analogous process: IEPs must establish a process by which drivers or motor carriers transporting their IME may report to the IEP or the IEP's designated agent any defects or deficiencies the driver or motor carrier are aware of at the time the IME is returned to the IEP's facility.

*Part 393—Parts and Accessories Necessary for Safe Operation*

CHP argues that IEPs who operate IME on highways are, by definition, motor carriers. Therefore, CHP recommends changing the language ''No intermodal equipment provider may operate intermodal equipment * * *'' in proposed § 393.1(c) to read ''No intermodal equipment provider may tender intermodal equipment for interchange * * *''

*FMCSA Response:* FMCSA agrees with CHP that, if an IEP itself is operating IME on a highway, the IEP is a motor carrier to the extent that its highway operations are concerned, and it would be covered by the full range of the FMCSRs applicable to those operations. This rule focuses on IEPs that tender IME to be transported over our Nation's highways in interstate commerce by others. To clarify this, a minor revision has been made to the regulatory language.

*Part 396—Inspection, Repair, and Maintenance*

Section 396.3, Inspection, Repair, and Maintenance

IANA points out that proposed § 396.3 does not provide a time frame for required systematic inspections, but that the summary of the economic impact in the preamble assumes that quarterly inspections are needed. It believes this lack of clarity should be addressed in the final rule. Teamsters argue that § 396.3 should require motor carriers and IEPs to perform systematic inspections on a quarterly basis. However, IICL believes that a minimum of two inspections per year would be sufficient to protect the safety of the public.

ConSurve seeks clarity on the language of § 396.3(b), which suggests the IEP's responsibilities for equipment condition extend 30 days past interchange. In this regard, ConSurve asks on what basis this determination is made and which party is responsible for inspection, repair, and maintenance when a container/chassis is delivered but then remains at that location for more than 30 days.

In reference to proposed § 396.3(b), OCEMA contends that it is unrealistic to retain records ''where the vehicle is either housed or maintained,'' as required by § 396.3(c), because over the course of a year, either or both of these locations may vary significantly for a given piece of IME. OCEMA recommends adding a separate paragraph describing the record retention requirements for IEPs that would also allow inspection, maintenance, and repair records to be

retained by the IEP in a central location or central electronic database.

*FMCSA Response:* FMCSA estimates that approximately four inspections of IME will be performed annually. However, the use cycle of IME (and other CMVs, for that matter) is what determines the appropriate number of inspections, their level of detail, and the maintenance and repair activities necessary to ensure all CMVs are in safe and proper operating condition. Therefore the IEP must perform as many inspections as necessary to maintain IME in a condition complying with the FMCSRs.

The second paragraph of § 396.3(b) states ''IEPs must maintain, or cause to be maintained, records for *each unit of intermodal equipment they tender or intend to tender*'' [emphasis added]. If an IEP has not yet tendered a unit of intermodal equipment, but intends to tender that piece of IME in the future (*i.e.*, the responsibility has not been transferred to another IEP), it continues to be responsible for that piece of IME until tender is made to a carrier or driver. In this instance, the tendering IEP would be required to maintain the maintenance records on that piece of IME until tender is completed. The intent of Congress in enacting the roadability provisions in SAFETEA–LU was to require the tendering IEP to systematically maintain IME and the underlying responsibility for that maintenance to be continuous. Responding to ConSurve's question, the responsibility for inspection, repair, and maintenance for an item of IME that remains at a consignee's location more than 30 days would depend upon the terms of the interchange agreement or any other written document executed by an IEP and a motor carrier, the primary purpose of which is to establish the responsibilities and liabilities of both parties with respect to the interchange of the intermodal equipment.

Responding to OCEMA's question concerning retention of IME maintenance records at a central location, FMCSA allows motor carriers to retain CMV maintenance records at a location different from one where a vehicle is housed or maintained. The motor carrier is still held responsible for ensuring the records are up to date and accurate, and upon request by the Agency, the maintenance records must be made available within 2 working days. IEPs will be subject to the same requirements.

Section 396.11, Driver Vehicle Inspection Reports

ATA, AAR, and OCEMA believe that the list of components in proposed § 396.11(a)(2) for which the driver is responsible to report, if defective or deficient, does not include all of the safety items that can be visually checked by a driver or the defects a driver is likely to become aware of while operating the equipment. These commenters recommend FMCSA add to this list those components contained in Exhibit A to the UIIA. OCEMA also contends that this would be consistent with the requirements of § 390.44 and § 396.12 that require motor carriers' drivers to report any damage or deficiencies which they become aware of that could affect the safe operation of the IME.

ATA suggests the Agency use photographs as part of the records requirement to document IME condition and repair status, noting that many new and modernized intermodal terminal facilities are already using them. However, ATA believes the reporting requirements set out in § 396.12 will provide a reliable record of equipment condition and repairs needed, as well as providing the tracking/audit basis for insuring that necessary repairs are actually made.

The IICL suggests FMCSA should also require motor carriers to train their drivers to properly inspect and identify defects or problems with IME, including chassis and trailers, and also provide training to drivers on how to properly complete a standardized vehicle inspection and report form. Records of such training should be available to the FMCSA upon request.

*FMCSA Response:* The Agency believes the list of components is appropriate to ensure IME safety when operated on highways, but IEPs may add the components in Exhibit A of the UIIA to their inspection checklists (as motor carriers are allowed to add components to their checklist). In accordance with 49 CFR 390.31, IEPs may use electronic recordkeeping, at their option.

As for requiring motor carriers to train their drivers to properly inspect IME and to identify and document equipment defects, FMCSA does not prescribe specific CMV inspection training for drivers transporting IME. These issues are currently addressed in parts 391, concerning driver qualifications, 392 concerning the driving of CMVs, and 396, concerning inspection, repair and maintenance, and already apply to drivers transporting IME.

Section 396.12, Requirements for Accepting IEP Reports

ATA recommends that the document proposed for § 396.12(a) should be developed and standardized by the Agency and should use the safety check items listed in UIIA Exhibit A. ATA believes document standardization would facilitate driver acceptance (and use) and maintenance and repair efficiencies, as well as streamline the audit review process. Schneider suggests drivers should make the report on the industry-accepted J1 or EIR (equipment interchange receipt), so as to not add further paperwork burden to the process. CNRC believes the contents of these reports should be spelled out by FMCSA in more detail. It also argues that a more detailed report will shorten the time required to repair any damage without unnecessarily lengthening the time required to report the damage.

ATA supports the inclusion of proposed § 396.12(c), as fulfilling a longstanding need for documentation of IME repairs. Teamsters question the 3-month retention period specified in proposed § 396.12(d), stating that proposed § 396.21(b)(1) would require inspection reports to be retained for 14 months, but documentation regarding repair of defects uncovered by the inspection would only be kept for 3 months. Teamsters believe § 396.12(d) should be modified to require IEPs to keep documentation of the repair, as well as documentation that a repair was unnecessary, for as long as the IME is in use.

CHP believes the reports required by § 396.12 should include not only the motor carrier's USDOT number but also identification of the IEP by the identification number required under § 390.21 and a unique identifier of the particular piece of IME. This would help avoid the potential for wrong identification of a particular piece of IME in terminal environments where there are hundreds of intermodal chassis virtually indistinguishable from one another.

*FMCSA Response:* In response to ATA's and CNRC's recommendation for a standardized form for drivers to use to comply with proposed § 396.12(a), the Agency supports specifying the content of the reports, but not the format of the required documents. This approach provides greater regulatory flexibility to IEPs and carriers without compromising safety. Therefore, the regulated entities may use any forms which contain the minimum information required by the final rule.

The 3-month retention period for IME maintenance records in proposed § 396.12(d) is consistent with § 396.11, which requires a 3-month retention period for DVIRs submitted to motor carriers. Concerning the proposed requirement to document a determination that a requested repair

was unnecessary, this provision is included in § 396.12(c)(2), within the ''Corrective Action'' section. This is separate from the § 396.3(b) requirement to retain systematic inspection, repair, and maintenance records. If an IEP repairs an item of IME in response to information recorded on a DVIR, the documentation of that repair (a work order, etc.) must be prepared and maintained as a maintenance record for a 12-month period as specified in § 396.3. Also, the information concerning the repair may be noted on the DVIR as an indicator the defect or deficiency reported by the driver was corrected.

FMCSA agrees with CHP that reports required by § 396.12 should include the motor carrier's USDOT number, the IEP's USDOT number, and a unique identifier of the particular piece of IME. This was inadvertently left out of the proposed provision at § 396.12(b)(2), but will now be included in the final rule.

Section 396.17, Periodic Inspection

Advocates argue that they cannot support FMCSA's proposed periodic inspection interval of one year for IME that is interchanged or intended for interchange to motor carriers in intermodal transportation. They believe this is far too infrequent for ensuring the roadability safety of tendered IME. Advocates strongly support the CHP proposal for a minimum of four inspections each year for tendered IME and indicate that these inspections should be spaced at 3-month intervals. ConSurve agrees with this argument.

Pacer points out, however, that it currently performs inspections at least annually and believes this is sufficient to properly and safely maintain IME. Pacer adds that FMCSA regulations only require annual inspections for non-intermodal equipment and believes there is no reason that IME should be subjected to more stringent requirements.

PMA suggests that FMCSA develop a separate Appendix G to the FMCSRs for IME. It believes the inspection of some items, such as those concerning lighting devices, are only referenced broadly but other parts or items specific to intermodal chassis are not identified or included in Appendix G.

*FMCSA Response:* The Agency's periodic or annual inspection should not be construed to be a substitute for a systematic inspection, repair, and maintenance program. The annual inspection is only a fraction of the maintenance program—it is not the entire program. Therefore, the Agency does not believe it necessary to require more frequent ''periodic inspections.'' IEPs must complete the annual inspection and support a systematic inspection, repair and maintenance program throughout the entire year.

As discussed earlier, the frequency of inspections needed for a CMV, including IME, is dependent upon its usage and would be addressed in the systematic program established by the IEP. Some IEPs might find it necessary to perform more frequent inspections than others. Therefore, FMCSA believes it is more appropriate to establish a performance-based inspection, repair, and maintenance rule rather than to set a specific minimum number of inspections to accomplish the safety objective.

FMCSA does not agree with PMA's suggestion that new, chassis-specific inspection criteria be developed to ensure the proper periodic inspection of IME. Recognizing that the components on IME are similar to those on other types of trailers, the Agency believes the current periodic inspection criteria under Appendix G to the FMCSRs can be appropriately applied to IME.

Section 396.19, Inspector Qualifications

OCEMA opposed the Agency's proposed amendments to § 396.19 requiring IEPs to ensure the persons performing the inspections under § 396.17(e) are qualified and to retain evidence of each person's qualifications for as long as the person is performing annual inspections and for one year thereafter. It believes that IEPs would not be able to perform this function because: (1) Thousands of individual chassis inspectors are employed by third party vendors; and (2) the IEPs have no control over the training, hiring, or firing of these individuals. OCEMA believes the third parties should be responsible for assuring the qualifications of their inspectors and IEPs should be allowed to rely on the third-party certifications.

*FMCSA Response:* The Agency acknowledges that some IEPs may contract with third parties to perform inspections, repairs, and maintenance on IME. It is the IEP's responsibility to ensure their third-party contractors use persons who have the appropriate training and/or experience to inspect IME. Question 1 of the FMCSA's regulatory guidance for current § 396.19 provides a clarification of how motor carriers and IEPs may satisfy the requirement for maintaining evidence of inspector qualifications (April 4, 1997; 62 FR 16369 at 16429; also available on the Agency's Web site at *http://www.fmcsa.dot.gov*).

Section 396.23, Equivalent to Periodic Inspection

Teamsters support the requirement that an annual inspection be performed by a qualified inspector; however, they believe § 396.23 could result in the driver being cited during a roadside inspection for the motor carrier's or the IEP's failure to comply with the annual inspection requirement. They recommend that the rule be modified to make it clear that it is the motor carrier or the IEP who is liable for failure to perform the annual inspection, not the driver.

*FMCSA Response:* Sections 396.17, ''Periodic inspection,'' and 396.23, ''Equivalent to periodic inspection,'' are clear in assigning responsibility for the conduct of the annual inspection to the motor carrier or the IEP—and not the driver. Section 396.17(b) requires (1) motor carriers to inspect or cause to be inspected all motor vehicles subject to their control, and (2) IEPs to inspect or cause to be inspected IME that is interchanged or intended for interchange to motor carries in intermodal transportation. Section 396.17(c) specifies that a motor carrier must not use a CMV, and an IEP must not tender equipment to a motor carrier for interchange, unless (1) each component identified in appendix G to Subchapter B, ''Minimum Periodic Inspection Standards,'' has passed an inspection at least once during the preceding 12 months; and (2) documentation of such inspection is on the vehicle. Further, § 396.17(h) states that failure to properly perform the annual inspection required shall cause *the motor carrier or IEP* be subject to the penalty provisions of 49 U.S.C. 521(b). It does not state the driver will be liable.

Enforcement Plan

Maryland expressed concern that there is no mechanism to assign responsibility for OOS violations observed during roadside inspections to specific parties. For example, a driver picks up a chassis at the IEP's facility that the driver believes to be in safe and proper operating condition. After the driver leaves the intermodal facility, the vehicle is placed OOS during a roadside inspection. Maryland recommends that to avoid improperly citing the IEP for an OOS violation the driver should have discovered during a pre-trip inspection, the driver should keep a copy of the IEP inspection report indicating the date and time the driver picked up the IME. Enforcement personnel would then have documentation demonstrating that the driver believed the chassis was ''in safe

operating condition'' when he or she accepted the chassis.

Maryland also expressed concern that implementation of roadside enforcement processes would require modification of FMCSA's information technology (IT) systems to capture both the motor carrier's USDOT number and the IEP's USDOT number or other unique identifier.

OHP raised several questions about FMCSA's Proposed Enforcement Plans regarding the issuance of an Operations OOS Order (referred to as ''Imminent Hazard OOS Order'' in the comment) to IEPs. If it is FMCSA's intent to have inspectors conducting roadside inspections enforce the FMCSRs and issue Imminent Hazardous OOS Orders against IEPs, OHP suggests FMCSA modify the Aspen inspection program to allow the inspector to record intermodal equipment violations on the inspection report against the IEP (similar to noting violations against a shipper of HM). Regarding communication of the OOS order to law enforcement personnel, OHP suggests FMCSA use the FMCSA Safety and Fitness Electronic Records (SAFER) Web site, as is currently used to communicate OOS orders against motor carriers. OHP also asked if an OOS order will state whether the IEP is prohibited from offering IME after the OOS order is issued, or if it would prohibit the further movement of IME already in use by the carrier or driver in interstate commerce. It suggests FMCSA consider issuing OOS orders to prohibit the intermodal service provider from offering IME after the OOS order is issued. Finally, OHP asked what FMCSA expects the roadside inspectors to do if they stop and inspect a properly credentialed motor carrier (i.e., a carrier that does not have an OOS order issued against it) using a piece of IME from an IEP that has been issued an OOS order and it could be proven the IME was offered after the OOS order was issued. To handle such situations, OHP suggests FMCSA consider providing roadside inspectors with a special violation code to use in the Aspen inspection program to indicate whether an IEP violated an OOS order. This would allow the motor carrier to continue with the current trip, assuming the vehicle passed the inspections.

*FMCSA Response:* Responding to Maryland's concern about the assignment of responsibility for OOS violations, most of the process will remain as it currently stands. Federal, State, and local enforcement officials will document what is observed during the inspection, including information about the type of defects, their nature, and whether they were observed on the power unit, the trailer, or both. They will also note the USDOT number of the power unit and the USDOT and other identification numbers of the trailer. Based upon the types of defects and deficiencies noted, equipment-related citations will be assigned to the motor carrier, the IEP, or both. However, if a driver indicated that the IME items in § 392.7(b) were in good working order when the driver accepted the equipment, the motor carrier will also be cited for ''failure to inspect'' violations. If any CMV is placed OOS for defects on the power unit, trailer unit, or both, the driver must not continue to operate it until the OOS condition is remedied.

As for OHP's questions, FMCSA will assess the extent and the severity of violations found during a roadability review of an IEP. If the findings indicate a localized situation—perhaps only one facility out of several has significant compliance problems—FMCSA may consider focusing its enforcement actions on that single facility. If a single item of IME is found to have severe defects or deficiencies that are likely to cause a breakdown of the vehicle or to cause a crash, the chassis may be placed OOS during a roadside inspection.

FMCSA clarifies that Imminent Hazard OOS Orders for IEPs can be issued at any time if the Agency believes there is evidence of imminent hazard to safety.

International Implications

ATA, Advocates, and Maryland are concerned about the applicability of the proposed rule to IEPs that are located in foreign countries, but offer equipment for operation in the United States. These three commenters believe that foreign-based IEPs should be treated the same as foreign-based motor carriers, including the marking, recordkeeping, and systematic maintenance and repair requirements. Commenters also believe that IME being transported into the U.S. should be evaluated at the point of entry for safety adequacy and national security.

On the other hand, CNRC believes that costs to assure compliance for foreign-based equipment and for foreign-based IEPs could be lessened if FMCSA were to consider exempting IME in transit between points in the same foreign country from the new regulations, or IME that will be in the U.S. for less than 30 days.

*FMCSA Response:* All CMVs (including IME) are subject to the FMCSRs when operated in interstate commerce in the U.S. As for CNRC's recommendation, the Agency has no jurisdiction over foreign-based IEPs that tender foreign-based IME in transit between points in a foreign country. However, FMCSA declines to grant exemptions for IME operating within the U.S. A foreign-based IEP that tenders foreign-based IME for transportation into the U.S. must obtain a USDOT number and identify its IME accordingly. This is consistent with the current requirements for motor carriers based outside the U.S. to obtain a USDOT number and mark their power units, if they intend to operate in this country.

Implementation Date

Suggestions from commenters on the length of time needed to implement the proposed requirements range from 9–24 months. For example, IICL believes a 2-year phase-in period would be needed if IME had to be physically marked with the IEP's identifier. However, if the existing alphanumeric identifiers were to be used, only a one-year phase-in period would be needed to implement the requirements after development of a database and reporting process.

*FMCSA Response:* After consideration of the comments, FMCSA will implement an effective date for this rule 6 months from the date of publication, that is, June 17, 2009 to allow States sufficient time to apply for determinations of non-preemption. In addition, FMCSA has set a compliance date of 12 months after the publication date of this rule, or by December 17, 2009, to allow IEPs time to establish maintenance programs and recordkeeping systems. This means that IEPs must register for a DOT number and set up maintenance and inspection recordkeeping systems by this date. The IEPs must mark their chassis within 24 months of the publication date of this rule, or by December 17, 2010. The two-year phase-in period provides the IEPs with sufficient time to locate and mark all of their IME.

Analysis of Safety Data

OCEMA, Maryland, and AAR commented on the analysis of IME safety data and the estimated number of IEPs.

OCEMA states that most of the analysis compares OOS violation statistics for intermodal chassis maintained by IEPs to those owned by motor carriers or to non-intermodal trailing equipment maintained by motor carriers. It believes that the data in these studies do not clearly reflect the equipment's safety. In addition, OCEMA notes that FMCSA has demonstrated that most defects can be detected by a visual inspection and that carriers and drivers share with IEPs in the

responsibility for the safe operation of intermodal chassis.

Maryland believes that the Agency's safety data on driver's inspections of brakes (Table 10 in the Safety Analysis portion of the NPRM) gives credence to its argument that drivers do not have the ''means or opportunity'' to conduct the required safety inspections on IME.

AAR points out that it has reviewed the studies FMCSA used to assess the benefits of its proposed rules on intermodal chassis maintenance and has found flaws. AAR believes that several of the studies overestimated the difference in OOS rates between intermodal chassis and non-intermodal trailers. Further, AAR disagrees with the inclusion of violations associated with the securement of the intermodal container itself. AAR reasons that, because intermodal containers must be secured to chassis, they are subject to potential cargo securement problems that would not exist for non-intermodal trailers. It also disputes the conclusion of the analysis of crash data, stating that their own analysis found only 18 cases where the crash was attributable to the condition of the intermodal chassis, as opposed to the tractor or to the driver's failure to properly secure the container on the chassis. AAR estimates that this amounts to 1.9 percent of the 953 crashes in which intermodal chassis were involved.

*FMCSA Response:* FMCSA acknowledges that there are circumstances where a driver may not be able to perform a thorough visual inspection on a chassis presented with a container attached. However, the Agency emphasizes that the IEP is responsible for assuring that the IME it intends to tender to motor carriers and drivers is in safe and proper operating condition. IME safety is a shared responsibility and drivers are required by the FMCSRs to report equipment deficiencies or defects they note during the course of a pre-trip inspection performed in accordance with § 392.7(b), as well as any defects or deficiencies that become apparent before the time the IME is returned.

FMCSA disagrees with AAR's contention that the Agency overstated the problem of safety violations for IME. The roadside inspection data consistently show that chassis are not being maintained at a level comparable to non-chassis equipment. Furthermore, because cargo securement—whether the cargo is an intermodal container transported by a chassis trailer or another type of cargo transported upon or within a trailer—is a critical part of ensuring the safe operation of CMVs, FMCSA stands by its decision to include cargo securement violations in its analyses.

Economic Analysis

Ten commenters addressed FMCSA's economic analysis either generally or by providing specific information or estimates that differ from those included in the NPRM. For example, USMX believes FMCSA underestimated the financial burden of the proposed regulations and that the safety benefits would not outweigh the costs. Pacer, ConSurve, and Clark expressed similar concerns.

OCEMA is concerned about FMCSA's estimate that there are 108 non-motor carrier IEPs in the U.S., of which 93 are steamship lines, 5 are railroads, and 10 are chassis pool operators. It disagrees with using this breakdown to roughly allocate the chassis population among the various chassis owning entities, including motor carriers. OCEMA argues that this distribution does not account for the fact that many of the lessors' chassis are under long-term lease to the steamship lines. Thus, steamship lines operate significantly more chassis than they actually own. OCEMA believes this misallocation of chassis among providers led FMCSA to underestimate the regulatory costs ocean carriers will experience if this rule is implemented.

IICL, ConSurve, and OCEMA believe FMCSA has significantly underestimated the total costs to comply with the rule, and, in particular, argue FMCSA failed to adequately account for the significantly higher wages paid to union workers employed at or near port facilities.

VIM believes FMCSA's estimated cost of applying the IEP number to chassis is significantly lower than the actual cost, also due in part to an underestimate of wages. This commenter marked over 20,000 chassis and states that its direct cost is well over $25 per chassis, more than double FMCSA's cost, and notes that chassis may need to be re-marked regularly due to frequent migration among chassis pools. VIM also states that there are indirect costs associated with moving a chassis to another area simply to apply the identifying number. OCEMA agreed with VIM.

Maryland, AAR, and OCEMA question FMCSA's estimate of quarterly inspections when the rule language requires only an annual inspection.

PUCO addressed the costs to States of conducting compliance reviews (CRs) and safety audits by stating that it is concerned the amount of money available to undertake these additional tasks may not keep pace with the increased workload. Consequently, PUCO urged FMCSA to carefully examine the budgetary needs of those conducting the reviews and ensure sufficient funds are made available for this purpose.

AAR questions the Agency's threshold analysis that the costs to comply with the rule would be paid for if the rule prevented 8–12 fatalities (or fatal crashes) per year. AAR contends that achieving what it considers a modest safety improvement may be more than one can reasonably expect even from eliminating fatalities attributable to defects in intermodal chassis. According to AAR's own analysis of the data, if 1.9 percent of the crash fatalities are due to chassis condition, then elimination of fatal crashes caused by chassis condition would prevent about 1 fatality per year—well short of the stated breakeven goal of 8 per year.

Finally, OCEMA questions FMCSA's statement that the Regulatory Flexibility Act does not apply to 93 steamship line equipment providers because they are all foreign entities. OCEMA states ''[t]here are in fact a number of U.S. companies that are carriers controlling large numbers of chassis. Examples include Crowley Maritime Corporation, American President Line, Matson Navigation, and Horizon Line. It may also be of interest to FMCSA that many of the foreign steamship lines have established U.S. subsidiaries which, in some cases, are the entities that own and operate chassis.''

*FMCSA Response:* FMCSA acknowledges that the NPRM may have underestimated the costs to some IEPs because of potentially higher labor costs associated with steamship companies, especially if these entities control a larger portion of the chassis pool than originally estimated. Because of these concerns, FMCSA has updated its cost estimates to reflect the labor costs specific to each major industry that IEPs represent. Steamship lines may lease a large fraction of chassis owned by pool operators and under this rule would be financially responsible for the inspection, repair, and maintenance of this equipment. Costs for all pool lessor chassis are evaluated using cost data applicable to steamship lines.

In response to IICL's and OCEMA's comments on wages (specifically, that cost estimates do not account for higher wages of union employees), FMCSA is using the generally accepted source for wage data, the Bureau of Labor Statistics, Occupational Employment Statistics survey. The wages reported for

steamship line employees[4] reflect any wage premium paid to union employees in this industry group. On net, estimates of costs borne by steamship lines directly, or indirectly via long-term leases of chassis from lessors, were revised upward 10–20 percent for the final rule.

Regarding the number of inspections needed for compliance with this rule, FMCSA presented costs estimates based on a quarterly inspection program to preclude the possibility of understating compliance costs. FMCSA has subsequently added cost estimates based on a semiannual inspection program for IME. The estimates based on quarterly inspections should be viewed as an upper bound for compliance costs, while new estimates based on a semiannual inspection program provide a reasonable lower bound for these costs.

With regard to PUCO's concerns about providing adequate funding for roadability reviews, FMCSA will take this new responsibility into account as it plans to implement the requirements of this final rule.

Regarding cost-effectiveness, it is unclear whether a sufficient number of fatal crashes will be avoided to achieve positive net benefits. However, the Agency reevaluated this threshold to include all crashes avoided and industry efficiency gains, and it believes this rule would reasonably achieve a minimum level of cost-effectiveness. These results are presented in the final Regulatory Impact Analysis.

In response to OCEMA's comments on the Regulatory Flexibility Act Analysis, FMCSA realizes some steamship lines are U.S. companies or U.S.-based subsidiaries of foreign companies that own and control intermodal equipment. However, the Agency does not believe the steamship lines or subsidiaries that own and control intermodal equipment would meet the Small Business Administration's (SBA) definition of ''small business.'' A U.S. small business concern is ''independently owned and operated and * * * is not dominant in its field of operation,'' and has a suggested threshold payroll of 500 employees. FMCSA examined publicly available financial statements and investor relation material (where available) for entities with membership in one of the major trade organizations representing companies affected by this rule. It also looked at any additional steamship lines that provide ''direct call liner services'' at U.S. port facilities. The Agency confirmed that the entities identified as being subject to increased costs as a result of this rule are either foreign-based entities that are not subject to the Regulatory Flexibility Act or otherwise do not meet the criteria for the small business designation, based on the SBA's definition of ''small business.''

The final rule provides IEPs with several options for identifying IME in order to eliminate almost all of the costs associated with chassis marking. Nevertheless, we recognize that frequent flows of IME into and out from an IEP's pool do raise identification costs, because a significant number of chassis change ownership frequently and will need to be re-identified each year. Consequently, the Agency added estimates of chassis re-identification costs to its economic analysis.

## IV. Summary of the Final Rule

This section describes only those changes from the proposed rule text in the NPRM. The final rule also includes several provisions, not included in the NPRM, that are necessary to fully address FMCSA's compliance review and enforcement procedures for IEPs.

*Part 385—Safety Fitness Procedures*

The final rule incorporates the NPRM text for part 385 with several changes. A definition for the term *roadability review* is added to § 385.3 and deleted from proposed § 385.203. In §§ 385.201 and 385.203, roadability reviews were added to the list of functions that Safety Inspectors, Auditors, and Investigators can perform. FMCSA also deleted a portion of § 385.503(c) to ensure that §§ 385.503(b) and (c) provide a consistent definition for the term ''imminent hazard.'' The Agency then added the appropriate cross-reference for the definition of ''imminent hazard.''

Under the final rule, FMCSA will conduct roadability reviews to evaluate the safety of IEPs and their compliance with the relevant FMCSRs. This activity will consist of an on-site examination of an IEP's inspection, repair, and maintenance operation; and records to determine its compliance with applicable FMCSRs (i.e., parts 390, 393, and 396).

In addition to IEPs identified in SafeStat, a roadability review may be conducted on an IEP that falls into one of the following categories: (1) The provider is the subject of a complaint that FMCSA determines to be non-frivolous; (2) the provider has equipment involved in a higher-than-average number of recordable crashes or HM incidents; (3) the provider has a higher than average OOS rate for its chassis; or (4) the Agency determines there is a need for a review. FMCSA will conduct roadability reviews using the software called Compliance Analysis and Performance Review Information (CAPRI). If FMCSA finds violations of parts 390, 393, or 396, the Agency will cite the IEP for those violations and impose civil penalties according to the civil penalty structure contained in 49 U.S.C. 521(b). FMCSA may prohibit an IEP from tendering any IME from one or more locations if the provider's compliance with the FMCSRs is so deficient that continued operation constitutes an imminent hazard to highway safety under 49 U.S.C. 521(b)(5).

*Part 386—Rules of Practice*

The final rule amends 49 CFR part 386 concerning rules of practice for enforcement proceedings before the FMCSA Assistant Administrator. This will make part 386 applicable to IEPs subject to today's final rule concerning inspection, repair, and maintenance requirements.

FMCSA determined that § 386.72(b) needed to be amended to include an explicit reference to placing IEPs OOS when they tender IME that poses an imminent hazard to safety, although the Agency did not propose to do so in the NPRM. In title 49 of the U.S. Code, section 521(b)(5)(B) defines *imminent hazard* as a violation of certain statutes and implementing regulations involving a ''*vehicle*, employee, or commercial motor vehicle operations which substantially increases the likelihood of serious injury or death if not discontinued immediately.'' [emphasis added]. Thus, if an IEP tenders equipment meeting the definition in section 521(b)(5)(B), the Secretary can stop it from tendering such equipment.

The final rule also amends § 386.83 to extend the applicability of this section to IEPs.

Finally, the final rule amends Appendix A to part 386 to add IEPs' violations of OOS orders to the penalty table in this appendix.

*Part 390—Federal Motor Carrier Safety Regulations*

The final rule requires IME to be identified with the USDOT number issued by FMCSA to the IEP. However, in response to commenters' concerns about the cost and complexity of re-marking chassis when IME is transferred to a different IEP, the rule allows IEPs to use several alternatives for identifying IME. It also provides a 24-month period for IEPs to comply with the IME identification requirement.

[4] North American Industry Classification System (NAICS), industry code 483100 (Deep Sea, Coastal, and Great Lakes Water Transportation).

IEPs have the choice of identifying the IME with a label, sticker, decal, or other easily applied marking, instead of the more elaborate marking (for power units) required by 49 CFR 390.21. If an IEP uses a label, it must be readily visible and legible to an inspection official during daylight hours when the vehicle is stationary. The label must be a color that contrasts sharply with the background on which it is placed, and the letters must contrast sharply in color with the background of the label. The label must be kept and maintained in a manner that retains this legibility.

As an alternative, the IEP may use a paper identification document but must protect it from damage in a weatherproof container on the IME, of the kind used for vehicle registration documents. Also, the IEP may include its USDOT number on interchange paperwork, so long as the unique identification of the item of IME is clearly delineated as well. The IEP identification (USDOT number) must be clear enough to be immediately legible to a safety official during the course of an equipment inspection. Alternatively, IME may be marked with a USDOT number in the same fashion as required under the current § 390.21, except the marking will only be required on the curb side of the equipment. IEPs may use the 10-character alphanumeric codes until the compliance date of December 17, 2010. Even though the FMCSA Administrator denied IANA's request to initiate a pilot program,[5] the Agency asked IANA to communicate with it in the future concerning its progress in developing the Global Intermodal Equipment Registry (GIER). The Agency will consider allowing the GIER if it becomes apparent that its use could serve as an additional alternative method of complying with the provisions of 49 CFR 390.21.

Section 390.40 of the final rule lists the responsibilities of an IEP. The final rule adds a new paragraph (d) that requires IEPs to ''ensure that intermodal equipment intended for interchange with motor carriers is in safe and proper operating condition.'' Former paragraphs (d) through (i) were re-numbered (e) through (j). The phrase, ''in a timely manner,'' is deleted from paragraph (h), which was paragraph (g) in the NPRM.

The order of presentation of §§ 390.42 and 390.44 are reversed from the order in which they were published in the NPRM.

Section 390.42 addresses the rights and responsibilities of drivers and motor carriers operating intermodal equipment. Former paragraph (b) was deleted and the subject covering accuracy of violations data is now addressed in § 390.44. Paragraph (a) is adopted as proposed. Paragraph (c) is revised slightly to make the text consistent with § 390.40(i) and is redesignated as paragraph (b). Section 390.44 prescribes procedures for IEPs and motor carriers to request correction of their safety records. Paragraphs 390.44(a) and (b) are expanded to state that these procedures include safety violations cited during roadside inspections the IEP or the motor carrier believed were improperly attributed to them. Paragraphs 390.44(c) and (d) are adopted as proposed.

*Part 392—Driving of Commercial Motor Vehicles*

The final rule amends § 392.7 to provide a more comprehensive list of IME-specific components. Drivers preparing to transport IME are required to make an inspection of specific components of IME and be satisfied the IME is in good working order before operating it over the road. FMCSA emphasizes that this does not limit a driver to performing a visual inspection where an auditory inspection or a combination of a visual and an auditory inspection may be more appropriate.

*Part 393—Parts and Accessories Necessary for Safe Operation*

The final rule amends paragraph (d) of § 390.40 to require that intermodal equipment intended for interchange with motor carriers to transport intermodal containers is in safe and proper operating condition. As discussed earlier in this document, FMCSA believes this change is responsive to CHP's comment concerning the definitional language of Part 393 because the new requirement focuses on IEPs as equipment providers while the current regulations continue to focus on IEPs that operate as motor carriers. Also, the final rule replaces § 393.1(a), ''Scope'', which was deleted in error in the NPRM.

*Part 396—Inspection, Repair, and Maintenance*

The final rule amends part 396 to require IEPs to establish a systematic inspection, repair, and maintenance program and to maintain records documenting its program. Equipment providers are also required to comply with FMCSA's periodic and annual inspection regulations. Further, IEPs are required to establish a process by which a motor carrier or driver can report the defects or deficiencies on container chassis that they discover or are reported to them. IEPs are then required to document whether they repaired the defect or deficiency, or whether repair is unnecessary, before the IME is tendered for interchange.

Section 396.9 has been revised to explicitly include IME among the types of CMVs the Agency may place OOS. Although FMCSA and its predecessor agencies have always had the authority to place CMVs OOS, § 31151(c) specifically authorizes the Agency to place IME OOS. This requirement is now added to the FMCSRs in § 396.9. In § 396.9(d)(1), FMCSA changed the last part of the second sentence to require the driver to immediately mail, fax, or otherwise transmit the report to the motor carrier and IEP if the driver would not return to a carrier or IEP facility within 24 hours. In § 396.9(d)(2), a sentence was added to require that repairs to IME taken OOS must also be documented in the maintenance records for such equipment (see 49 U.S.C. 31151(c)).

The final rule also amends § 396.11 to add a new paragraph (a)(2), specifying that the IEP must have a process to receive reports of defects or deficiencies in the equipment.

Finally, the final rule adds a new § 396.12 to require IEPs to establish a procedure to accept reports of defects or deficiencies from motor carriers or drivers, repair the defects that are likely to affect safety, and document the procedure. The text is revised from the NPRM to require the IEP to record its USDOT number and a unique identifier of the particular IME, in repair records. The latter is the 10-character alphanumeric identification assigned to the individual IME (comprised of the 4-letter Standard Carrier Alpha Code of the IME leasing company, steamship line, or other party, and a 6-digit numeric field unique to the IME), the license-plate number, the VIN, or another number permanently associated with the IME.

## V. Regulatory Analyses and Notices

*Executive Order 12866 (Regulatory Planning and Review and DOT Regulatory Policies and Procedures)*

FMCSA determined this final rule is a ''significant regulatory action'' under Executive Order 12866, Regulatory

[5] On January 2, 2008, IANA *et al.* submitted a petition proposing a pilot program that would have been implemented through the development and subsequent maintenance of a central database to register all chassis operated in the United States. The so-called GIER database would enable IEPs and motor carrier safety enforcement personnel to identify the responsible IEP that is associated with the existing unique alphanumeric identifier (ID), which consists of four letters followed by six numbers.

Planning and Review, and significant under DOT regulatory policies and procedures. Therefore, this final rule has been reviewed by the Department's Office of the Secretary of Transportation (OST) and the Office of Management and Budget (OMB). However, the Agency estimates that the economic impact of this final rule will not exceed the annual $100 million threshold for economic significance. This final rule implements statutory requirements and reflects the Agency's response to comments received on the NPRM issued on December 21, 2006 (71 FR 76796).

FMCSA prepared a regulatory evaluation analyzing the costs and benefits of this rule. The regulatory evaluation indicates that the rule will not have a significant economic impact on IEPs, motor carriers, and drivers. The economic benefits of the rule are estimated to include: (1) Safety benefits from avoiding crashes involving IME, and (2) efficiency benefits resulting from a reduction in vehicle OOS orders on intermodal chassis and wait times for drivers to receive a roadworthy chassis. The results of this evaluation are summarized below. A copy of the full Regulatory Evaluation document is included in Docket Number FMCSA–2005–23315.

Estimated Compliance Costs for Intermodal Equipment Providers

Potential costs considered in this Regulatory Evaluation include costs to:

- File an Intermodal Equipment Provider Identification Report (FMCSA Form MCS–150C),
- Identify the IEP responsible for the equipment through the USDOT number assigned by FMCSA,
- Establish a systematic inspection program, and a repair and maintenance program to ensure the safe operating condition of each chassis,
- Maintain documentation of the inspection program, and
- Establish and maintain a new reporting system for identifying and correcting defective and deficient equipment.

When considering the cost impact of the rule, the Agency recognized that some of these costs are already being incurred by the motor carrier and intermodal industries. Based on information provided by commenters and participants in public listening sessions, FMCSA believes that periodic inspections of IME by those controlling that equipment (§ 396.17(c)) are being performed at least once every 12 months, as required by the regulation. As discussed in more detail below, surveys of steamship lines and railroads that are also IEPs indicate that some are engaging in regular repair and preventive maintenance, and conducting inspections in addition to the mandatory periodic inspection. Further, because some motor carriers themselves apparently make repairs to IMEs, this final rule would shift many of these uncompensated costs back to IEPs. Therefore, for all of these reasons, the costs of this final rule are lower than would be in the absence of any inspection, repair, or maintenance activity currently performed on IME.

Total first-year costs associated with this rule range from $7.8–$38.8 million, depending on equipment providers' current inspection, maintenance, and repair programs for their chassis. Total discounted costs over the 10-year analysis period range from $52.4–$285.4 million, using a 7 percent discount rate.

Filing Intermodal Equipment Provider Identification Report (Form MCS–150C)

This final rule requires each IEP to (1) obtain a unique USDOT number by submitting an Intermodal Equipment Provider Identification Report, Form MCS–150C, to FMCSA, and (2) file an update of its report every 24 months. FMCSA estimates that 108 entities (93 steamship lines, 5 railroads, and 10 common pool operators/equipment lessors) will need to submit form MCS–150C.

FMCSA estimates that it takes 20 minutes to complete the Form MCS–150C the first time it is filed.[6] As mandated in section 217 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA), Pub. L. 106–159, 113 Stat. 1748, at 1767 (December 9, 1999), the Form MCS–150 need not be updated more frequently than every two years. FMCSA estimates that the biennial update would take considerably less time than the original submission, as little as 10 minutes, because most of the updated information is likely to be the same as the original filing, and equipment providers will have had experience in completing the form at least once before.[7]

A supervisor or manager would most likely be responsible for filing a Form MCS–150C. According to the national employment and wage data from the May 2006 Occupational Employment Statistics survey published by the Bureau of Labor Statistics (BLS), the median hourly wages for ''first line office and administrative managers'' [8] in the trucking, ocean shipping and railroad industries [9] were $22.57, $21.77, and $27.04, respectively (this analysis will use wages in the steamship industry for common pool operators). The weighted average of these hourly wage estimates is $22.09. The BLS also publishes estimates of benefits in its National Compensation Survey (NCS).[10] According to the December 2006 NCS, total hourly employee compensation in the transportation and warehousing industries is $31.39, of which $20.80 (or 65.4 percent) is wages and salary, and $10.99 (or 34.6 percent) is benefits. Including benefits brings the labor cost for filing the Form MCS–150C to $33.77 per hour.

IEPs would incur a one-time cost of $10.26 per entity (20 minutes at $33.77 per hour), or about $1,108 for the 108 non-motor carrier IEPs. Biennial updates would occur in years 3, 5, 7, and 9 and cost $5.63 per entity (10 minutes at $33.77 per hour), or about $554 for IEPs in each of those years. Total 10-year costs to IEPs discounted at a 7 percent rate would be $1,754. Table 1 summarizes the estimated initial costs for IEPs to file a Form MCS–150C with FMCSA, as well as subsequent costs incurred to file the biennial updates. Motor carriers are already required to file the Form MCS–150, and will not incur any new costs.

[6] FMCSA, Motor Carrier Identification Report, (65 FR 70509; November 24, 2000).

[7] The estimated time requirements for IEPs to fill out a Form MCS–150C for the first time and biennially are consistent with FMCSA's estimate of the time it takes motor carriers to fill out a Form MCS–150.

[8] Standard Occupational Classification (SOC) 43–1011.

[9] North American Industry Classification System (NAICS) 484100 (General freight, trucking), 483100 (Deep Sea, Coastal, Great Lakes Shipping), 482100 (Railroads).

[10] Benefits include paid leave, supplementary pay, insurance, retirement and savings, as well legally required items, such as social security, and workers' compensation.

TABLE 1—COSTS TO FILE IDENTIFICATION REPORT (MCS–150 OR MCS–150C)

| Provider | Number of entities | Additional costs due to the Final Rule | |
|---|---|---|---|
| | | Year 1 costs | Total costs over 10 years, discounted at 7% |
| Steamship Lines | 93 | $1,032 | $1,488 |
| Railroads | 5 | 69 | 99 |
| Common-pool operators | 10 | 115 | 166 |
| Motor Carriers | 1,900 | 0 | 0 |
| Total | 2,008 | 1,216 | 1,754 |

*Note: Figures may not sum to totals due to rounding.*

USDOT Number IEP Identification on Each Chassis

This final rule requires all IEPs to identify their chassis with a USDOT number that is assigned when the Form MCS–150C is filed with the Agency. This final rule allows IEPs to mark their IME with a label or other marking that identifies the IEP through its assigned USDOT number. The label or other marking must be legible and the IEP identification must be clearly readily visible to an enforcement official during the course of an equipment inspection.

FMCSA believes that IEPs will be able to fulfill these identification requirements at the very low cost of $2 per chassis, which includes $1 for labor and $1 for materials. With regard to labor, this analysis assumes that this activity will take on average no more than a minute per chassis to affix a label or insert a document that clearly displays the IEP's USDOT number in the weatherproof container used for vehicle registration documents. Regardless of who completes these tasks at the IEP's facility, the cost (including overhead and fringe benefits) of one-minute's worth of labor will not exceed $1.

Material costs will vary depending on which option the IEP chooses, but should also be minimal. FMCSA staff researched custom-printed weather-proof outdoor vinyl labels offered by numerous companies and found that these may be purchased in bulk-lots of 1,000—each non-motor carrier IEP controls on average about 7,500 chassis—for well below $1 dollar per vinyl label. If an IEP chooses to simply include in the vehicle a document with its USDOT number, material costs are even lower: Commercial printing services would cost about $0.10 per page (for each chassis), and these documents could be produced by the IEPs themselves at even lower cost. Nevertheless, this analysis rounds up all material costs to $1.

Chassis identification will not be a one-time expense for IEPs for three main reasons. First, older chassis are retired and replaced each year. Based upon research and assessment conducted at the time the NPRM was developed, FMCSA believes that the operational life of an intermodal chassis is approximately 14 years and consequently that 1/14 of the total chassis pool turns over each year.[11] Second, vendors that sell weatherproof vinyl labels indicate that these labels last for about three years and therefore will need to be replaced as they wear out. Last, some IEPs report that the composition of their chassis pools changes quite often. This ''churn'' in chassis in a pool can reportedly be as high as 40 percent per year. Because each chassis will need to be identified with the USDOT number of the IEP that currently controls it, a large fraction of the total chassis pool may need to be re-identified each year.

Table 2 summarizes the cost of chassis identification. High ''churn'' rates were reported only by chassis pool lessors, and, as previously discussed, many of their chassis are actually under long-term lease to steamship lines. Consequently, these high rates of turnover are likely concentrated among less than one-quarter of the total chassis pool. Costs were calculated under a variety of churn rates that were applied to the total non-motor carrier-controlled pool, and, as can be seen, total costs do not vary greatly. This analysis will subsequently use a churn rate of 20 percent. It is also worth noting that more frequent re-identification of IME by IEPs alleviates the costs from replacing worn-out labels.

TABLE 2—COMPARISON OF CHASSIS IDENTIFICATION COSTS

[$ Millions]

| Annual chassis churn | 50% | 40% | 30% | 20% | 10% | 5% | 0% |
|---|---|---|---|---|---|---|---|
| First Year Costs: | | | | | | | |
| Initial Marking | $1.6 | $1.6 | $1.6 | $1.6 | $1.6 | $1.6 | $1.6 |
| Year 1 Churn | 0.8 | 0.6 | 0.5 | 0.3 | 0.2 | 0.1 | 0.0 |
| Costs in Years 2–10, Discounted at 7%: | | | | | | | |
| Label Replacement | 0.5 | 0.7 | 1.0 | 1.2 | 1.4 | 1.4 | 1.4 |
| Churn | 4.9 | 3.9 | 2.9 | 2.0 | 1.0 | 0.5 | 0.0 |
| New Chassis | 0.8 | 0.8 | 0.8 | 0.8 | 0.8 | 0.8 | 0.8 |
| Total 10-Year Costs, Discounted at 7% | 8.5 | 7.6 | 6.8 | 5.9 | 4.9 | 4.4 | 3.8 |

*Note: Figures may not sum to totals due to rounding.*

[11] The operational life estimate was derived using data on the model years of chassis that underwent roadside inspections.

Systematic Inspection, Repair, and Maintenance Programs

Current regulations (49 CFR 396.17) require motor carriers or their agents to conduct periodic (annual) inspections on their equipment. Also, in accordance with § 396.3(a), every motor carrier is required to systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles subject to its control. The parts and accessories for those motor vehicles are required to be in safe and proper operating condition at all times a vehicle is being operated. These parts and accessories include those components specified in part 393 and any additional parts and accessories that may affect safety of operation. Such parts and accessories include but are not limited to frame and frame assemblies, suspension systems, axles and attaching parts, wheels and rims, and steering systems (§ 396.3(a)(1)). This final rule explicitly extends these requirements to IEPs.

Information collected prior to this rulemaking (surveys, port visits, anecdotal information provided by industry contacts) led FMCSA to conclude that most IEPs currently have active inspection, repair, and maintenance programs for their chassis that satisfy § 396.17, and would bear no additional costs to satisfy this particular regulation. With regard to the requirements of § 396.3, FMCSA believes that the majority of providers are performing regular inbound and outbound inspections at terminals, annual inspections, and some forms of preventive maintenance, along with maintaining records on the inspection, repair, and maintenance (IRM) activities performed. However, the Agency could not conclude that all IEPs are 100 percent in compliance with the systematic IRM requirements of § 396.3. Consequently, the Agency anticipates some additional costs associated with the requirements for systematic IRM specifically due to the need for additional IME inspections by some IEPs.

Maintenance and Repair Costs

Maintenance programs for some IEPs may need to be improved to bring them into full compliance with the requirements. However, these changes are expected to make maintenance and repair more proactive and less reactive. For instance, currently some IEPs perform maintenance only in direct response to equipment deficiencies noted by drivers or IEP personnel in the course of driver pre-trip, outbound, or inbound inspections, or during the annual inspection required by the FMCSRs. The final rule instead now requires all IEPs to proactively conduct inspections and preventive maintenance at more regularly scheduled intervals. Overall repair costs could increase if there were cost savings from delaying certain repairs as along as possible. Some of these delayed repairs, however, may have resulted in more costly repairs later or shortened chassis life, so it is unclear the extent to which the strategy of delaying repairs reduces costs. Delaying repairs, however, would increase the chances that repairs were undertaken by carriers after IME had left an IEP terminal, usually while the driver was en route to his or her destination. In these instances, this final rule shifts some of the uncompensated repair costs from motor carriers to IEPs. Further, if on-the-road repairs are more expensive than those done at the IEP terminals, this final rule could result in a net reduction in certain repair costs. Regardless, there is much uncertainty about the magnitude of any of these effects, and the Agency does not have data on repairs that did not occur, to be able to estimate the impact on repair costs. The Agency continues to assume, as it did in the NPRM, no additional costs for maintenance and repair as a result of this final rule.

Additional Inspections

Although any reallocation of maintenance and repair costs is assumed to have zero net cost impact, the extent to which this reallocation occurs will depend on the effectiveness of IEPs' current inspection systems at identifying needed repairs or performing regular maintenance *before* chassis are tendered to truck drivers to operate in interstate commerce. Drivers who submitted comments to the proposed rule stated that chassis are often tendered without having been adequately inspected, specifically noting that pre-trip walk-around inspections uncover problems that should have been noted and addressed earlier by IEPs. However, information from a limited survey of steamship lines indicates that the majority seem to already comply with the systematic IRM requirement. Because FMCSA is unable to conclude that full compliance already exists, it assumes that non-motor carrier IEPs will need to undertake new activities and thus incur costs in order to comply with the requirements of this rule. New costs will specifically arise from IEPs' performing additional inspections where needed.

FMCSA is uncertain about the proportion of chassis that are currently inspected often and thoroughly enough to meet the requirement of this final rule. For this analysis, FMCSA assumes a range of compliance of 50–75 percent of the intermodal chassis population. The baseline rate of compliance may be higher, although FMCSA did not find evidence that it is at 100 percent. To calculate the costs of this final rule, FMCSA assumed that IEPs will have to conduct additional inspections on the non-compliant fraction (25 to 50 percent) of the chassis pool to meet the IRM requirement.

FMCSA based the foregoing assumptions on information from a variety of sources, including surveys, port visits, its own observations at roadside inspections, and comments on the NPRM and at the public listening sessions. Although intermodal survey responses suggest that some IEPs are already achieving a high level of compliance with this rule, FMCSA believes the survey responses are dominated by larger, better-managed firms with more rigorous inspection and repair programs. FMCSA did not survey chassis pool operators, although this industry submitted comments to the NPRM. FMCSA believes its assumption of 25 to 50 percent non-compliance does not underestimate costs.

The final rule sets no explicit requirements on the number of inspections per chassis under a systematic IRM program. However, to create cost estimates, FMCSA made assumptions about how many additional inspections IEPs would actually undertake. FMCSA assumes all chassis currently receive at least an annual inspection. In the Regulatory Evaluation for the NPRM, FMCSA assumed that typically three additional inspections (amounting to a quarterly inspection program) would be needed to bring the non-compliant portion (non-motor-carrier-controlled IME pool) into compliance. Some commenters may have interpreted that estimate as implying a requirement for 4 inspections annually; because a typical intermodal chassis travels only several thousand miles per year, this number of inspections might be excessive. In response to those commenters, for the final rule, FMCSA also analyzed the costs of semiannual inspections, where non-compliant chassis would need just one additional scheduled inspection to be brought into compliance with the FMCSRs. The Agency notes that mileage is not the only factor that contributes to chassis wear, as environmental factors may also play a prominent role in some parts of the country. A quarterly inspection regime can be used to calculate a reasonable upper bound for costs, while a semiannual program can

be used to calculate a reasonable lower bound.

This analysis assumes that it takes, on average, 45 minutes to conduct an annual inspection of an intermodal chassis. FMCSA assumes 30 minutes for all its current annual inspection programs. AAR members note that it takes 30 minutes to conduct the annual inspection of intermodal chassis. However, OCEMA indicates the annual FMCSA inspection takes one hour regardless of who is performing the inspection. The cost of conducting inspections can vary depending on the nature of the labor being used (e.g., union or non-union, employees or contractors, on-site or off-site) and the geographic region. FMCSA assumes a transportation equipment inspector will devote 30 minutes to the inspection. The inspector would be supported by a truck maintenance technician who is assumed to devote 15 minutes to the inspection.[12]

FMCSA examined wages from three distinct industry segments: Motor carriers, steamship lines, and railroads.[13] Public comments note that common pool operators may lease a large fraction of their chassis to steamship lines and also are often located near ports. For both reasons, FMCSA believes wages specific to steamship lines are also applicable to chassis pool operators. A transportation equipment inspector earns wages of $16.88, $23.04, and $27.56 per hour in the motor carrier, railroad, and steamship industries, respectively. A truck maintenance technician earns wages of $17.14, $22.33, and $23.86 per hour in the motor carrier, railroad, and steamship industries, respectively. As previously discussed regarding the costs of filing the Form MCS–150C, wages account for 65.4 percent of total compensation. Applying these data and the estimated time for an inspection yields a per inspection cost of wages of $19.46, $26.15, and $30.19 for motor carrier, railroad, and steamship industries, respectively. Because this rule extends no additional requirements to motor carriers, additional costs are based only on chassis controlled by non-motor carrier IEPs.

FMCSA also estimated existing IRM costs for all IEPs for comparison with the additional costs of the final rule. Using responses from the recent IEP surveys, FMCSA estimates that the average cost of repair and maintenance was $1,356 per chassis per year for railroads, and $688 per chassis per year for steamship lines. When put on a per mile basis (also taken from the survey responses), these estimates are close ($0.13 for railroads and $0.15 for steamship lines). For the purposes of this analysis, the average, $1,022 per chassis per year, is used as the expected cost of repair and maintenance.

Table 3 shows the estimated costs of IRM programs for equipment providers. Costs are presented for two scenarios, that 50 percent of chassis are not part of compliant IRM programs, and that 25 percent are not. For each scenario, two estimates on the additional number of inspections needed to achieve compliance, one or three, are presented. Additional costs of this rule for new inspections to meet systematic IRM requirements were estimated to be between $6.0 million and $36.0 million per year.

TABLE 3—ESTIMATED ANNUAL COSTS OF SYSTEMATIC INSPECTION, REPAIR, AND MAINTENANCE PROGRAMS FOR INTERMODAL CHASSIS

| IEP | Firms | Chassis | Existing costs ($ millions) | | | | Costs from final rule ($ millions) | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | Inspections per year currently performed on compliant chassis* | | | | Additional inspections per year needed to bring non-compliant chassis into compliance* | | | |
| | | | 4 | | 2 | | 3 | | 1 | |
| | | | Percent of chassis currently in full compliance | | Percent of chassis currently in full compliance | | Percent of chassis currently not in compliance | | Percent of chassis currently not in compliance | |
| | | | 50% | 75% | 50% | 75% | 50% | 25% | 50% | 25% |
| Steamship Lines | 93 | 392,000 | 430.2 | 439.1 | 418.4 | 421.3 | 17.8 | 8.9 | 5.9 | 3.0 |
| Railroads | 5 | 96,200 | 104.6 | 106.5 | 102.1 | 102.7 | 3.8 | 1.9 | 1.3 | 0.6 |
| Common Pool Operators | 10 | 320,000 | 351.2 | 358.4 | 341.5 | 343.9 | 14.5 | 7.2 | 4.8 | 2.4 |
| Motor Carriers | 1,900 | 41,800 | 46.0 | | 44.3 | | 0.0 | | 0.0 | |
| Total | 2,008 | 850,000 | 932.0 | 950.0 | 906.3 | 912.3 | 36.0 | 18.0 | 12.0 | 6.0 |

* All chassis are assumed to undergo an annual inspection.
*Note: Figures may not sum to totals due to rounding.*

Recordkeeping

FMCSA believes that the systematic IRM requirement will prompt IEPs to conduct one to three additional inspections per year on a subset of the total number of chassis. The Agency assumes that IEPs are already keeping records on the inspections they currently perform. FMCSA estimates that the time needed to document and file each inspection report is approximately 3 minutes.[14] Including benefits, a transportation equipment inspector earns wages between $26 and $42 per hour. The 3 minutes of an

[12] All wage figures are from the May 2006 DOL Occupational Employee Statistics (OES). The specific occupations used were Transportation Inspector (53–6051) and Bus and Truck Mechanic (49–3031).

[13] Specifically, industries as defined by the North American Industry Classification System (NAICS): General Freight Trucking (488400), Rail Transportation (482100), and Deep Sea, Coastal, and Great Lakes Water Transportation (483100). Where specific occupations were not included in the latter, industry Support Activities for Water Transportation (488300) was used.

[14] FMCSA's supporting document on information collection titled, ''Inspection, Repair, and Maintenance,'' is covered by OMB approval number 2126–0003.

inspector's time devoted to recordkeeping would cost IEPs, on average, wages of no more than $2 per inspection. Table 4 presents the annual estimated cost of recordkeeping for the additional inspections underlying the costs presented in Table 3 above.,

TABLE 4—ADDITIONAL ANNUAL RECORDKEEPING COSTS

| IEP | Firms | Chassis | Costs from final rule ($ millions) | | | |
|---|---|---|---|---|---|---|
| | | | Additional inspections per year to reach full compliance | | | |
| | | | 3 | | 1 | |
| | | | Percent of chassis currently not in compliance | | Percent of chassis currently not in compliance | |
| | | | 50% | 25% | 50% | 25% |
| Steamship Lines | 93 | 392,000 | 1.2 | 0.6 | 0.4 | 0.2 |
| Railroads | 5 | 96,200 | 0.3 | 0.1 | 0.1 | 0.0 |
| Common Pool Operators | 10 | 320,000 | 1.0 | 0.5 | 0.3 | 0.2 |
| Total | 108 | 808,200 | 2.4 | 1.2 | 0.8 | 0.4 |

*Note: Figures may not sum to totals due to rounding.*

Defective and Deficient Equipment Reporting

The final rule requires that IEPs establish a system for motor carriers and drivers to report to IEPs any defects or deficiencies in tendered chassis that would affect the safety of the operation of those chassis or result in its mechanical breakdown on the road. This change potentially requires: (1) The establishment of the system; (2) the minimum information that the intermodal provider must obtain from motor carriers and drivers; (3) the corrective actions that must be taken when a chassis is identified as being defective or deficient in some way; and (4) the retention period for all documentation generated as a consequence of this system. This requirement will be added to the FMCSRs in a new § 396.12, ''Procedures for intermodal equipment providers to accept reports required by § 390.44(b).''

The requirements of § 396.12 are not expected to result in additional costs to IEPs or motor carriers and their drivers. Surveys and other research indicate that all required actions are currently performed in some form. A detailed discussion of the requirements of § 396.12 is contained in the full Regulatory Evaluation in the docket.

Total Compliance Costs of the Regulation

Table 5 summarizes the expected compliance costs attributable to the regulation.

TABLE 5—TOTAL COSTS OF INTERMODAL RULE

[$ millions]

| Period | Additional annual inspections needed to achieve full compliance | Current percentage of non-compliant chassis | Filing form MCS–150C | Chassis marking | Inspections | Recordkeeping | Total |
|---|---|---|---|---|---|---|---|
| Year 1 | 3 | 50 | 0.001 | 1.6 | 36.0 | 1.2 | 38.8 |
| | | 25 | | | 18.0 | 0.6 | 20.2 |
| | 1 | 50 | | | 12.0 | 0.4 | 14.0 |
| | | 25 | | | 6.0 | 0.2 | 7.8 |
| 10-Year Discounted at 7% | 3 | 50 | 0.003 | 5.9 | 270.7 | 8.8 | 285.4 |
| | | 25 | | | 135.3 | 4.4 | 145.6 |
| | 1 | 50 | | | 90.2 | 2.9 | 99.0 |
| | | 25 | | | 45.1 | 1.5 | 52.4 |
| 10-Year Discounted at 3% | 3 | 50 | 0.003 | 6.6 | 316.5 | 10.3 | 333.4 |
| | | 25 | | | 158.2 | 5.2 | 170.0 |
| | 1 | 50 | | | 105.5 | 3.4 | 115.6 |
| | | 25 | | | 52.7 | 1.7 | 61.1 |

*Note: Figures may not sum to totals due to rounding.*

The first-year costs are estimated to be between $7.8 million and $38.8 million. The present value of compliance costs over ten years, calculated using a 7 percent discount rate, are expected to be between $52.4 million and $285.4 million. With a 3 percent discount rate, these ten-year costs are expected to be between $61.1 million and $333.4 million. This wide range of cost estimates primarily reflects the Agency's decision to include a lower cost

scenario for how IEPs will meet the systematic IRM requirements of this final rule.

Safety and Economic Benefits of Improving Container Chassis Maintenance

The expected benefits of the final rule include the following:

- Prevented crashes:
  1. Prevented injuries;
  2. Saved lives;
  3. Reduced property damage;
- Increased operational efficiency of intermodal chassis by:
  1. Reduced vehicle out-of-service rate;
  2. Reduced average unproductive time spent by truckers waiting for chassis repairs on the road;
  3. Reduced average time spent by truckers at rail terminals or port facilities waiting to be given a roadworthy chassis.

The following sections quantify the potential benefits of the rule by estimating the number of crashes avoided to justify the compliance costs directly or indirectly imposed by the rule. These sections also provide a qualitative discussion of benefits of the rule where quantitative estimates are not available.

Threshold Analysis for Safety Benefits

FMCSA is cautious in presenting safety benefits because it lacks data that systematically identify crashes associated with hauling intermodal freight. Most crash data do not indicate specifically what type of semitrailer is involved in the crash, and the limited amount of detail in such data makes any conclusions based on crash analyses less certain. One can determine from carriers' filings of Form MCS–150 if the motor carrier involved in a crash hauls, exclusively or in part, intermodal freight. However, the information collected on that form may not be accurate, and carriers are not required to indicate what fraction of carriers' business is devoted to intermodal freight, so estimates derived from this information are extremely uncertain. Furthermore the small fraction of crash reports that identify an intermodal chassis often do not present enough information to allow the Agency to determine whether poor chassis condition was a contributing factor in the crash.

FMCSA conducted a threshold analysis of the benefits needed to make this final rule cost effective. Because the costs of this rule are relatively low, even small safety benefits would make it cost beneficial. The estimated average cost of a truck crash involving a truck tractor with a single semitrailer is $170,229.[15] Based on the cost estimates presented in Table 5, this final rule will need to prevent between 40 and 230 crashes per year to yield positive net benefits.[16]

Benefits Associated with Increased Operational Efficiency

The final rule is likely to produce some productivity benefits by enabling the hauling of intermodal freight to function more smoothly through a reduction of vehicle OOS rates. According to information provided to FMCSA by ATA members, carriers spend, on average, 3 hours of a driver's time and 1.5 hours of other employees' time to correct each vehicle OOS order received on chassis tendered by an equipment provider.[17] The opportunity cost for a truck driver and one employee's time is calculated at $140 per vehicle OOS order attributable to a problem chassis.[18] Given that, on average, between 18.5 and 25 percent of roadside inspections of intermodal chassis result in vehicle OOS violations, the cost savings associated with this final rule, in terms of the opportunity cost of the driver and motor carriers' time, would quickly add up, as there are an estimated 850,000 intermodal chassis in operation in the U.S.

FMCSA estimated the number of OOS orders this final rule would eliminate. A complete discussion on the methodology behind these estimates is contained in the full Regulatory Evaluation in the docket. Based on its research, FMCSA assumed intermodal chassis have OOS rates of 19 percent and that this final rule will reduce this OOS rate 25 percent, to a 14.25 percent rate. This is slightly above the trailing-unit OOS rate of 13 percent for non-intermodal carriers. In 2006, FMCSA determined that 21,154 inspections were performed on intermodal chassis, resulting in 3,982 OOS orders. FMCSA currently estimates that 95 percent of chassis are tendered by non-motor carrier IEPs, and therefore 95 percent of these OOS orders are for non-motor carrier IME. If this rule eliminated 25 percent of OOS orders on non-motor carrier IME, it would result in a reduction of about 950 OOS orders per year. Applying the estimated cost of $140 per OOS order yields an annual benefit of $133,000. The net present value of this benefit over 10 years, discounted at a 7 percent rate, will be about $1 million.

FMCSA anticipates this final rule, by mandating that IEPs implement systematic IRM, will reduce the number of defective chassis being offered or tendered for transportation in interstate commerce, and thereby reduce the time needed by truck drivers to find a roadworthy chassis at intermodal terminal facilities.

Regulatory Flexibility Analysis

FMCSA believes there will not be a significant economic impact on a substantial number of small entities. Chapter 4.2 of the Regulatory Evaluation in the docket contains the full Regulatory Flexibility Analysis for this rule. The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (5 U.S.C. 601 *et seq.*) requires agencies to consider the impact of regulations on small businesses, small non-profit organizations, and small governmental jurisdictions, unless the Agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities (SEISNOSE). This final rule will affect primarily 93 steamship lines, 10 IME pool operators, and 5 railroads—all of which are either large entities or foreign-owned businesses. This final rule does not apply to a substantial number of small entities.

Intergovernmental Review

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on

[15] Zaloshnja, Eduard and Ted Miller (December 2006). ''Unit Costs of Medium and Heavy Truck Crashes.'' *http://ai.volpe.dot.gov/CarrierResearchResults/PDFs/Crash%20Costs%202006.pdf.* These costs represent the present value of all costs over the victim's expected life span that result from a crash, computed using a 4 percent discount rate. The costs are medically related costs, emergency services costs, property damage costs, lost productivity, and monetized value of the pain, suffering, and quality of life adjustments. Zaloshnja and Miller present estimates in 2005 dollars; this evaluation adjusts these estimates to 2006 dollars using the 2.93 percent increase in the gross domestic price deflator from 2005 to 2006. Zaloshnja and Miller use a $3.0 million value of a statistical life (VSL). We have recomputed crash costs using a $5.8 million VSL in accordance with DOT guidance (Office of the Secretary of Transportation, ''Treatment of the Economic Value of a Statistical Life in Departmental Analyses.'' Feb. 2008. Available at: *http://ostpxweb.ost.dot.gov/policy/reports/080205.htm*) and also published at 73 FR 35194, June 20, 2008.

[16] The net present value of a single crash avoided per year over 10 years, with a 7 percent discount rate, is $1,242,863. Total discounted costs over ten years are divided by this number to calculate the annual average number crashes.

[17] Average revenue per tractor would also measure opportunity cost, but this analysis only measures the cost of staff time, not equipment (the tractor and trailer), thereby resulting in a lower potential cost savings estimate.

[18] Using National employment and wage data, the median hourly wage for a truck driver is estimated at $16.01 and supervisor/manager is estimated at $21.08. With fringe benefit added to the wages, the hourly wage and salaries are estimated at $23.39 and $30.79 for truck driver and the manager/supervisor, respectively.

Federal programs and activities do not apply to this program.

Paperwork Reduction Act

FMCSA determined that this final rule requires revisions to two existing information collections. OMB Number 2126–0003 entitled, ''Inspection, Repair and Maintenance,'' will expire on April 30, 2009. The currently-approved ''total annual burden hours'' for 2126–0003 is 59,093,244 hours.

OMB Number 2126–0013 entitled, ''Motor Carrier Identification Report,'' expires March 31, 2011. The currently-approved ''total annual burden hours'' for 2126–0013 is 119,270 hours.

The amendments in this final rule that affect existing information collections include the requirements for entities that offer intermodal container chassis for transportation in interstate commerce to: (1) File an Intermodal Equipment Provider Identification Report (FMCSA Form MCS–150C, a variant on the currently-approved Motor Carrier Identification Report, Form MCS–150); (2) establish a systematic inspection, repair, and maintenance program to ensure the safe operating condition of each IME tendered to motor carriers and drivers, and to maintain documentation of the program in accordance with 49 CFR part 396; and (3) provide a means for an IEP to effectively respond, using a variant of the Driver-Vehicle Inspection Report currently approved by OMB, to driver and motor carrier complaints about the condition of intermodal container chassis.

The requirement for IEPs to file the Form MCS–150C report is expected to add only 36 burden hours to data collection 2126–0013 in the first year after this rule takes effect, and 18 hours every 2 years thereafter for updates to the form. In addition, it is anticipated that electronic recordkeeping will reduce, to the greatest extent practicable, the costs associated with complying with the recordkeeping requirements.

National Environmental Policy Act of 1969 (NEPA)

FMCSA analyzed this final rule for the purpose of the NEPA (42 U.S.C. 4321 *et seq.*) and conducted an environmental assessment under the procedures set forth in FMCSA Order 56101.1, published March 1, 2004 (69 FR 9680). Under FMCSA Order 5610.1, the environmental assessment focuses only on those resource categories that are of interest to the public or important to the decision, including Public Health and Safety, Hazardous Materials Transportation, Solid Waste Disposal, and other Special Areas of Consideration. In addition, the NEPA analysis also incorporates the rule's potential impact on Historic Properties (Section 106 Analysis under the National Historic Preservation Act) and Section 4(f) Determinations under the DOT Act (recodified at 49 U.S.C. 303(c)).

The results of the Environmental Assessment indicate that the potential for crash reduction may result in a small net benefit to the environment. FMCSA calculated the impacts of CMV crashes on the environment and the estimated crash reductions for this final rule will prevent emissions from congestion resulting from these CMV crashes, as well as prevent hazardous materials spills and solid waste generated as a result of the averted CMV crashes. However, because these impacts are rather small, FMCSA made a Finding of No Significant Impact for this rulemaking. Further environmental review in the form of an Environmental Impact Statement is not required. The Environmental Assessment and the Finding of No Significant Impact are in the docket.

Executive Order 12898 (Environmental Justice)

FMCSA considered the environmental effects of this final rule in accordance with Executive Order 12898 and DOT Order 5610.2 on addressing Environmental Justice for Minority Populations and Low-Income Populations, published April 15, 1997 (62 FR 18377) and determined that there are no environmental justice issues associated with this rule nor any collective environmental impact resulting from its promulgation. Environmental justice issues would be raised if there were ''disproportionate'' and ''high and adverse impact'' on minority or low-income populations. None of the regulatory alternatives considered in this rulemaking will result in high and adverse environmental impacts.

Energy Effects

FMCSA analyzed this action under Executive Order 13211, ''Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use.'' FMCSA determined that it is not a ''significant energy action'' because it is not economically significant (i.e., a cost of more than $120.7 million in a single year) and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Unfunded Mandates Reform Act of 1995

FMCSA determined this final rule does not impose an unfunded mandate, as defined by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532 *et seq.*), resulting in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $120.7 million or more (adjusted for inflation) in any one year.

Civil Justice Reform

This rulemaking 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

FMCSA analyzed this action, as required under Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks.'' FMCSA certifies it is not an economically significant rule, nor does it concern an environmental risk to health or safety that may disproportionately affect children.

Taking of Private Property

This rulemaking does 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.''

Federalism

FMCSA analyzed this final rule in accordance with the principles and criteria of Executive Order 13132, ''Federalism,'' and determined it has federalism implications within the meaning of the Order.

The Federalism Order applies to ''policies that have federalism implications,'' which it defines as regulations and other actions ''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.'' Sec. 1(a). The key concept here is ''substantial direct effects on the States.''

Section 31151(d) preempts ''a law, regulation, order, or other requirement of a State, a political subdivision of a State, or a tribal organization relating to commercial motor vehicle safety'' if it ''exceeds or is inconsistent with a requirement imposed under or pursuant to'' 49 U.S.C. 31151. In other words, this final rule establishing maintenance and related requirements for IME preempts any State or local law or regulation on

the same subject if it exceeds or is inconsistent with the Federal requirement.

Nonetheless, there are exceptions to this ''preemption'' principle. ''[A] State requirement for the periodic inspection of intermodal chassis by IEPs that was in effect on January 1, 2005,'' shall remain in effect only until the effective date of the final rule adopted under this proceeding [section 31151(e)(1)]; thus giving the States time to adapt to, and/or change, existing State laws and requirements to coincide with the new Federal roadability requirements. Additionally, notwithstanding section 31151(d), State requirements are not preempted by a Federal requirement if the Secretary ''determines that the State requirement is as effective as the Federal requirement and does not unduly burden interstate commerce'' [section 31151(e)(2)(A)]. A State must request a non-preemption determination before the effective date of the FMCSA final rule (section 31151(e)(2)(B)), here 6 months after publication in the **Federal Register**. No subsequent amendment to a non-preempted requirement may take effect unless it is first submitted to the Secretary, who must find that the amendment is no less effective than the FMCSA requirements and does not unduly burden interstate commerce (section 31151(e)(2)(C)).

Section 31151 clearly has a ''direct effect'' on the States, federalism implications, and preempts State law, but all of those results are intended and required by the statute. Although most of the States that adopted statutes regulating the maintenance of IME did not enforce them for several years, section 31151 will foreclose the opportunity for States to enact alternative legislation on this subject. We believe, however, that section 31151 does not create a ''substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' The IME affected by this rulemaking operate in interstate commerce. The regulation of interstate commerce is constitutionally and historically vested in the Federal government, not the States. The assertion of Federal authority in this area does not change the traditional relationship between the national government and the States, nor does it affect the constitutional and practical distribution of power and responsibilities among the various levels of government.

Section 3(b) of the Federalism Order provides that ''[n]ational action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance.'' The constitutional authority and statutory mandate for this rulemaking are clear and explicit.

FMCSA determined that this action will have a direct effect on States. However, because existing State laws on the maintenance of IME are so few and narrow in scope, the Agency also determined that this action will not have a substantial direct effect nor impose substantial additional costs or burdens on the States.

The Agency consulted with the States on the federalism implications of this regulation, as required by E.O. 13132, to ensure that State and local officials had meaningful and timely input into the formal promulgation and development of this regulation. Also, FMCSA provided State and local governments with ample opportunity to address this issue during the NPRM comment period and subsequent reopening of the comment period for the purpose of hearing oral comments at three public listening sessions, as indicated previously in this rule. Most of the States' concerns were based on the amount of time the Agency would allow them to file requests for non-preemption. FMCSA responded to these requests by setting a more realistic 6-month delayed effective date for this final rule, in light of the additional time States need to develop applications for non-preemption and the Agency will need to act on these requests. Thus, the Agency believes it has met the concerns of these State and local officials in this regard.

**List of Subjects**

*49 CFR Part 385*

Administrative practice and procedure, Highway safety, Intermodal equipment roadability, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

*49 CFR Part 386*

Administrative practice and procedure, Brokers, Freight forwarders, Hazardous materials, Intermodal equipment provider, Highway safety, Motor carriers, Motor vehicle safety, Penalties.

*49 CFR Part 390*

Highway safety, Intermodal equipment providers, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

*49 CFR Part 392*

Highway safety, Intermodal equipment providers, Motor carriers.

*49 CFR Part 393*

Highway safety, Intermodal equipment providers, Motor carriers, Motor vehicle safety.

*49 CFR Part 396*

Highway safety, Intermodal equipment providers, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

**VI. The Final Rule**

■ For the reasons discussed above, FMCSA amends Subchapter B, Chapter III, in Title 49 of the Code of Federal Regulations, as set forth below:

## PART 385—SAFETY FITNESS PROCEDURES

■ 1. Revise the authority citation for part 385 to read as follows:

**Authority:** 49 U.S.C. 113, 504, 521(b), 5105(e), 5109, 5113, 13901–13905, 31136, 31144, 31148, 31151, and 31502; Sec. 350 of Pub. L. 107–87; and 49 CFR 1.73.

■ 2. Amend § 385.1 by adding paragraph (e) to read as follows:

### § 385.1 Purpose and scope.

* * * * *

(e) Subpart F of this part establishes procedures to perform a roadability review of intermodal equipment providers to determine their compliance with the applicable Federal Motor Carrier Safety Regulations (FMCSRs).

■ 3. Amend § 385.3 by adding paragraph (4) to the definition of ''Reviews,'' to read as follows:

### § 385.3 Definitions and acronyms.

* * * * *

*Reviews.* * * *

(4) *Roadability review* means an on-site examination of the intermodal equipment provider's compliance with the applicable FMCSRs.

* * * * *

■ 4. Revise § 385.201 to read as follows:

### § 385.201 Who is qualified to perform a review of a motor carrier or an intermodal equipment provider?

(a) An FMCSA employee, or a State or local government employee funded through the Motor Carrier Safety Assistance Program (MCSAP), who was qualified to perform a compliance review before June 17, 2002, may perform a compliance review, safety audit, roadability review, or roadside inspection if he or she complies with § 385.203(b).

(b) A person who was not qualified to perform a compliance review before June 17, 2002, may perform a compliance review, safety audit, roadability review, or roadside inspection after complying with the requirements of § 385.203(a).

**§ 385.203 [Amended]**

■ 5. Amend § 385.203 by adding ''roadability review,'' after ''safety audit,'' in paragraphs (a) and (b).

■ 6. Amend part 385 by adding a new Subpart F—Intermodal Equipment Providers (§§ 385.501–385.503) to read as follows:

## Subpart F—Intermodal Equipment Providers

**§ 385.501 Roadability review.**

(a) FMCSA will perform roadability reviews of intermodal equipment providers, as defined in § 390.5 of this chapter.

(b) FMCSA will evaluate the results of the roadability review using the criteria in Appendix A to this part as they relate to compliance with parts 390, 393, and 396 of this chapter.

**§ 385.503 Results of roadability review.**

(a) FMCSA will not assign a safety rating to an intermodal equipment provider based on the results of a roadability review. However, FMCSA may cite the intermodal equipment provider for violations of parts 390, 393, and 396 of this chapter and may impose civil penalties resulting from the roadability review.

(b) FMCSA may prohibit the intermodal equipment provider from tendering specific items of intermodal equipment determined to constitute an ''imminent hazard'' (See § 386.72(b)(1) of this chapter).

(c) FMCSA may prohibit an intermodal equipment provider from tendering any intermodal equipment from a particular location or multiple locations if the agency determines the intermodal equipment provider's failure to comply with the FMCSRs constitutes an imminent hazard under § 386.72(b)(1).

## PART 386—RULES OF PRACTICE FOR MOTOR CARRIER, INTERMODAL EQUIPMENT PROVIDER, BROKER, FREIGHT FORWARDER, AND HAZARDOUS MATERIALS PROCEEDINGS

■ 7. The authority citation for part 386 is revised to read as follows:

**Authority:** 49 U.S.C. 521, 5123, 13301, 13902, 14915, 31132–31133, 31136, 31144, 31151, 31502, 31504; Sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); Sec. 217, Pub. L. 105–159, 113 Stat. 1748, 1767; and 49 CFR 1.73.

■ 8. Revise the heading of part 386 to read as set forth above.

■ 9. Revise § 386.1 to read as follows:

**§ 386.1 Scope of the rules in this part.**

(a) The rules in this part govern proceedings before the Assistant Administrator, who also acts as the Chief Safety Officer of the Federal Motor Carrier Safety Administration (FMCSA), under applicable provisions of the Federal Motor Carrier Safety Regulations (FMCSRs) (49 CFR parts 350–399), including the commercial regulations (49 CFR parts 360–379), and the Hazardous Materials Regulations (49 CFR parts 171–180).

(b) The purpose of the proceedings is to enable the Assistant Administrator:

(1) To determine whether a motor carrier, intermodal equipment provider (as defined in § 390.5 of this chapter), property broker, freight forwarder, or its agents, employees, or any other person subject to the jurisdiction of FMCSA, has failed to comply with the provisions or requirements of applicable statutes and the corresponding regulations; and

(2) To issue an appropriate order to compel compliance with the statute or regulation, assess a civil penalty, or both, if such violations are found.

■ 10. Amend § 386.72 by revising paragraph (b) to read as follows:

**§ 386.72 Imminent hazard.**

* * * * *

(b)(1) Whenever it is determined that a violation of 49 U.S.C. 31502 or the Motor Carrier Safety Act of 1984, as amended, or the Commercial Motor Vehicle Safety Act of 1986, as amended, or a regulation issued under such section or Acts, or a combination of such violations, poses an imminent hazard to safety, the Director of the Office of Enforcement and Compliance or a Division Administrator, or his or her delegate, shall order:

(i) A commercial motor vehicle or employee operating such vehicle out-of-service, or order an employer to cease all or part of the employer's commercial motor vehicle operations, as provided by 49 U.S.C. 521(b)(5);

(ii) An intermodal equipment provider's specific vehicle or equipment out-of-service, or order an intermodal equipment provider to cease all or part of its operations, as provided by 49 U.S.C. 521(b)(5) and 49 U.S.C. 31151(a)(3)(I).

(2) In making any such order, no restrictions shall be imposed on any vehicle, terminal or facility, employee, employer or intermodal equipment provider beyond that required to abate the hazard.

(3) In this paragraph (b), *imminent hazard* means any condition of vehicle, intermodal equipment, or commercial motor vehicle operations that substantially increases the likelihood of serious injury or death if not discontinued immediately.

(4) Upon the issuance of an order under paragraph (b)(1) of this section, the motor carrier employer, intermodal equipment provider or driver employee shall comply immediately with such order. Opportunity for review shall be provided in accordance with 5 U.S.C. 554, except that such review shall occur not later than 10 days after issuance of such order, as provided by section 213(b) of the Motor Carrier Safety Act of 1984 (49 U.S.C. 521(b)(5)). An order to an employer or intermodal equipment provider to cease all or part of its operations shall not prevent vehicles in transit at the time the order is served from proceeding to their immediate destinations, unless any such vehicle or its driver is specifically ordered out-of-service forthwith. However, vehicles and drivers proceeding to their immediate destination shall be subject to compliance upon arrival.

(5) For purposes of this section, the term *immediate destination* is the next scheduled stop of the vehicle already in motion where the cargo on board can be safely secured.

(6) Failure to comply immediately with an order issued under this section shall subject the motor carrier employer, intermodal equipment provider, or driver to penalties prescribed in subpart G of this part.

■ 11. Revise § 386.83 to read as follows:

**§ 386.83 Sanction for failure to pay civil penalties or abide by payment plan; operation in interstate commerce prohibited.**

(a)(1) *General rule.* A CMV owner or operator, or intermodal equipment provider that fails to pay a civil penalty in full within 90 days after the date specified for payment by FMCSA's final agency order, is prohibited from operating in interstate commerce starting on the next (i.e., the 91st) day. The prohibition continues until FMCSA has received full payment of the penalty.

(2) *Civil penalties paid in installments.* The FMCSA Service Center may allow a CMV owner or operator, or an intermodal equipment provider, to pay a civil penalty in installments. If the CMV owner or operator, or intermodal equipment provider, fails to make an installment

payment on schedule, the payment plan is void and the entire debt is payable immediately. A CMV owner or operator, or intermodal equipment provider, that fails to pay the full outstanding balance of its civil penalty within 90 days after the date of the missed installment payment, is prohibited from operating in interstate commerce on the next (i.e., the 91st) day. The prohibition continues until the FMCSA has received full payment of the entire penalty.

(3) *Appeals to Federal Court.* If the CMV owner or operator, or intermodal equipment provider, appeals the final agency order to a Federal Circuit Court of Appeals, the terms and payment due date of the final agency order are not stayed unless the Court so directs.

(b) *Show cause proceeding.* (1) FMCSA will notify a CMV owner or operator, or intermodal equipment provider, in writing if it has not received payment within 45 days after the date specified for payment by the final agency order or the date of a missed installment payment. The notice will include a warning that failure to pay the entire penalty within 90 days after payment was due, will result in the CMV owner or operator, or an intermodal equipment provider, being prohibited from operating in interstate commerce.

(2) The notice will order the CMV owner or operator, or intermodal equipment provider, to show cause why it should not be prohibited from operating in interstate commerce on the 91st day after the date specified for payment. The prohibition may be avoided only by submitting to the Chief Safety Officer:

(i) Evidence that the respondent has paid the entire amount due; or

(ii) Evidence that the respondent has filed for bankruptcy under chapter 11, title 11, United States Code. Respondents in bankruptcy must also submit the information required by paragraph (d) of this section.

(3) The notice will be delivered by certified mail or commercial express service. If the principal place of business of a CMV owner or operator, or an intermodal equipment provider, is in a foreign country, the notice will be delivered to the designated agent of the CMV owner or operator or intermodal equipment provider.

(c) A CMV owner or operator, or intermodal equipment provider, that continues to operate in interstate commerce in violation of this section may be subject to additional sanctions under paragraph IV(h) of appendix A to part 386.

(d) This section does not apply to any person who is unable to pay a civil penalty because the person is a debtor in a case under 11 U.S.C. chapter 11. CMV owners or operators, or intermodal equipment providers, in bankruptcy proceedings under chapter 11 must provide the following information in their response to the FMCSA:

(1) The chapter of the Bankruptcy Code under which the bankruptcy proceeding is filed (i.e., chapter 7 or 11);

(2) The bankruptcy case number;

(3) The court in which the bankruptcy proceeding was filed; and

(4) Any other information requested by the agency to determine a debtor's bankruptcy status.

■ 12. Amend appendix A to part 386 by revising paragraphs IV.c, IV.d, and IV.g. to read as follows:

**Appendix A to Part 386—Penalty Schedule; Violations of Notices and Orders**

* * * * *

IV. Out-of-Service Order * * *

c. Violation—Operation of a commercial motor vehicle or intermodal equipment by a driver after the vehicle or intermodal equipment was placed out-of-service and before the required repairs are made.

Penalty—$2,100 each time the vehicle or intermodal equipment is so operated.

(This violation applies to drivers as defined in IVa above.)

d. Violation—Requiring or permitting the operation of a commercial motor vehicle or intermodal equipment placed out-of-service before the required repairs are made.

Penalty—Up to $16,000 each time the vehicle or intermodal equipment is so operated after notice of the defect is received.

(This violation applies to intermodal equipment providers and motor carriers, including an independent owner-operator who is not a ''driver,'' as defined in IVa above.)

* * * * *

g. Violation—Operating in violation of an order issued under § 386.72(b) to cease all or part of the employer's commercial motor vehicle operations or to cease all or part of an intermodal equipment provider's operations, i.e., failure to cease operations as ordered.

Penalty—Up to $16,000 per day the operation continues after the effective date and time of the order to cease.

* * * * *

## PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

■ 13. Revise the authority citation for part 390 to read as follows:

**Authority:** 49 U.S.C. 508, 13301, 13902, 31133, 31136, 31144, 31151, 31502, 31504; sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 217, 229, Pub. L. 106–159, 113 Stat. 1748, 1767, 1773; and 49 CFR 1.73.

■ 14. Amend § 390.3 by adding a new paragraph (h) to read as follows:

**§ 390.3 General applicability.**

* * * * *

(h) *Intermodal equipment providers.* On and after December 17, 2009, the rules in the following provisions of subchapter B of this chapter apply to intermodal equipment providers:

(1) Subpart F, Intermodal Equipment Providers, of Part 385, Safety Fitness Procedures.

(2) Part 386, Rules of Practice for Motor Carrier, Intermodal Equipment Provider, Broker, Freight Forwarder, and Hazardous Materials Proceedings.

(3) Part 390, Federal Motor Carrier Safety Regulations; General, *except* § 390.15(b) concerning accident registers.

(4) Part 393, Parts and Accessories Necessary for Safe Operation.

(5) Part 396, Inspection, Repair, and Maintenance.

■ 15. Amend § 390.5 by adding, in alphabetical order, definitions for *Interchange, Intermodal equipment, Intermodal equipment interchange agreement, and Intermodal equipment provider* to read as follows:

**§ 390.5 Definitions.**

* * * * *

*Interchange* means the act of providing intermodal equipment to a motor carrier pursuant to an intermodal equipment interchange agreement for the purpose of transporting the equipment for loading or unloading by any person or repositioning the equipment for the benefit of the equipment provider, but it does not include the leasing of equipment to a motor carrier for primary use in the motor carrier's freight hauling operations.

*Intermodal equipment* means trailing equipment that is used in the intermodal transportation of containers over public highways in interstate commerce, including trailers and chassis.

*Intermodal equipment interchange agreement* means the Uniform Intermodal Interchange and Facilities Access Agreement (UIIFA) or any other written document executed by an intermodal equipment provider or its agent and a motor carrier or its agent, the primary purpose of which is to establish the responsibilities and liabilities of both parties with respect to the interchange of the intermodal equipment.

*Intermodal equipment provider* means any person that interchanges intermodal equipment with a motor carrier pursuant to a written interchange

agreement or has a contractual responsibility for the maintenance of the intermodal equipment.

* * * * *

■ 16. Revise § 390.15(a) to read as follows:

**§ 390.15 Assistance in investigations and special studies.**

(a) Each motor carrier and intermodal equipment provider must do the following:

(1) Make all records and information pertaining to an accident available to an authorized representative or special agent of the Federal Motor Carrier Safety Administration, an authorized State or local enforcement agency representative, or authorized third party representative within such time as the request or investigation may specify.

(2) Give an authorized representative all reasonable assistance in the investigation of any accident, including providing a full, true, and correct response to any question of the inquiry.

* * * * *

■ 17. Revise § 390.19 to read as follows:

**§ 390.19 Motor carrier, hazardous material shipper, and intermodal equipment provider identification reports.**

(a) *Applicability*. Each motor carrier and intermodal equipment provider must file Form MCS–150, Form MCS–150B or Form MCS–150C with FMCSA as follows:

(1) A U.S.-, Canada-, Mexico-, or non-North America-domiciled motor carrier conducting operations in interstate commerce must file a Motor Carrier Identification Report, Form MCS–150.

(2) A motor carrier conducting operations in intrastate commerce and requiring a Safety Permit under 49 CFR part 385, subpart E of this chapter must file the Combined Motor Carrier Identification Report and HM Permit Application, Form MCS–150B.

(3) Each intermodal equipment provider that offers intermodal equipment for transportation in interstate commerce must file an Intermodal Equipment Provider Identification Report, Form MCS–150C.

(b) *Filing schedule*. Each motor carrier or intermodal equipment provider must file the appropriate form under paragraph (a) of this section at the following times:

(1) Before it begins operations; and

(2) Every 24 months, according to the following schedule:

| USDOT number ending in | Must file by last day of |
|---|---|
| 1 | January. |
| 2 | February. |
| 3 | March. |
| 4 | April. |
| 5 | May. |
| 6 | June. |
| 7 | July. |
| 8 | August. |
| 9 | September. |
| 0 | October. |

(3) If the next-to-last digit of its USDOT Number is odd, the motor carrier or intermodal equipment provider shall file its update in every odd-numbered calendar year. If the next-to-last digit of the USDOT Number is even, the motor carrier or intermodal equipment provider shall file its update in every even-numbered calendar year.

(c) *Availability of forms*. The forms described under paragraph (a) of this section and complete instructions are available from the FMCSA Web site at *http://www.fmcsa.dot.gov* (Keyword ''MCS–150,'' or ''MCS–150B,'' or ''MCS–150C''); from all FMCSA Service Centers and Division offices nationwide; or by calling 1–800–832–5660.

(d) *Where to file*. The required form under paragraph (a) of this section must be filed with FMCSA Office of Information Management. The form may be filed electronically according to the instructions at the Agency's Web site, or it may be sent to Federal Motor Carrier Safety Administration, Office of Information Management, MC–RIO, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(e) *Special instructions for for-hire motor carriers*. A for-hire motor carrier should submit the Form MCS–150, or Form MCS–150B, along with its application for operating authority (Form OP–1, OP–1(MX), OP–1(NNA) or OP–2), to the appropriate address referenced on that form, or may submit it electronically or by mail separately to the address mentioned in paragraph (d) of this section.

(f) Only the legal name or a single trade name of the motor carrier or intermodal equipment provider may be used on the forms under paragraph (a) of this section (Form MCS–150, MCS–150B, or MCS–150C).

(g) A motor carrier or intermodal equipment provider that fails to file the form required under paragraph (a) of this section, or furnishes misleading information or makes false statements upon the form, is subject to the penalties prescribed in 49 U.S.C. 521(b)(2)(B).

(h)(1) Upon receipt and processing of the form described in paragraph (a) of this section, FMCSA will issue the motor carrier or intermodal equipment provider an identification number (USDOT Number).

(2) The following applicants must additionally pass a pre-authorization safety audit as described below before being issued a USDOT Number:

(i) A Mexico-domiciled motor carrier seeking to provide transportation of property or passengers in interstate commerce between Mexico and points in the United States beyond the municipalities and commercial zones along the United States-Mexico international border must pass the pre-authorization safety audit under § 365.507 of this subchapter. The Agency will not issue a USDOT Number until expiration of the protest period provided in § 365.115 of this subchapter or—if a protest is received–after FMCSA denies or rejects the protest.

(ii) A non-North America-domiciled motor carrier seeking to provide transportation of property or passengers in interstate commerce within the United States must pass the pre-authorization safety audit under § 385.607(c) of this subchapter. The Agency will not issue a USDOT Number until expiration of the protest period provided in § 365.115 of this subchapter or—if a protest is received—after FMCSA denies or rejects the protest.

(3) The motor carrier must display the number on each self-propelled CMV, as defined in § 390.5, along with the additional information required by § 390.21.

(4) The intermodal equipment provider must identify each unit of interchanged intermodal equipment by its assigned USDOT number.

(i) A motor carrier that registers its vehicles in a State that participates in the Performance and Registration Information Systems Management (PRISM) program (authorized under section 4004 of the Transportation Equity Act for the 21st Century [(Public Law 105–178, 112 Stat. 107]) is exempt from the requirements of this section, provided it files all the required information with the appropriate State office.

■ 18. Amend § 390.21 by revising the section heading and paragraphs (a) and (b)(2), and by adding paragraph (g) to read as follows:

**§ 390.21 Marking of self-propelled CMVs and intermodal equipment.**

(a) *General*. Every self-propelled CMV subject to subchapter B of this chapter must be marked as specified in paragraphs (b), (c), and (d) of this section, and each unit of intermodal equipment interchanged or offered for interchange to a motor carrier by an intermodal equipment provider subject

to subchapter B of this chapter must be marked as specified in paragraph (g) of this section.

(b) * * *

(2) The identification number issued by FMCSA to the motor carrier or intermodal equipment provider, preceded by the letters ''USDOT.''

* * * * *

(g) *Intermodal equipment.* (1) The requirements for marking intermodal equipment apply to each intermodal equipment provider, as defined in § 390.5, that interchanges or offers for interchange intermodal equipment to a motor carrier.

(2) Each unit of intermodal equipment interchanged or offered for interchange to a motor carrier by an intermodal equipment provider subject to subchapter B of this chapter must identify the intermodal equipment provider.

(3) The intermodal equipment provider must be identified by its legal name or a single trade name and the identification number issued by FMCSA, preceded by the letters ''USDOT.''

(4) The intermodal equipment must be identified as follows, using any one of the following methods:

(i) The identification marking must appear on the curb side of the item of equipment. It must be in letters that contrast sharply in color with the background on which the letters are placed. The letters must be readily legible, during daylight hours, from a distance of 50 feet (15.24 meters) while the CMV is stationary; and be kept and maintained in a manner that retains this legibility; or

(ii) The identification marking must appear on a label placed upon the curb side of the item of equipment. The label must be readily visible and legible to an inspection official during daylight hours when the vehicle is stationary. The label must be a color that contrasts sharply with the background on which it is placed, and the letters must also contrast sharply in color with the background of the label. The label must be kept and maintained in a manner that retains this legibility; or

(iii) The USDOT number of the intermodal equipment provider must appear on the interchange agreement so that it is clearly identifiable to an inspection official. The interchange agreement must include additional information to identify the specific item of intermodal equipment (such as the VIN and 4-character SCAC code and 6-digit unique identifying number); or

(iv) The identification marking must be shown on a document placed in a weathertight compartment affixed to the frame of the item of intermodal equipment. The color of the letters used in the document must contrast sharply in color with the background of the document. The document must include additional information to identify the specific item of intermodal equipment (such as the VIN and 4-character SCAC code and 6-digit unique identifying number).

■ 19. Amend part 390 by adding a new subpart C (§§ 390.40–390.46) to read as follows:

**Subpart C—Requirements and Information for Intermodal Equipment Providers and for Motor Carriers Operating Intermodal Equipment**

Sec.
390.40 What responsibilities do intermodal equipment providers have under the Federal Motor Carrier Safety Regulations (49 CFR parts 350–399)?
390.42 What are the responsibilities of drivers and motor carriers operating intermodal equipment?
390.44 What are the procedures to correct the safety record of a motor carrier or an intermodal equipment provider?
390.46 Are State and local laws and regulations on the inspection, repair, and maintenance of intermodal equipment preempted by the Federal Motor Carrier Safety Regulations?

## Subpart C—Requirements and Information for Intermodal Equipment Providers and for Motor Carriers Operating Intermodal Equipment

### § 390.40 What responsibilities do intermodal equipment providers have under the Federal Motor Carrier Safety Regulations (49 CFR parts 350–399)?

An intermodal equipment provider must—

(a) Identify its operations to the FMCSA by filing the Form MCS–150C required by § 390.19.

(b) Mark its intermodal equipment with the USDOT number as required by § 390.21 before tendering the equipment to a motor carrier.

(c) Systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, in a manner consistent with § 396.3(a)(1), as applicable, all intermodal equipment intended for interchange with a motor carrier.

(d) Ensure that intermodal equipment intended for interchange with motor carriers is in safe and proper operating condition.

(e) Maintain a system of driver vehicle inspection reports submitted to the intermodal equipment provider as required by § 396.11 of this chapter.

(f) Maintain a system of inspection, repair, and maintenance records as required by § 396.12 of this chapter for equipment intended for interchange with a motor carrier.

(g) Periodically inspect equipment intended for interchange, as required under § 396.17 of this chapter.

(h) At facilities at which the intermodal equipment provider makes intermodal equipment available for interchange, have procedures in place, and provide sufficient space, for drivers to perform a pre-trip inspection of tendered intermodal equipment.

(i) At facilities at which the intermodal equipment provider makes intermodal equipment available for interchange, develop and implement procedures to repair any equipment damage, defects, or deficiencies identified as part of a pre-trip inspection, or replace the equipment, prior to the driver's departure. The repairs or replacement must be made after being notified by a driver of such damage, defects, or deficiencies.

(j) Refrain from placing intermodal equipment in service on the public highways if that equipment has been found to pose an imminent hazard, as defined in § 386.72(b)(1) of this chapter.

### § 390.42 What are the responsibilities of drivers and motor carriers operating intermodal equipment?

(a) Before operating intermodal equipment over the road, the driver accepting the equipment must inspect the equipment components listed in § 392.7(b) of this subchapter and be satisfied they are in good working order.

(b) A driver or motor carrier transporting intermodal equipment must report to the intermodal equipment provider, or its designated agent, any known damage, defects, or deficiencies in the intermodal equipment at the time the equipment is returned to the provider or the provider's designated agent. If no damage, defects, or deficiencies are discovered by the driver, the report shall so indicate. The report must include, at a minimum, the items in § 396.11(a)(2) of this chapter.

### § 390.44 What are the procedures to correct the safety record of a motor carrier or an intermodal equipment provider?

(a) *An intermodal equipment provider or its agent* may electronically file questions or concerns at *http://dataqs.fmcsa.dot.gov* about Federal and State data that reference the provider. This includes safety violations alleging that the components, parts, or accessories of intermodal chassis or trailers listed in § 392.7(b) of this chapter were not in good working order when inspected at roadside. An

intermodal equipment provider should not be held responsible for such violations because a motor carrier indicated pursuant to § 392.7(b) that these components, parts, or accessories had no safety defects at the time of the pre-trip inspection.

(b) *A motor carrier or its agent* may electronically file questions or concerns at *http://dataqs.fmcsa.dot.gov* about Federal and State data that reference the motor carrier. This includes safety violations alleging that any components, parts, or accessories of intermodal chassis or trailers, except those listed in § 392.7(b) of this chapter, were not in good working order when inspected at roadside. Such violations will not be used by FMCSA in making a safety fitness determination of a motor carrier (unless there is evidence that the driver or motor carrier caused or substantially contributed to the violations) because the driver could not readily detect these violations during a pre-trip inspection performed in accordance with § 392.7(b).

(c) *An intermodal equipment provider, or its agent*, may request FMCSA to investigate a motor carrier believed to be in noncompliance with responsibilities under 49 U.S.C. 31151 or the implementing regulations in this subchapter regarding interchange of intermodal equipment by contacting the appropriate FMCSA Field Office.

(d) *A motor carrier or its agent* may request FMCSA to investigate an intermodal equipment provider believed to be in noncompliance with responsibilities under 49 U.S.C. 31151 or the implementing regulations in this subchapter regarding interchange of intermodal equipment by contacting the appropriate FMCSA Field Office.

**§ 390.46 Are State and local laws and regulations on the inspection, repair, and maintenance of intermodal equipment preempted by the Federal Motor Carrier Safety Regulations?**

(a) *General*. As provided by 49 U.S.C. 31151(d), a law, regulation, order, or other requirement of a State, a political subdivision of a State, or a tribal organization relating to the inspection, repair, and maintenance of intermodal equipment is preempted if such law, regulation, order, or other requirement exceeds or is inconsistent with a requirement imposed by the Federal Motor Carrier Safety Regulations.

(b) *Pre-existing State requirements*—(1) *In general*. Pursuant to 49 U.S.C. 31151(e)(1), unless otherwise provided in paragraph (b)(2) of this section, a State requirement for the periodic inspection of intermodal chassis by intermodal equipment providers that was in effect on January 1, 2005, shall remain in effect only until June 17, 2009.

(2) *Nonpreemption determinations*—(i) *In general*. Pursuant to 49 U.S.C. 31151(e)(2), and notwithstanding paragraph (a) of this section, a State requirement described in paragraph (b)(1) of this section is not preempted if the Administrator determines that the State requirement is as effective as the FMCSA final rule and does not unduly burden interstate commerce.

(ii) *Application required*. Paragraph (b)(2)(i) of this section applies to a State requirement only if the State applies to the Administrator for a determination with respect to the requirement before the effective date of the final rule (June 17, 2009). The Administrator will make a determination with respect to any such application within 6 months after the date on which the Administrator receives the application.

(iii) *Amended State requirements*. If a State amends a regulation for which it previously received a nonpreemption determination from the Administrator under paragraph (b)(2)(i) of this section, it must apply for a determination of nonpreemption for the amended regulation. Any amendment to a State requirement not preempted under this subsection because of a determination by the Administrator may not take effect unless it is submitted to the Agency before the effective date of the amendment, and the Administrator determines that the amendment would not cause the State requirement to be less effective than the FMCSA final rule on ''Requirements for Intermodal Equipment Providers and Motor Carriers and Drivers Operating Intermodal Equipment'' and would not unduly burden interstate commerce.

## PART 392—DRIVING OF COMMERCIAL MOTOR VEHICLES

■ 20. Revise the authority citation for part 392 to read:

**Authority:** 49 U.S.C. 13902, 31136, 31151, 31502; and 49 CFR 1.73.

■ 21. Amend § 392.7 by designating the existing text as paragraph (a) and adding a new paragraph (b) to read:

**§ 392.7 Equipment, inspection, and use.**

* * * * *

(b) Drivers preparing to transport intermodal equipment must make an inspection of the following components, and must be satisfied they are in good working order before the equipment is operated over the road. Drivers who operate the equipment over the road shall be deemed to have confirmed the following components were in good working order when the driver accepted the equipment:

Service brake components that are readily visible to a driver performing as thorough a visual inspection as possible without physically going under the vehicle, and trailer brake connections.

Lighting devices and reflectors.

Tires.

Coupling devices.

Rails or support frames.

Tie down bolsters.

Locking pins, clevises, clamps, or hooks.

Sliders or sliding frame lock.

## PART 393—PARTS AND ACCESSORIES NECESSARY FOR SAFE OPERATION

■ 22. Revise the authority citation for part 393 to read as follows:

**Authority:** 49 U.S.C. 322, 31136, 31151 and 31502; sec. 1041(b), Pub. L. 102–240, 105 Stat. 1914, 1993 (1991); and 49 CFR 1.73.

■ 23. Amend § 393.1 by revising paragraph (b) and adding paragraphs (c) and (d) to read as follows:

**§ 393.1 Scope of the rules of this part.**

* * * * *

(b)(1) Every motor carrier and its employees must be knowledgeable of and comply with the requirements and specifications of this part.

(2) Every intermodal equipment provider and its employees or agents responsible for the inspection, repair, and maintenance of intermodal equipment interchanged to motor carriers must be knowledgeable of and comply with the applicable requirements and specifications of this part.

(c) No motor carrier may operate a commercial motor vehicle, or cause or permit such vehicle to be operated, unless it is equipped in accordance with the requirements and specifications of this part.

(d) No intermodal equipment provider may operate intermodal equipment, or cause or permit such equipment to be operated, unless it is equipped in accordance with the requirements and specifications of this part.

## PART 396—INSPECTION, REPAIR, AND MAINTENANCE

■ 24. Revise the authority citation for part 396 to read as follows:

**Authority:** 49 U.S.C. 31133, 31136, 31151, and 31502; and 49 CFR 1.73.

■ 25. Revise § 396.1 to read as follows:

**§ 396.1 Scope.**

(a) Every motor carrier, its officers, drivers, agents, representatives, and employees directly concerned with the inspection or maintenance of commercial motor vehicles must be knowledgeable of and comply with the rules of this part.

(b) Every intermodal equipment provider, its officers, agents, representatives, and employees directly concerned with the inspection or maintenance of intermodal equipment interchanged or offered for interchange to motor carriers must be knowledgeable of and comply with the rules of this part.

■ 26. Amend § 396.3 by revising the introductory text of paragraphs (a) and (b) to read as follows:

**§ 396.3 Inspection, repair, and maintenance.**

(a) *General.* Every motor carrier and intermodal equipment provider must systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles and intermodal equipment subject to its control.

* * * * *

(b) *Required records.* Motor carriers, except for a private motor carrier of passengers (nonbusiness), must maintain, or cause to be maintained, records for each motor vehicle they control for 30 consecutive days. Intermodal equipment providers must maintain or cause to be maintained, records for each unit of intermodal equipment they tender or intend to tender to a motor carrier. These records must include:

* * * * *

■ 27. Revise § 396.9 to read as follows:

**§ 396.9 Inspection of motor vehicles and intermodal equipment in operation.**

(a) Personnel authorized to perform inspections—Every special agent of the FMCSA (as defined in Appendix B to this subchapter) is authorized to enter upon and perform inspections of a motor carrier's vehicles in operation and intermodal equipment in operation.

(b) Prescribed inspection report—The Driver Vehicle Examination Report shall be used to record results of motor vehicle inspections and results of intermodal equipment inspections conducted by authorized FMCSA personnel.

(c) Motor vehicles and intermodal equipment declared ''out-of-service.''

(1) Authorized personnel shall declare and mark ''out-of-service'' any motor vehicle or intermodal equipment which by reason of its mechanical condition or loading would likely cause an accident or a breakdown. An ''Out-of-Service Vehicle'' sticker shall be used to mark vehicles and intermodal equipment ''out-of-service.''

(2) No motor carrier or intermodal equipment provider shall require or permit any person to operate nor shall any person operate any motor vehicle or intermodal equipment declared and marked ''out-of-service'' until all repairs required by the ''out-of-service notice'' have been satisfactorily completed. The term *operate* as used in this section shall include towing the vehicle or intermodal equipment, except that vehicles or intermodal equipment marked ''out-of-service'' may be towed away by means of a vehicle using a crane or hoist. A vehicle combination consisting of an emergency towing vehicle and an ''out-of-service'' vehicle shall not be operated unless such combination meets the performance requirements of this subchapter except for those conditions noted on the Driver Vehicle Examination Report.

(3) No person shall remove the ''Out-of-Service Vehicle'' sticker from any motor vehicle or intermodal equipment prior to completion of all repairs required by the ''out-of-service notice.''

(d) Motor carrier or intermodal equipment provider disposition.

(1) The driver of any motor vehicle, including a motor vehicle transporting intermodal equipment, who receives an inspection report shall deliver a copy to both the motor carrier operating the vehicle and the intermodal equipment provider upon his/her arrival at the next terminal or facility. If the driver is not scheduled to arrive at a terminal or facility of the motor carrier operating the vehicle or at a facility of the intermodal equipment provider within 24 hours, the driver shall immediately mail, fax, or otherwise transmit the report to the motor carrier and intermodal equipment provider.

(2) Motor carriers and intermodal equipment providers shall examine the report. Violations or defects noted thereon shall be corrected. Repairs of items of intermodal equipment placed out-of-service are also to be documented in the maintenance records for such equipment.

(3) Within 15 days following the date of the inspection, the motor carrier or intermodal equipment provider shall—

(i) Certify that all violations noted have been corrected by completing the ''Signature of Carrier/Intermodal Equipment Provider Official, Title, and Date Signed'' portions of the form; and

(ii) Return the completed roadside inspection form to the issuing agency at the address indicated on the form and retain a copy at the motor carrier's principal place of business, at the intermodal equipment provider's principal place of business, or where the vehicle is housed for 12 months from the date of the inspection.

■ 28. Amend § 396.11 by revising paragraph (a) to read:

**§ 396.11 Driver vehicle inspection report(s).**

(a) *Report required.* (1) *Motor carriers.* Every motor carrier must require its drivers to report, and every driver must prepare a report in writing at the completion of each day's work on each vehicle operated. The report must cover at least the following parts and accessories:

—Service brakes including trailer brake connections
—Parking brake
—Steering mechanism
—Lighting devices and reflectors
—Tires
—Horn
—Windshield wipers
—Rear vision mirrors
—Coupling devices
—Wheels and rims
—Emergency equipment

(2) *Intermodal equipment providers.* Every intermodal equipment provider must have a process to receive driver reports of defects or deficiencies in the intermodal equipment operated. The driver must report on, and the process to receive reports must cover, at least the following parts and accessories:

—King pin upper coupling device
—Rails or support frames
—Tie down bolsters
—Locking pins, clevises, clamps, or hooks
—Sliders or sliding frame lock
—Wheels, rims, lugs, tires
—Lighting devices, lamps, markers, and conspicuity marking material
—Air line connections, hoses, and couplers
—Brakes

* * * * *

■ 29. Add § 396.12 to read as follows:

**§ 396.12 Procedures for intermodal equipment providers to accept reports required by § 390.42(b) of this chapter.**

(a) *System for reports.* Each intermodal equipment provider must establish a system for motor carriers and drivers to report to it any damage, defects, or deficiencies of intermodal equipment discovered by, or reported to, the motor carrier or driver which would—

(1) Affect the safety of operation of the intermodal equipment, or

(2) Result in its mechanical breakdown while transported on public roads.

(b) *Report content.* The system required by paragraph (a) of this section must include documentation of all of the following:

(1) Name of the motor carrier responsible for the operation of the intermodal equipment at the time the damage, defects, or deficiencies were discovered by, or reported to, the driver.

(2) Motor carrier's USDOT number; intermodal equipment provider's USDOT number, and a unique identifying number for the item of intermodal equipment.

(3) Date and time the report was submitted.

(4) All damage, defects, or deficiencies of the intermodal equipment reported to the equipment provider by the motor carrier or its driver. If no defect or deficiency in the intermodal equipment is discovered by the driver, the report shall so indicate.

(5) The signature of the driver who prepared the report.

(c) *Corrective action.* (1) Prior to allowing or permitting a motor carrier to transport a piece of intermodal equipment for which a motor carrier or driver has submitted a report about damage, defects or deficiencies, each intermodal equipment provider or its agent must repair the reported damage, defects, or deficiencies that are likely to affect the safety of operation of the vehicle.

(2) Each intermodal equipment provider or its agent must certify on the original driver's report which lists any damage, defects, or deficiencies of the intermodal equipment that the reported damage, defects, or deficiencies have been repaired, or that repair is unnecessary, before the vehicle is operated again.

(d) *Retention period for reports.* Each intermodal equipment provider must maintain all documentation required by this section, including the original driver report, the certification of repairs on all intermodal equipment, and the certification of the driver's pre-inspection review, for a period of three months from the date that a motor carrier or its driver submits the report to the intermodal equipment provider or its agent.

■ 30. Revise §§ 396.17, 396.19, 396.21, 396.23, and 396.25 to read:

**§ 396.17 Periodic inspection.**

(a) Every commercial motor vehicle must be inspected as required by this section. The inspection must include, at a minimum, the parts and accessories set forth in appendix G of this subchapter. The term *commercial motor vehicle* includes each vehicle in a combination vehicle. For example, for a tractor semitrailer, full trailer combination, the tractor, semitrailer, and the full trailer (including the converter dolly if so equipped) must each be inspected.

(b) Except as provided in § 396.23 and this paragraph, motor carriers must inspect or cause to be inspected all motor vehicles subject to their control. Intermodal equipment providers must inspect or cause to be inspected intermodal equipment that is interchanged or intended for interchange to motor carriers in intermodal transportation.

(c) A motor carrier must not use a commercial motor vehicle, and an intermodal equipment provider must not tender equipment to a motor carrier for interchange, unless each component identified in appendix G of this subchapter has passed an inspection in accordance with the terms of this section at least once during the preceding 12 months and documentation of such inspection is on the vehicle. The documentation may be:

(1) The inspection report prepared in accordance with § 396.21(a), or

(2) Other forms of documentation, based on the inspection report (e.g., sticker or decal), which contains the following information:

(i) The date of inspection;

(ii) Name and address of the motor carrier, intermodal equipment provider, or other entity where the inspection report is maintained;

(iii) Information uniquely identifying the vehicle inspected if not clearly marked on the motor vehicle; and

(iv) A certification that the vehicle has passed an inspection in accordance with § 396.17.

(d) A motor carrier may perform the required annual inspection for vehicles under the carrier's control which are not subject to an inspection under § 396.23(b)(1). An intermodal equipment provider may perform the required annual inspection for intermodal equipment interchanged or intended for interchange to motor carriers that are not subject to an inspection under § 396.23(b)(1).

(e) In lieu of the self-inspection provided for in paragraph (d) of this section, a motor carrier or intermodal equipment provider responsible for the inspection may choose to have a commercial garage, fleet leasing company, truck stop, or other similar commercial business perform the inspection as its agent, provided that business operates and maintains facilities appropriate for commercial vehicle inspections and it employs qualified inspectors, as required by § 396.19.

(f) Vehicles passing roadside or periodic inspections performed under the auspices of any State government or equivalent jurisdiction or the FMCSA, meeting the minimum standards contained in appendix G of this subchapter, will be considered to have met the requirements of an annual inspection for a period of 12 months commencing from the last day of the month in which the inspection was performed. If a vehicle is subject to a mandatory State inspection program, as provided in § 396.23(b)(1), a roadside inspection may only be considered equivalent if it complies with the requirements of that program.

(g) It is the responsibility of the motor carrier or intermodal equipment provider to ensure that all parts and accessories on commercial motor vehicles intended for use in interstate commerce for which they are responsible are maintained at, or promptly repaired to, the minimum standards set forth in appendix G to this subchapter.

(h) Failure to perform properly the annual inspection required by this section shall cause the motor carrier or intermodal equipment provider to be subject to the penalty provisions of 49 U.S.C. 521(b).

**§ 396.19 Inspector qualifications.**

(a) Motor carriers and intermodal equipment providers must ensure that individuals performing annual inspections under § 396.17(d) or (e) are qualified as follows:

(1) Understand the inspection criteria set forth in part 393 and appendix G of this subchapter and can identify defective components;

(2) Are knowledgeable of and have mastered the methods, procedures, tools and equipment used when performing an inspection; and

(3) Are capable of performing an inspection by reason of experience, training, or both as follows:

(i) Successfully completed a Federal- or State-sponsored training program or have a certificate from a State or Canadian Province that qualifies the individuals to perform commercial motor vehicle safety inspections, or

(ii) Have a combination of training or experience totaling at least 1 year. Such training or experience may consist of:

(A) Participation in a commercial motor vehicle manufacturer-sponsored training program or similar commercial training program designed to train students in commercial motor vehicle operation and maintenance;

(B) Experience as a mechanic or inspector in a motor carrier or

intermodal equipment maintenance program;

(C) Experience as a mechanic or inspector in commercial motor vehicle maintenance at a commercial garage, fleet leasing company, or similar facility; or

(D) Experience as a commercial motor vehicle inspector for a State, Provincial or Federal government.

(b) Motor carriers and intermodal equipment providers must retain evidence of that individual's qualifications under this section. They must retain this evidence for the period during which that individual is performing annual motor vehicle inspections for the motor carrier or intermodal equipment provider, and for one year thereafter. However, motor carriers and intermodal equipment providers do not have to maintain documentation of inspector qualifications for those inspections performed either as part of a State periodic inspection program or at the roadside as part of a random roadside inspection program.

**§ 396.21 Periodic inspection recordkeeping requirements.**

(a) The qualified inspector performing the inspection shall prepare a report that:

(1) Identifies the individual performing the inspection;

(2) Identifies the motor carrier operating the vehicle or intermodal equipment provider intending to interchange the vehicle to a motor carrier;

(3) Identifies the date of the inspection;

(4) Identifies the vehicle inspected;

(5) Identifies the vehicle components inspected and describes the results of the inspection, including the identification of those components not meeting the minimum standards set forth in appendix G to this subchapter; and

(6) Certifies the accuracy and completeness of the inspection as complying with all the requirements of this section.

(b)(1) The original or a copy of the inspection report shall be retained by the motor carrier, intermodal equipment provider, or other entity that is responsible for the inspection for a period of fourteen months from the date of the inspection report. The original or a copy of the inspection report must be retained where the vehicle is either housed or maintained.

(2) The original or a copy of the inspection report must be available for inspection upon demand of an authorized Federal, State or local official.

(3) *Exception.* If the motor carrier operating the commercial motor vehicles did not perform the commercial motor vehicle's last annual inspection, or if an intermodal equipment provider did not itself perform the annual inspection on equipment intended for interchange to a motor carrier, the motor carrier or intermodal equipment provider is responsible for obtaining the original or a copy of the last annual inspection report upon demand of an authorized Federal, State, or local official.

**§ 396.23 Equivalent to periodic inspection.**

(a) A motor carrier or an intermodal equipment provider may meet the requirements of § 396.17 through a State or other jurisdiction's roadside inspection program. The inspection must have been performed during the preceding 12 months. In using the roadside inspection, the motor carrier or intermodal equipment provider would need to retain a copy of an annual inspection report showing that the inspection was performed in accordance with the minimum periodic inspection standards set forth in appendix G to this subchapter. If the motor carrier operating the commercial vehicle is not the party directly responsible for its maintenance, the motor carrier must deliver the roadside inspection report to the responsible party in a timely manner. Before accepting such an inspection report, the motor carrier or intermodal equipment provider must ensure that the report complies with the requirements of § 396.21(a).

(b)(1) If a commercial motor vehicle is subject to a mandatory State inspection program which is determined by the Administrator to be as effective as § 396.17, the motor carrier or intermodal equipment provider must meet the requirement of § 396.17 through that State's inspection program. Commercial motor vehicle inspections may be conducted by State personnel, at State authorized commercial facilities, or by the motor carrier or intermodal equipment provider itself under the auspices of a State authorized self-inspection program.

(2) Should the FMCSA determine that a State inspection program, in whole or in part, is not as effective as § 396.17, the motor carrier or intermodal equipment provider must ensure that the periodic inspection required by § 396.17 is performed on all commercial motor vehicles under its control in a manner specified in § 396.17.

**§ 396.25 Qualifications of brake inspectors.**

(a) Motor carriers and intermodal equipment providers must ensure that all inspections, maintenance, repairs or service to the brakes of its commercial motor vehicles, are performed in compliance with the requirements of this section.

(b) For purposes of this section, *brake inspector* means any employee of a motor carrier or intermodal equipment provider who is responsible for ensuring that all brake inspections, maintenance, service, or repairs to any commercial motor vehicle, subject to the motor carrier's or intermodal equipment provider's control, meet the applicable Federal standards.

(c) No motor carrier or intermodal equipment provider may require or permit any employee who does not meet the minimum brake inspector qualifications of paragraph (d) of this section to be responsible for the inspection, maintenance, service or repairs of any brakes on its commercial motor vehicles.

(d) The motor carrier or intermodal equipment provider must ensure that each brake inspector is qualified as follows:

(1) Understands the brake service or inspection task to be accomplished and can perform that task; and

(2) Is knowledgeable of and has mastered the methods, procedures, tools and equipment used when performing an assigned brake service or inspection task; and

(3) Is capable of performing the assigned brake service or inspection by reason of experience, training, or both as follows:

(i) Has successfully completed an apprenticeship program sponsored by a State, a Canadian Province, a Federal agency or a labor union, or a training program approved by a State, Provincial or Federal agency, or has a certificate from a State or Canadian Province that qualifies the person to perform the assigned brake service or inspection task (including passage of Commercial Driver's License air brake tests in the case of a brake inspection); or

(ii) Has brake-related training or experience or a combination thereof totaling at least one year. Such training or experience may consist of:

(A) Participation in a training program sponsored by a brake or vehicle manufacturer or similar commercial training program designed to train students in brake maintenance or inspection similar to the assigned brake service or inspection tasks; or

(B) Experience performing brake maintenance or inspection similar to the

assigned brake service or inspection task in a motor carrier or intermodal equipment provider maintenance program; or

(C) Experience performing brake maintenance or inspection similar to the assigned brake service or inspection task at a commercial garage, fleet leasing company, or similar facility.

(e) No motor carrier or intermodal equipment provider may employ any person as a brake inspector unless the evidence of the inspector's qualifications, required under this section, is maintained by the motor carrier or intermodal equipment provider at its principal place of business, or at the location at which the brake inspector is employed. The evidence must be maintained for the period during which the brake inspector is employed in that capacity and for one year thereafter. However, motor carriers and intermodal equipment providers do not have to maintain evidence of qualifications to inspect air brake systems for such inspections performed by persons who have passed the air brake knowledge and skills test for a Commercial Driver's License.

■ 31. Amend Appendix G to Subchapter B—Minimum Periodic Inspection Standards, in Paragraph 6. *Safe Loading*, by adding new subparagraph 6.c to read:

**Appendix G to Subchapter B of Chapter III—Minimum Periodic Inspection Standards**

* * * * *

6. Safe loading.

* * * * *

c. Container securement devices on intermodal equipment—All devices used to secure an intermodal container to a chassis, including rails or support frames, tiedown bolsters, locking pins, clevises, clamps, and hooks that are cracked, broken, loose, or missing.

* * * * *

Issued on: December 4, 2008.

**John H. Hill,**

*Administrator.*

[FR Doc. E8–29254 Filed 12–16–08; 8:45 am]

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# Part IV

# Department of Housing and Urban Development

## 24 CFR Parts 26 and 28

## Revisions to the Regulations Implementing the Program Fraud Civil Remedies Act of 1986 Revision of Hearing Procedures; Revision of Hearing Procedures; Final Rules

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**24 CFR Part 28**

**[Docket No. FR–5085–F–02]**

**RIN 2501–AD25**

## Revisions to the Regulations Implementing the Program Fraud Civil Remedies Act of 1986

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends HUD's regulations implementing the Program Fraud Civil Remedies Act of 1986 (PFCRA), which were codified in 1996 and were amended in 2003 to include inflation adjustments. This final rule more closely conforms the PFCRA regulations with the PFCRA statutory language, to incorporate additional definitions into the PFCRA regulations, and to add an additional item to the list of factors that HUD shall consider in determining the amount of penalties and assessments to be imposed. This final rule follows publication of a September 8, 2008, proposed rule, but makes no changes at this final rule stage.

**DATE:** *Effective Date:* January 16, 2009.

**FOR FURTHER INFORMATION CONTACT:** Dane Narode, Associate General Counsel for Program Enforcement, Office of General Counsel, Department of Housing and Urban Development, 1250 Maryland Avenue, SW., Suite 200, Washington, DC 20024–0500; telephone number 202–708–2350 (this is not a toll-free number); e-mail address *Dane.M.Narode@hud.gov.* Hearing- or speech-impaired individuals may access the telephone number above by calling the toll-free Federal Information Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

### I. Background

On June 24, 1988, at 53 FR 24000, HUD published its regulations implementing the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801) (PFCRA). PFCRA established administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to HUD or its agents. HUD's regulations implementing PFCRA are located at 24 CFR part 28. On September 24, 1996, at 61 FR 50208, HUD issued a final rule further streamlining the PFCRA regulations at part 28.

### II. The September 8, 2008, Proposed Rule

On September 8, 2008, at 73 FR 52130, HUD published a rule that proposed to amend HUD's PFCRA regulations in 24 CFR part 28 to more closely conform the regulations with the PFCRA statutory language, to incorporate additional definitions into the PFCRA regulations, and to add an additional item to the list of factors that HUD shall consider in determining the amount of penalties and assessments to be imposed. In addition to these amendments, the September 8, 2008, rule proposed to move the disclosure of documents regulatory provisions from HUD's regulations in part 28 to HUD's regulations in 24 CFR part 26 (''Hearing Procedures''). The preamble to the September 8, 2008, proposed rule at 73 FR 52130 describes in more detail the amendments that HUD proposed to make to the regulations in part 28.

The September 8, 2008, proposed rule provided a 60-day public comment period. HUD received two public comments from individuals by the close of the public comment period on November 7, 2008.

One commenter expressed strong support for the changes that HUD proposed to make to the part 28 regulations. The commenter expressed support for adding ''ability to pay'' as an additional factor to determine penalties and assessments, and stated that the appropriate penalty should be commensurate with an individual's income.

The second commenter stated that, unless the commenter misunderstood the proposed rule, the proposed rule was eliminating, by its streamlining procedures, complaints filed by the general public. With respect to the latter comment, the commenter does misunderstand the September 8, 2008, proposed rule. The regulations in 24 CFR part 28 solely address the procedures or penalties against persons who make, submit, present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to HUD or HUD's agents. The regulations in 24 CFR part 28 do not affect valid claims or complaints presented to HUD, which, depending upon the nature of the complaint, will be addressed by the appropriate HUD office with jurisdiction over the matter in the claim or complaint, or by HUD's Office of Inspector General.

### III. This Final Rule

At this final rule stage, HUD adopts the proposed rule without change.

### IV. Small Business Concerns Related to Board Enforcement Actions

With respect to enforcement actions undertaken pursuant to this rule, HUD is cognizant that section 222 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) requires the Small Business and Agriculture Regulatory Enforcement Ombudsman to ''work with each agency with regulatory authority over small businesses to ensure that small business concerns that receive or are subject to an audit, on-site inspection, compliance assistance effort, or other enforcement related communication or contact by agency personnel are provided with a means to comment on the enforcement activity conducted by this personnel.'' To implement this statutory provision, the Small Business Administration has requested that federal agencies include the following language in agency publications and notices that are provided to small business concerns at the time the enforcement action is undertaken. The language is as follows:

Your Comments Are Important

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the enforcement actions of [insert agency name], you will find the necessary comment forms at *www.sba.gov/ombudsman* or call 1–888–REG–FAIR (1–888–734–3247).

In accordance with its notice describing HUD's actions on the implementation of SBREFA, which was published on May 21, 1998 (63 FR 28214), HUD will include the language cited above on notices implementing enforcement actions, to ensure that small entities have the full means to comment on the enforcement activity conducted by HUD.

### V. Findings and Certifications

*Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule revises definitions and usages of terms to conform more closely with those of the governing statute, and would add ''ability to pay'' as a factor to be considered in determining penalty and

assessment amounts. These revisions impose no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

*Environmental Impact*

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction; or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

*Executive Order 13132, Federalism*

Executive Order 13132 (entitled ''Federalism'') prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of Section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

*Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule does not impose any federal mandates on any state, local, or tribal government or the private sector within the meaning of UMRA.

**List of Subjects for 24 CFR Part 28**

Administrative practice and procedure; Claims; Fraud; Penalties.

■ Accordingly, for the reasons discussed in the preamble, HUD amends 24 CFR part 28 as follows:

## PART 28—IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

■ 1. The authority citation for 24 CFR part 28 is amended to read as follows:

**Authority:** 28 U.S.C. 2461 note; 31 U.S.C. 3801–3812; 42 U.S.C. 3535(d).

■ 2. Revise § 28.1(b) to read as follows:

### § 28.1 Purpose.

* * * * *

(b) Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments. Hearings under this part shall be conducted in accordance with the Administrative Procedure Act pursuant to part 26, subpart B, of this chapter.

■ 3. Revise § 28.5 to read as follows:

### § 28.5 Definitions.

(a) The terms *ALJ* and *HUD* are defined in 24 CFR part 5.

(b) The terms *Claim, Knows or has reason to know, Person, Reviewing Official,* and *Statement* have the same meanings as defined in 31 U.S.C. 3801.

(c) *Ability to pay* is determined based on an assessment of the respondent's resources available both presently and prospectively from which the Department could ultimately recover the total award, which may be predicted based on historical evidence.

(d) *Benefit* means anything of value, including, but not limited to, any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan insurance or guarantee.

(e) *Respondent* means any person alleged to be liable for a civil penalty or assessment under § 28.25.

(f) The *reasonable prospect of collecting an appropriate amount of penalties and assessments* is determined based on a generalized assessment made by a Reviewing Official based on the limited information available in the Report of Investigation for purposes of determining whether the allocation of HUD's resources to any particular action is appropriate. This assessment is not the same as the assessment made when determining ability to pay, nor is the reasonable prospect of collecting a factor to be considered in determining the amount of any penalty or assessment in any particular case.

(g) *Report of Investigation* means a report containing the findings and conclusions of a Program Fraud Civil Remedies Act investigation by the Inspector General or his or her designee, as described in § 28.15.

■ 4. Revise § 28.10(a)(1) and (b)(1) to read as follows:

### § 28.10 Basis for civil penalties and assessments.

(a) *Claims.* (1) A civil penalty of up to $7,500 may be imposed upon any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know:

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by a written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that:

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of the omission; and

(C) Is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed.

* * * * *

(b) *Statements.* (1) A civil penalty of up to $7,500 may be imposed upon any person who makes, presents, or submits, or causes to be made, presented, or submitted, a written statement that:

(i) The person knows or has reason to know:

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) (*1*) Omits a material fact; and

(*2*) Is false, fictitious, or fraudulent as a result of such omission;

(ii) In the case of a statement described in (b)(1)(A)(ii) of this section, is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; and

(iii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement.

* * * * *

■ 5. Revise § 28.20 to read as follows:

### § 28.20 Request for approval by the Department of Justice.

(a) If the General Counsel or designee determines that the Report of Investigation supports an action under this part, he or she must submit a written request to the Department of Justice for approval to issue a complaint under § 28.25.

(b) The request shall include a description of the claims or statements at issue; the evidence supporting the allegations; an estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 28.10; any exculpatory or mitigating circumstances that may relate to the claims or statements; and a statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

■ 6. Revise § 28.25 to read as follows:

**§ 28.25 Complaint.**

(a) *General.* Upon obtaining approval from the Department of Justice, the General Counsel or designee may issue a complaint to the respondent. The complaint shall be mailed, by registered or certified mail, or shall be delivered through such other means by which delivery may be confirmed. The complaint shall also be filed simultaneously with the Office of Administrative Law Judges in accordance with § 26.30(a) of this chapter.

(b) *Complaint.* The complaint shall include:

(1) The allegations of liability against the respondent, including the statutory basis for liability, the claims or statements at issue, and the reasons why liability arises from those claims or statements;

(2) A statement that the required approval to issue the complaint was received from the Department of Justice as required by 24 CFR 28.20;

(3) The amount of penalties and assessments for which the respondent may be held liable;

(4) A statement that the respondent may request a hearing by submitting a written response to the complaint;

(5) The addresses to which a response must be sent in accordance with § 26.38 of this title; and

(6) A statement that failure to submit an answer within 30 days of receipt of the complaint may result in the imposition of the maximum amount of penalties and assessments sought without right of appeal.

(c) *Parts 26 and 28.* A copy of this part 28 and part 26, subpart B of this chapter, shall be included with the complaint.

(d) *Obligation to preserve documents.* Upon receipt of the complaint, the respondent is required to preserve and maintain all documents and data, including electronically stored data, within their possession or control that may relate to the allegations in the complaint. The Department shall also preserve such documents or data upon the issuance of the complaint.

■ 7. Revise § 28.30 to read as follows:

**§ 28.30 Response.**

(a) The respondent may file a written response to the complaint, in accordance with § 26.30 of this title, within 30 days of service of the complaint. The response shall be deemed to be a request for a hearing. The response must include the admission or denial of each allegation of liability made in the complaint; any defense on which the respondent intends to rely; any reasons why the penalties and assessments should be less than the amount set forth in the complaint; and the name, address, and telephone number of the person who will act as the respondent's representative, if any.

(b) *Failure to respond.* If no response is submitted, HUD may file a motion for default judgment in accordance with § 26.41 of this chapter.

■ 8. Revise § 28.35 to read as follows:

**§ 28.35 Statute of Limitations.**

The statute of limitations for commencing hearings under this part shall be tolled:

(a) If the hearing is commenced in accordance with 31 U.S.C. 3803(d)(2)(B) within 6 years after the date on which the claim or statement is made; or

(b) If the parties agree to such tolling.

■ 9. Amend § 28.40 as follows:

■ a. Revise paragraphs (a) and (b) introductory text;

■ b. Redesignate paragraph (b)(17) as (b)(18);

■ c. Add a new subparagraph (b)(17); and

■ d. Revise newly designated paragraph (b)(18).

**§ 28.40 Hearings.**

(a) *General.* Hearings under this part shall be conducted in accordance with the procedures in part 26, subpart B, of this chapter, governing actions in accordance with the Administrative Procedure Act.

(b) *Factors to consider in determining amount of penalties and assessments.* In determining an appropriate amount of civil penalties and assessments, the ALJ and, upon appeal, the Secretary or designee, shall consider and state in his or her opinion any mitigating or aggravating circumstances. Because of the intangible costs of fraud, the expense of investigating fraudulent conduct, and the need for deterrence, ordinarily twice the amount of the claim as alleged by the government, and a significant civil penalty, should be imposed. The amount of penalties and assessments imposed shall be based on the ALJ's and the Secretary's or designee's consideration of evidence in support of one or more of the following factors:

* * * * *

(17) The respondent's ability to pay, and

(18) Any other factors that in any given case may mitigate or aggravate the seriousness of the false claim or statement.

* * * * *

Dated: December 3, 2008.

**Roy A. Bernardi,**

*Deputy Secretary.*

[FR Doc. E8–29771 Filed 12–16–08; 8:45 am]

**BILLING CODE 4210–67–P**

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## 24 CFR Part 26

**[Docket No. FR–5084–F–02]**

**RIN 2501–AD24**

## Revision of Hearing Procedures

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the hearing procedures before hearing officers who have the responsibility for adjudicating those matters that do not raise issues under the Administrative Procedure Act (APA). This final rule also amends the hearing procedures before Administrative Law Judges (ALJs) who have the responsibility for adjudicating those matters that are subject to the requirements of the APA. Specifically, the final rule modifies pleading and motion requirements of the hearing procedures, and the procedures for the review of hearing officers' determinations. It also amends the discovery and deposition requirements to clarify the hearing officers' discovery procedures and to specifically allow for written interrogatories, in addition to depositions, requests for production of documents, and requests for admissions. Additionally, the final rule amends the discovery, appeal, and judicial review procedures related to hearings that are conducted pursuant to the APA. This final rule follows a September 8, 2008, published rule, and no comments were received in response to that rule. This final rule adopts the proposed rule without change. The changes made by this final rule better reflect current practice and conform the regulations more closely to statutory requirements.

**DATES:** *Effective Date:* January 16, 2009.

**FOR FURTHER INFORMATION CONTACT:** Dane Narode, Associate General Counsel for Program Enforcement, Office of General Counsel, Department of Housing and Urban Development, 1250 Maryland Avenue, SW., Suite 200, Washington, DC 20024–0500; telephone number 202–708–2350 (this is not a toll-free number); e-mail address: *Dane.M.Narode@hud.gov*. Hearing- or speech-impaired individuals may access the telephone number above by calling

the toll-free Federal Information Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

## I. Background

HUD's regulations implementing rules of procedure for hearings are located at 24 CFR part 26. Subpart A of part 26 applies to those hearing procedures before hearing officers who have the responsibility for adjudicating those matters that do not raise issues under the APA. HUD utilizes these rules of procedure with respect to determinations by the Multifamily Participation Review Committee, to: (1) Hearings conducted pursuant to referrals by debarring or suspending officials under 2 CFR part 2424; (2) hearings conducted pursuant to 24 CFR 17.150–17.170; and (3) other administrative disputes. Subpart B of part 26 applies to those hearing procedures before ALJs who have the responsibility for adjudicating those matters that are subject to the requirements of the APA.

## II. The September 8, 2008, Proposed Rule

On September 8, 2008, at 73 FR 52112, HUD published a rule that proposed to amend HUD's hearing procedures to reflect current practice and to more closely conform to applicable statutes; the hearing provisions of the APA; and the hearing procedures in HUD's regulations found in 24 CFR part 25 (Mortgagee Review Board), part 28 (Implementation of the Program Fraud Civil Remedies Act), and part 30 (Civil Money Penalties: Certain Prohibited Conduct). Additionally, the regulatory sections were proposed to be reordered to better track the normal course of a hearing conducted under 24 CFR part 26. The preamble to the September 8, 2008, proposed rule at 73 FR 52112 through 52114 sets out in more detail the amendments that were proposed to be made to the regulations in part 26.

The September 8, 2008, proposed rule provided a 60-day public comment period. HUD received no public comments by the date of the close of the public comment period on November 7, 2008.

## III. This Final Rule

At this final rule stage, HUD adopts the proposed rule without change.

## IV. Small Business Concerns Related to Board Enforcement Actions

With respect to enforcement actions undertaken pursuant to the procedures provided in this rule, HUD is cognizant that section 222 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) requires the Small Business and Agriculture Regulatory Enforcement Ombudsman to ''work with each agency with regulatory authority over small businesses to ensure that small business concerns that receive or are subject to an audit, on-site inspection, compliance assistance effort, or other enforcement related communication or contact by agency personnel are provided with a means to comment on the enforcement activity conducted by this personnel.'' To implement this statutory provision, the Small Business Administration has requested that federal agencies include the following language on agency publications and notices that are provided to small business concerns at the time the enforcement action is undertaken. The language is as follows:

Your Comments Are Important

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the enforcement actions of [insert agency name], you will find the necessary comment forms at *www.sba.gov/ombudsman* or call 1–888–REG–FAIR (1–888–734–3247).

In accordance with its notice describing HUD's actions on the implementation of SBREFA, which was published on May 21, 1998 (63 FR 28214), HUD will include the language cited above on notices implementing enforcement actions, to ensure that small entities have the full means to comment on the enforcement activity conducted by HUD.

## V. Findings and Certifications

*Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule clarifies pleading, discovery, and motion requirements that apply to hearings before HUD hearing officers and ALJs, respectively, by codifying current practice and by eliminating the need for parties to refer to outside sources, such as the Federal Rules of Civil Procedure, for routine requirements. Procedures that apply to parties in matters adjudicated in such hearings do not change significantly as a result of this rule, whether or not parties are small entities. These revisions impose no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

*Environmental Impact*

This rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*)

*Executive Order 13132, Federalism*

Executive Order 13132 (entitled ''Federalism'') prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of Section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

*Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule would not impose any federal mandates on any state, local, or tribal government or the private sector within the meaning of UMRA.

**List of Subjects for 24 CFR Part 26**

Administrative practice and procedure.

■ Accordingly, for the reasons discussed in the preamble, HUD amends title 24 of the Code of Federal Regulations by revising part 26 to read as follows:

## PART 26—HEARING PROCEDURES


### Subpart A—Hearings Before Hearing Officers

Sec.
26.1 Purpose and scope.

**Hearing Officer**

26.2 Hearing officer, powers, and duties.
26.3 *Ex parte* communications.
26.4 Sanctions.
26.5 Disqualification of hearing officer.

**Representation of the Parties**

26.6 Department representative.
26.7 Respondent's representative.
26.8 Standards of practice.

**Pleadings and Motions**

26.9 Form and filing requirements.
26.10 Service.
26.11 Time computation.
26.12 Notice of administrative action.
26.13 Complaint.
26.14 Answer.
26.15 Amendments and supplemental pleadings.
26.16 Motions.

**Discovery**

26.17 Prehearing conference.
26.18 Discovery.
26.19 Request for production of documents.
26.20 Depositions.
26.21 Written interrogatories.
26.22 Requests for admissions.

**Hearings**

26.23 Public nature and timing of hearings; transcripts.
26.24 Rules of evidence.
26.25 Hearing officer's determination and order.

**Secretarial Review**

26.26 Review of determination of hearing officers
26.27 Interlocutory rulings.

### Subpart B—Hearings Pursuant to the Administrative Procedure Act

26.28 Purpose and scope.
26.29 Definitions.
26.30 Service and filing.
26.31 Time computations.

**Administrative Law Judge**

26.32 Powers and duties of the Administrative Law Judge (ALJ).
26.33 *Ex parte* communications.
26.34 Sanctions.
26.35 Disqualification of ALJ.

**Parties**

26.36 Parties to the hearing.
26.37 Separation of functions.

**Prehearing Procedures**

26.38 Commencement of action.
26.39 Prehearing conferences.
26.40 Motions.
26.41 Default.

**Discovery**

26.42 Discovery.
26.43 Subpoenas.
26.44 Protective orders.

**Hearings**

26.45 General.
26.46 Witnesses.
26.47 Evidence.
26.48 Posthearing briefs.
26.49 The record.
26.50 Initial decision.
26.51 Interlocutory rulings.
26.52 Appeal to the Secretary.
26.53 Exhaustion of administrative remedies.
26.54 Judicial review.
26.55 Collection of civil penalties and assessments.
26.56 Right to administrative offset.


**Authority:** 42 U.S.C. 3535(d).

## Subpart A—Hearings Before Hearing Officers

### § 26.1 Purpose and scope.

This part sets forth rules of procedure in certain proceedings of the Department of Housing and Urban Development presided over by a hearing officer. These rules of procedure apply to administrative sanction hearings pursuant to 2 CFR part 2424 and to hearings with respect to determinations by the Multifamily Participation Review Committee pursuant to 24 CFR part 200, subpart H, to the extent that these regulations are not inconsistent and unless these regulations provide otherwise. They also apply in any other case where a hearing is required by statute or regulation, to the extent that rules adopted under such statute or regulation are not inconsistent.

## Hearing Officer

### § 26.2 Hearing officer, powers, and duties.

(a) *Hearing officer.* Proceedings conducted under these rules shall be presided over by a hearing officer who shall be an Administrative Law Judge or Office of Appeals Administrative Judge authorized by the Secretary or designee to conduct proceedings under this part.

(b) *Time and place of hearing.* The hearing officer shall set the time and place of any hearing and shall give reasonable notice to the parties.

(c) *Powers of hearing officers.* The hearing officer shall conduct a fair and impartial hearing and take all action necessary to avoid delay in the disposition of proceedings and to maintain order. The hearing officer shall have all powers necessary to those ends, including, but not limited to, the power:

(1) To administer oaths and affirmations;

(2) To cause subpoenas to be issued as authorized by law;

(3) To rule upon offers of proof and receive evidence;

(4) To order or limit discovery as the interests of justice may require;

(5) To regulate the course of the hearing and the conduct of the parties and their counsel;

(6) To hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) To consider and rule upon all procedural and other motions appropriate in adjudicative proceedings;

(8) To take notice of any material fact not appearing in evidence in the record that is properly a matter of judicial notice;

(9) To make and file determinations; and

(10) To exercise such other authority as is necessary to carry out the responsibilities of the hearing officer under subpart A of this part.

### § 26.3 Ex parte communications.

(a) *Definition.* An ex parte communication is any communication with a hearing officer, direct or indirect, oral or written, concerning the merits or procedures of any pending proceeding that is made by a party in the absence of any other party.

(b) *Prohibition of ex parte communications.* Ex parte communications are prohibited except where:

(1) The purpose and content of the communication have been disclosed in advance or simultaneously to all parties; or

(2) The communication is a request for information concerning the status of the case.

(c) *Procedure after receipt of ex parte communication.* Any hearing officer who receives an ex parte communication that the hearing officer knows or has reason to believe is unauthorized shall promptly place the communication, or its substance, in all files and shall furnish copies to all parties. Unauthorized ex parte communications shall not be taken into consideration in deciding any matter in issue.

### § 26.4 Sanctions.

(a) The hearing officer may sanction a person, including any party or representative, for failing to comply with an order, rule, or procedure governing the proceeding; failing to prosecute or defend an action; or engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any sanction, including, but not limited to, those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) If a party refuses or fails to comply with an order of the hearing officer,

including an order compelling discovery, the hearing officer may enter any appropriate order necessary to the disposition of the hearing including a determination against the noncomplying party, including but not limited to, the following:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, regard each matter about which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with the order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; or

(4) Strike any part of the pleadings or other submissions of the party failing to comply with the order.

(d) If a party fails to prosecute or defend an action brought under subpart A of this part, the hearing officer may dismiss the action or may issue an initial decision against the non-prosecuting or defending party.

(e) The hearing officer may refuse to consider any motion, request, response, brief, or other document that is not filed in a timely fashion.

### § 26.5 Disqualification of hearing officer.

(a) When a hearing officer believes there is a basis for disqualification in a particular proceeding, the hearing officer shall withdraw by notice on the record and shall notify the Secretary and the official initiating the action under appeal.

(b) Whenever any party believes that the hearing officer should be disqualified from presiding in a particular proceeding, the party may file a motion with the hearing officer requesting the hearing officer to withdraw from presiding over the proceedings. This motion shall be supported by affidavits setting forth the alleged grounds for disqualification.

(c) Upon the filing of a motion and affidavit, the hearing officer shall proceed no further in the case until the matter of disqualification is resolved.

(d) If the hearing officer does not withdraw, a written statement of his or her reasons shall be incorporated in the record and the hearing shall proceed, unless the decision is appealed in accordance with the procedures set forth in § 26.27.

## Representation of the Parties

### § 26.6 Department representative.

In each case heard before a hearing officer under this part, the Department shall be represented by attorneys from the Office of General Counsel.

### § 26.7 Respondent's representative.

The party against whom the administrative action is taken may be represented at hearing, as follows:

(a) Individuals may appear on their own behalf;

(b) A member of a partnership or joint venture may appear on behalf of the partnership or joint venture;

(c) A bona fide officer may appear on behalf of a corporation or association upon a showing of adequate authorization;

(d) An attorney who files a notice of appearance with the hearing officer may represent any party. For purposes of this paragraph, an attorney is defined as a member of the bar of a federal court or of the highest court of any state or territory of the United States; or

(e) An individual not included within paragraphs (a) through (d) of this section may represent the respondent upon an adequate showing, as determined by the hearing officer, that the individual possesses the legal, technical, or other qualifications necessary to advise and assist in the presentation of the case.

### § 26.8 Standards of practice.

Attorneys shall conform to the standards of professional and ethical conduct required of practitioners in the courts of the United States and by the bars of which the attorneys are members. Any attorney may be prohibited by the hearing officer from representing a party if the attorney is not qualified under § 26.7 or if such action is necessary to maintain order in or the integrity of the pending proceeding.

## Pleadings and Motions

### § 26.9 Form and filing requirements.

(a) *Filing.* Unless otherwise provided by statute, rule, or regulation:

(1) Requests for hearings shall be filed with the Office of General Counsel's Docket Clerk, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410. The OGC Docket Clerk shall assign the docket number and forward the case to HUD's Office of Appeals.

(2) All other pleadings, submissions, and documents should be filed directly with the appropriate hearing officer.

(3) Filing may be made by first class mail, delivery, facsimile transmission, or electronic means; however, the hearing officer may place reasonable limits on filing by facsimile or electronic means. Duplicate copies are not required unless so ordered by the hearing officer. A document is considered timely filed if postmarked on or before the date due or delivered to the appropriate person by the date due.

(b) *Title.* Documents shall show clearly the title of the action and the docket number assigned by the Docket Clerk.

(c) *Form.* To the fullest extent possible, all documents shall be printed or typewritten in clear, legible form.

### § 26.10 Service.

(a) *Method of Service.* One copy of all pleadings, motions, and other documents required or permitted under these rules shall be served upon all parties by the person filing them and shall be accompanied by a certificate of service stating how and when such service has been made. Whenever these rules require or permit service to be made upon a party represented by an attorney, the service shall be made upon the attorney, unless service upon the party is ordered by the hearing officer. Service shall be made by delivery, by first class mail or overnight delivery to that person's last known address, by facsimile transmission, or by electronic means; however, the hearing officer may place reasonable limits on service by facsimile transmission or electronic means. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at that person's office with a clerk or other person in charge; or, if there is no one in charge, leaving it in a conspicuous place in the office; or, if the office is closed or the person to be served has no office, leaving it at that person's residence or usual place of abode with some person of suitable age and discretion who resides there. Service by mail, overnight delivery, facsimile transmission, or electronic means is complete upon deposit in a mail box, or upon posting, or upon electronic transmission.

(b) *Proof of Service.* Proof of service shall not be required unless the fact of service is put in issue by appropriate motion or objection on the part of the person allegedly served. In these cases, service may be established by written receipt signed by or on behalf of the person to be served, or may be established prima facie by affidavit, certificate of service of mailing, or electronic receipt of sending.

### § 26.11 Time computation.

(a) *Generally.* Computation of any period of time prescribed or allowed by this part shall begin with the first business day following the day on which the act, event, development, or default initiating the period of time occurred. When the last day of the period computed is a Saturday, Sunday, national holiday, or other day on which

the Department of Housing and Urban Development is closed, the period shall run until the end of the next following business day. When any prescribed or allowed period of time is 7 days or less, each of the Saturdays, Sundays, and national holidays shall be excluded from the computation of the prescribed or allowed period.

(b) *Entry of orders.* In computing any time period involving the date of the issuance of an order or decision by a hearing officer, the date of the issuance is the date the order or decision is served on the parties by the hearing officer or Docket Clerk.

(c) *Service by mail.* If a document is served by mail, 3 days shall be added to the time permitted for a response.

(d) *Extensions of time periods.* Except where mandated by statute, the hearing officer (or in the case of a review under §§ 26.26 and 26.27, the Secretary or designee) may upon motion enlarge the time within which any act required by these rules must be performed where necessary to avoid prejudicing the public interest or the rights of the parties.

**§ 26.12 Notice of administrative action.**

In every case, there shall be a notice of administrative action. The notice shall be in writing and inform the party of the nature of that administrative action. The notice shall state the reasons for the proposed or imposed action, except where general terms are permitted by 2 CFR part 2424, and shall inform the party of any right to a hearing to challenge the administrative action, and the manner and time in which to request such hearing. A supplemental notice may be issued in the discretion of the initiating official to add to or modify the reasons for the action.

**§ 26.13 Complaint.**

(a) *Respondent.* A complaint shall be served upon the party against whom an administrative action is taken, who shall be called the respondent.

(b) *Grounds.* The complaint shall state the legal and factual grounds upon which the administrative action is based. The grounds set forth in the complaint may not contain allegations beyond the scope of the notice of administrative action or any amendment thereto.

(c) *Notice of administrative action as complaint.* A notice of administrative action may serve as a complaint provided the notice states it is also a complaint and complies with paragraph (b) of this section.

(d) *Timing.* When the notice does not serve as a complaint, the complaint shall be served on or before the 30th day after the referral to a hearing officer or a request for hearing is made, or within any other time period designated by the hearing officer.

**§ 26.14 Answer.**

(a) Respondent shall file an answer within 30 days of receipt of the complaint, unless otherwise specified in this title or ordered by the hearing officer.

(b) The answer shall:

(1) Respond specifically to each factual allegation contained in the complaint;

(2) Specifically plead any affirmative defense; and

(3) Set forth any mitigating factors or extenuating circumstances.

(c) A general denial shall not be permitted. Allegations are admitted when not specifically denied in respondent's answer.

**§ 26.15 Amendments and supplemental pleadings.**

(a) *Amendments.* (1) By right: The Department may amend its complaint without leave at any time within 30 days of the date the complaint is filed or at any time before respondent's responsive pleading is filed, whichever is later. Respondent may amend its answer without leave at any time within 30 days of filing of its answer. A party shall plead in response to an amended pleading within 15 days of receipt of the amended pleading.

(2) By leave: Upon conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, the hearing officer may allow amendments to pleadings upon motion of any party.

(3) Conformance to evidence: When issues not raised by the pleadings, but reasonably within the scope of the proceeding initiated by the complaint, are tried by express or implied consent to the parties, they shall be treated in all respects as if they had been raised in the pleadings, and amendments of the pleadings necessary to make them conform to the evidence shall be allowed at any time.

(b) Supplemental pleadings. The hearing officer may, upon reasonable notice, permit service of a supplemental pleading concerning transactions, occurrences, or events that have happened or been discovered since the date of prior pleadings.

**§ 26.16 Motions.**

(a) *Motions.* Requests for rulings or actions to be taken by the hearing officer should be made, wherever appropriate, in the form of a motion. All motions from the commencement of the action until the issuance of a decision shall be addressed to the hearing officer, and shall be served upon all parties to the proceeding.

(b) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds for granting the motion. The parties may submit a proposed order with any motion.

(c) *Responses to motions.* Within 10 days after receipt of any written motion, or within any other period as may be designated by the hearing officer, the opposing party shall respond to the motion and set forth any objections to the motion. Failure to file a timely response to the motion may constitute a party's consent to the granting of the motion. The moving party shall have no right to reply, except as permitted by the hearing officer.

(d) *Motions for extensions of time.* Either party may file a motion for extension. At the discretion of the hearing officer, a motion for an extension of time may be granted for good cause at any time, notwithstanding an objection or any reply to the motion consistent with the provisions of § 26.2(c)(5) and (7). The hearing officer may waive the requirements of this section as to motions for extensions of time.

(e) *Oral argument.* The hearing officer may order oral argument on any motion.

(f) *Motions for summary judgment.*

(1) A party claiming relief or a party against whom relief is sought may timely move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(2) Objections in the consideration of summary judgment motions or answers thereto based upon a failure to strictly comply with the provisions of Rule 56 of the Federal Rules of Civil Procedure may, at the discretion of the hearing officer, be overruled.

(g) *Motions for dismissal.* When a motion to dismiss the proceeding is granted, the hearing officer shall issue a determination and order in accordance with the provisions of § 26.25.

**Discovery**

**§ 26.17 Prehearing conference.**

(a) *Prehearing conference.* The hearing officer may, sua sponte or at the request of any party, direct counsel for all parties to confer with the hearing officer before the hearing for the purpose of considering:

(1) Simplification and clarification of the issues;

(2) Stipulations and admissions of fact and of the contents and authenticity of documents;

(3) The disclosure of the names of witnesses;

(4) Matters of which official notice will be taken;

(5) Other matters as may aid in the orderly disposition of the proceeding, including disclosure of the documents or other physical exhibits that will be introduced into evidence in the course of the proceeding.

(b) *Recordation of prehearing conference*. The prehearing conference shall, at the request of any party, be recorded or transcribed.

(c) *Order on prehearing conference*. The hearing officer shall enter in the record an order that states the rulings upon matters considered during the conference, together with appropriate directions to the parties. The order shall control the subsequent course of the proceeding, subject to modifications upon good cause shown.

**§ 26.18 Discovery.**

(a) *General*. The parties are encouraged to engage in voluntary discovery procedures, which may commence at any time after an answer has been filed. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the hearing officer may order discovery of any matter relevant to the subject matter involved in the action. To be relevant, information need not be admissible at the hearing, if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Each party shall bear its own expenses associated with discovery. Discovery may include:

(1) Requests for production of documents as set forth in § 26.19;

(2) Depositions as set forth in § 26.20;

(3) Written interrogatories as set forth in § 26.21; and

(4) Requests for admissions as set forth in § 26.22.

(b) *Supplementation of responses*. A party who has responded to a request for discovery with a response is under a duty to timely amend a prior response to an interrogatory, request for production, or request for admission if so ordered by the hearing officer, or if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(c) *Requesting an order*. In connection with any discovery procedure, by motion addressed to the hearing officer and upon a showing of a good faith attempt to resolve the issue without the hearing officer's intervention, either party may:

(1) Request an order compelling a response with respect to any objection to or other failure to respond to the discovery requested or any part thereof, or any failure to respond as specifically requested, or

(2) Request a protective order limiting the scope, methods, time and place for discovery, and provisions for protecting privileged information or documents.

(d) *Limitations*. (1) By order, the hearing officer may set or alter limits on the number of document requests, depositions, and interrogatories, or the length of depositions.

(2) Orders compelling discovery shall be issued only where such discovery will not compel the disclosure of privileged information, unduly delay the hearing, or result in prejudice to the public interest or the rights of the parties, and upon a showing of good cause.

(3) Protective orders may be issued by a hearing officer if the hearing officer determines such an order is necessary to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense because:

(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

(4) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the hearing officer may nonetheless order discovery from such sources if the requesting party shows good cause or, when the party's refusal to provide the information sought is solely due to undue expense, if the party seeking the discovery agrees to bear the expense associated with the request.

(e) *Refusal to honor discovery order*. When a party refuses to honor a discovery order, the hearing officer may issue such orders in regard to the refusal as justice shall require.

**§ 26.19 Request for production of documents.**

(a) *Request to produce*. Any party may serve upon any other party a written request to produce, and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of § 26.18(a) and which are in the possession, custody, or control of the party upon whom the request is served.

(b) *Procedure*. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(c) *Response to request to produce*. The party upon whom the request is served shall serve a written response within 20 days after service of the request. A shorter or longer time may be directed by the hearing officer, or in the absence of such an order, agreed to by the parties in a written document that shall be timely submitted to the hearing officer. The response shall state, with respect to each item or category, whether inspection and related activities will be permitted as requested. If there are any objections to any requests, including objections to the requested form or forms for producing electronically stored information, the response shall state the reasons for such objections. If objection is made to part of an item or category, the part shall be specified and inspection of the remaining parts shall be permitted. If objection is made to the requested format or forms for producing electronically stored information—or if no form was specified in the request—

the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under § 26.18(c)(1) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(d) *Form of production.* Unless the parties otherwise agree, or the hearing officer otherwise orders:

(1) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(2) If a request does not specify the format or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(3) A party need not produce the same electronically stored information in more than one form.

**§ 26.20 Depositions.**

(a) *Taking oral deposition.* A party may take the oral deposition of any person. Reasonable written notice of deposition shall be served upon the opposing party and the deponent. The attendance of a deponent may be compelled by subpoena where authorized by law or by other order of the hearing officer.

(b) *Testifying on oral deposition.* Each person testifying on oral deposition shall be placed under oath by the person before whom the deposition is taken. The deponent may be examined and cross-examined. The questions and the answers, together with all objections made, shall be recorded by the person before whom the deposition is to be taken, or under that person's direction.

(c) *Objections.* Objection may be made to questions or answers for any reason that would require the exclusion of the testimony under § 26.24 as if the witness were present and testifying at hearing. Objections shall be in short form, stating every ground for objection. Failure to object to any question or answer shall be considered a waiver of objection, unless the parties agree otherwise. Rulings on any objections shall be made by the hearing officer at hearing, or at such other time requested by motion. The examination shall proceed, with the testimony being taken subject to the objections; the deponent may be instructed not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the hearing officer, or to present a motion for a protective order under § 26.18(c)(2).

(d) *Submission to deponent.* A transcript of the deposition shall be submitted to the deponent for examination and signature, unless submission is waived by the deponent and the parties. Any changes in form or substance that the deponent desires to make shall be entered upon the transcript by the person before whom the deposition was taken, with a statement of reasons given by the deponent for making them. The transcript shall then be signed by the deponent, unless the parties by stipulation waive the signing or the deponent is ill, cannot be found, or refuses to sign. If the transcript is not signed, the person before whom the deposition was taken shall sign it and state on the record the reason that it is not signed.

(e) *Certification and filing.* The person before whom the deposition was taken shall make a certification on the transcript as to its accuracy. Interested parties shall make their own arrangements with the person recording the testimony for copies of the testimony and the exhibits.

(f) *Deposition as evidence.* Subject to appropriate rulings by the hearing officer on objections, the deposition or any part may be introduced into evidence for any purpose if the deponent is unavailable. Only that part of a deposition that is received in evidence at a hearing shall constitute a part of the record in the proceeding upon which a decision may be based. Nothing in this rule is intended to limit the use of a deposition for impeachment purposes.

(g) *Payment of fees.* Fees shall be paid by the person upon whose application the deposition is taken.

**§ 26.21 Written interrogatories.**

(a) *Service of interrogatories.* Any party may serve upon any other party written interrogatories, not to exceed 25 in number, including all discrete subparts, unless additional interrogatories are agreed to by the parties or leave to serve additional interrogatories is granted by the hearing officer.

(b) *Response to interrogatories.* Within 20 days after service of the request, the party upon whom the interrogatories are served shall serve a written response, unless the parties agree in a written document submitted to the hearing officer or the hearing officer determines that a shorter or longer period is appropriate under the circumstances. The response shall specifically answer each interrogatory, separately and fully in writing, unless it is objected to, in which event the objecting party shall state the reasons for any objections with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the hearing officer for good cause shown. If objection is made to only part of an interrogatory, the objectionable part shall be specified and the party shall answer to the extent that the interrogatory is not objectionable.

(c) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can by the party served, the records from which the answer may be ascertained.

**§ 26.22 Requests for admissions.**

(a) Any party may serve upon any other party a written request for the admission of the genuineness of any relevant documents described in the request or of the truth of any relevant matters of fact. Copies of documents shall be delivered with the request unless copies have already been furnished. Each requested admission shall be considered admitted, unless within 30 days after service of the request, or within such other time as the parties may agree, or the hearing officer determines, the party from whom the admission is sought serves upon the party making the request either:

(1) A statement that:

(i) Denies specifically the relevant matters for which an admission is requested, or sets forth in detail the reasons why the party can neither truthfully admit nor deny them;

(ii) Fairly meets the substance of the requested admission and, when good faith requires that a party qualify an answer or deny only a part of the matter

of which an admission is requested, specifies as much of it as is true and qualifies or denies the remainder; and

(iii) Does not assert lack of information or knowledge as a reason for failure to admit or deny, unless the party states that the party has made reasonable inquiry, and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny; or

(2) Written objections to a requested admission that:

(i) State the grounds for the objection; and

(ii) Object to a requested admission, if necessary, either in whole or in part, on the basis of privilege or relevance.

(b) Responses to the request for admission on matters to which objections have been made may be deferred until the objection is ruled upon, but if written objections are made only to a part of a request, a response to the remainder of the request shall be provided.

(c) Any matter admitted under this rule is conclusively established unless the hearing officer, on motion, permits withdrawal or amendment of the admission. Admissions obtained pursuant to this procedure may be used in evidence only for the purposes of the pending action. The use of obtained admissions as evidence is permitted to the same extent and subject to the same objections as other evidence.

## Hearings

### § 26.23 Public nature and timing of hearings; transcripts.

(a) *Public hearings.* All hearings in adjudicative proceedings shall be public.

(b) *Conduct of hearing.* Hearings shall proceed with all reasonable speed. The hearing officer may order recesses for good cause, stated on the record. The hearing officer may, for convenience of the parties or witnesses, or in the interests of justice, order that hearings be conducted outside of Washington, DC, and, if necessary, in more than one location.

(c) *Transcripts.* Hearings shall be recorded and transcribed only by a reporter designated by the Department under the supervision of the hearing officer. The original transcript shall be a part of the record and shall constitute the sole official transcript. Any party or a member of the public, at his own expense, may obtain copies of transcripts from the reporter.

### § 26.24 Rules of evidence.

(a) *Evidence.* Every party shall have the right to present its case or defense by oral and documentary evidence, unless otherwise limited by law or regulation, to conduct such cross-examination and to submit rebuttal evidence as may be required for a full and true disclosure of the facts. Irrelevant, immaterial, privileged, or unduly repetitious evidence shall be excluded. Unless otherwise provided for in this part, the Federal Rules of Evidence shall provide guidance to the hearing officer in the conduct of proceedings under this part, but shall not be binding. Parties may object to clearly irrelevant material, but technical and hearsay objections to testimony as used in a court of law will not be sustained.

(b) *Testimony under oath or affirmation.* All witnesses shall testify under oath or affirmation.

(c) *Objections.* Objections to the admission or exclusion of evidence shall be in short form, stating the grounds of objections. Rulings on objections shall be a part of the transcript. Failure to object to admission or exclusion of evidence or to any evidentiary ruling shall be considered a waiver of objection, but no exception to a ruling on an objection is necessary in order to preserve it for appeal.

(d) *Authenticity of documents.* Unless specifically challenged, it shall be presumed that all relevant documents are authentic. An objection to the authenticity of a document shall not be sustained merely on the basis that it is not the original.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact. Stipulations may be received in evidence at a hearing, and when received shall be binding on the parties with respect to the matters stipulated. The parties are encouraged to enter into stipulations of fact whenever possible.

(f) *Official notice.* All matters officially noticed by the hearing officer shall appear on the record.

(g) *Burden of proof.* The burden of proof shall be upon the proponent of an action or affirmative defense, including, where applicable, mitigating factors, unless otherwise provided by law or regulation.

### § 26.25 Hearing officer's determination and order.

(a) *Scope of review.* The hearing officer shall conduct a de novo review of the administrative action to determine whether it is supported by a preponderance of the evidence, unless a different standard of proof is required by law or regulation. Each and every charge alleged by the Department need not be proven to support the administrative action. The hearing officer may modify or vacate the administrative action under review only upon a particularized finding of facts that justifies a deviation from the administrative action.

(b) *Closing of hearing.* At the discretion of the hearing officer, the closing of the record may be postponed in order to permit the admission of other evidence into the record. In the event further evidence is admitted, each party shall be given an opportunity to respond to such evidence.

(c) *Briefs.* Upon conclusion of the hearing, the hearing officer may request the parties to file proposed findings of fact and legal briefs. The hearing officer shall make a written determination and order based upon evidence and arguments presented by the parties. The determination shall be founded upon reliable and probative evidence. This determination and order shall be served upon all parties.

(d) *Bench decisions.* Where the parties agree and where appropriate in the judgment of the hearing officer, a bench decision will be issued.

(e) *Time period for issuance of decision.* The hearing officer shall endeavor to issue a determination within 60 days from the date of the closing of the record.

(f) *Finality of determination.* The determination and order shall be final unless a party timely appeals the determination in accordance with § 26.26. The determination shall inform the parties that, if provided for and consistent with Departmental regulations, any party may request, in writing, Secretarial review of the determination within 30 days after the hearing officer issues the determination, in accordance with § 26.26 of this part. The determination shall include the mailing address, facsimile number, and electronic submission information to which the request for Secretarial review should be sent. A request for Secretarial review may be made by mail, delivery, facsimile, or electronic submission.

## Secretarial Review

### § 26.26 Review of determination of hearing officers.

(a) Except in matters arising under 2 CFR part 2424, any party may file with the Secretary an appeal within 30 days after the date that the hearing officer issues a determination or order. The Secretary or designee may extend the 30-day period, in the Secretary's sole discretion, for good cause.

(b) *Brief in support of appeal.* The appeal shall be accompanied by a written brief, not to exceed 15 pages, setting forth the party's specific objections to the determination or order

of the hearing officer and the party's supporting reasons for any objections. The appealing party may request leave to file a brief in excess of 15 pages for good cause shown. Alternative proposed findings and conclusions, if any, may be appended as an exhibit.

(c) *Briefs in opposition.* Any opposing party may submit a brief in opposition to the appeal, not to exceed 15 pages, within 20 days of receiving a copy of the appeal and accompanying brief. The opposing party may request leave to file a brief in excess of 15 pages for good cause shown. The brief in opposition shall specifically state the opposing party's reasons for supporting the hearing officer's determination, or for objecting to any part of the hearing officer's determination.

(d) *Service.* The appeal and all briefs shall be served on all parties and on the Docket Clerk.

(e) *Forwarding of the record.* Upon request by the Office of the Secretary, the hearing officer shall forward the record of the proceeding to the Secretary or the Secretary's designee.

(f) *Time extensions.* The Secretary, or designee, in his or her sole discretion, may extend the deadlines or page limitations set forth in paragraphs (b) and (c) of this section. The Secretary or designee may also permit the filing of additional briefs, in his or her sole discretion.

(g) *Personal appearance.* There is no right to appear personally before the Secretary or designee.

(h) *Interlocutory rulings.* There is no right to appeal any interlocutory ruling by the hearing officer, except as provided for in § 26.27.

(i) *Objection not raised before hearing officer.* In reviewing the determination or order, the Secretary, or designee, shall not consider any objection that was not raised before the hearing officer unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(j) *Evidence in the record.* The Secretary or designee shall consider only evidence contained in the record forwarded by the hearing officer. However, if any party demonstrates to the satisfaction of the Secretary or designee that additional evidence not presented at the hearing is material, and that there were reasonable grounds for the failure to present such evidence at the hearing, the Secretary or designee shall remand the matter to the hearing officer for reconsideration in light of the additional evidence.

(k) *Ex parte communications.* The prohibitions of ex parte communications in § 26.3 shall apply to contacts with the Secretary or the Secretary's designee.

(l) *Determination.* The Secretary or designee may affirm, modify, reverse, remand, reduce, compromise, or settle any determination made or action ordered in the initial determination or order. The Secretary or designee shall consider, and include in any final determination, such factors as may be set forth in applicable statutes or regulations.

(m) *Written determination.* Where a request for Secretarial review has been timely made, the Secretary, or designee, shall issue a written determination within 30 days after receipt of the request for review, and shall serve it upon the parties to the hearing and the hearing officer. The Secretary, or designee, may extend the time in which a written determination must be issued by an additional 60 days for good cause shown in a written justification issued to the parties. The written determination of the Secretary shall be final. If the Secretary, or designee, does not act upon the request for review of a determination within 90 days of service of the request, then the initial determination shall be the final agency action.

### § 26.27 Interlocutory rulings.

(a) *Interlocutory rulings by the hearing officer.* A party seeking review of an interlocutory ruling shall file a motion with the hearing officer within 10 days of the ruling requesting certification of the ruling for review by the Secretary, or in cases arising under 2 CFR part 2424, with the Debarring Official. Certification may be granted if the hearing officer believes that:

(1) It involves an important issue of law or policy as to which there is substantial ground for difference of opinion; and

(2) An immediate appeal from the order may materially advance the ultimate termination of the litigation.

(b) *Petition for review.* Any party may file a petition for review of an interlocutory ruling within 10 days of the hearing officer's determination regarding certification.

(c) *Secretarial review.* The Secretary, or designee, or Debarring Official shall review a certified ruling. The Secretary, designee, or Debarring Official has the discretion to grant or deny a petition for review from an uncertified ruling.

(d) *Continuation of hearing.* Unless otherwise ordered by the hearing officer or the Secretary, designee, or Debarring Official, the hearing shall proceed pending the determination of any interlocutory appeal, and the order or ruling of the hearing officer shall be effective pending review.

## Subpart B—Hearings Pursuant to the Administrative Procedure Act

### § 26.28 Purpose and scope.

Unless otherwise specified in this title, the rules in this subpart B of this part apply to hearings that HUD is required by statute to conduct pursuant to the Administrative Procedure Act (5 U.S.C. 554 *et seq.*)

### § 26.29 Definitions.

The following definitions apply to subpart B of this part:

*Complaint* means the notice from HUD alleging violations of a HUD statute and/or regulation, citing the legal authority upon which it is issued, stating the relief HUD seeks, and informing a respondent of his or her right to submit a response to a designated office and to request an opportunity for a hearing before an Administrative Law Judge.

*Docket Clerk* means the Docket Clerk of the Office of Administrative Law Judges, located at the following address—409 Third Street, SW., Second Floor, Washington, DC 20024; mailing address is 451 7th Street, SW., Room B–133, Washington, DC 20410.

*Respondent,* unless otherwise identified by other governing statute, rule, or regulation, is the party against whom the administrative action is taken.

*Response* means the written response to a complaint, admitting or denying the allegations in the complaint and setting forth any affirmative defense and any mitigating factors or extenuating circumstances. The response shall be submitted to the division of the Office of General Counsel that initiates the complaint or to such other office as may be designated in the complaint. A response is deemed a request for a hearing.

### § 26.30 Service and filing.

(a) *Filing.* Unless otherwise provided by statute, rule, or regulation, all documents shall be filed with the Docket Clerk. Filing may be by delivery, first-class mail, overnight delivery, facsimile transmission, or electronic means; however, the ALJ may place reasonable limits on filing by facsimile transmission or electronic means. All documents shall clearly designate the docket number and title of the proceeding. Duplicate copies are not required unless ordered by the ALJ.

(b) *Service.* One copy of all documents filed with the Docket Clerk shall be served upon each party by the

persons filing them and shall be accompanied by a certificate of service stating how and when such service has been made. Service may be made by delivery, first-class mail, overnight delivery, facsimile transmission, or electronic means; however, the ALJ may place reasonable limits on service by facsimile transmission or electronic means. Documents shall be served upon a party's address of residence or principal place of business, or, if the party is represented by counsel, upon counsel of record at the address of counsel. Service is complete when handed to the person or delivered to the person's office or residence and deposited in a conspicuous place. If service is by first-class mail, overnight delivery, facsimile transmission, or electronic means, service is complete upon deposit in the mail or upon electronic transmission.

### § 26.31 Time computations.

(a) *General.* In computing any period of time under subpart B of this part, the time period begins the day following the act, event, or default, and includes the last day of the period, unless the last day is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which case the time period includes the next business day. When the prescribed time period is 7 days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

(b) *Entry of orders.* In computing any time period involving the date of the issuance of an order or decision by an Administrative Law Judge, the date of issuance is the date the order or decision is served by the Docket Clerk.

(c) *Service by mail.* If a document is served by mail, 3 days shall be added to the time permitted for a response.

## Administrative Law Judge

### § 26.32 Powers and duties of the Administrative Law Judge (ALJ).

The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and ensure that a record of the proceeding is made. The ALJ is authorized to:

(a) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(b) Continue or recess the hearing, in whole or in part, for a reasonable period of time;

(c) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(d) Administer oaths and affirmations;

(e) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(f) Rule on motions and other procedural matters;

(g) Regulate the scope and timing of discovery;

(h) Regulate the course of the hearing and the conduct of representatives and parties;

(i) Examine witnesses;

(j) Receive, rule on, exclude, or limit evidence;

(k) Upon motion of a party, take official notice of facts;

(l) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(m) Conduct any conference, argument, or hearing on motions in person or by telephone;

(n) Upon motion, except where mandated by statute, extend the time within which any act required by these rules must be performed where necessary to avoid prejudicing the public interest or the rights of the parties, or upon showing of good cause; and

(o) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under subpart B of this part.

### § 26.33 Ex parte communications.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

### § 26.34 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for failing to comply with an order, rule, or procedure governing the proceeding; failing to prosecute or defend an action; or engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any sanction, including, but not limited to, those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order compelling discovery, the ALJ may impose an appropriate sanction for such noncompliance, including, but not limited to, the following:

(1) Drawing an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deeming any matter about which an admission is requested to be admitted;

(3) Prohibiting the party failing to comply with the order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; or

(4) Striking any part of the pleadings or other submissions of the party failing to comply with the order.

(d) If a party fails to prosecute or defend an action brought under subpart B of this part, the ALJ may dismiss the action or may issue a decision against the non-prosecuting or defending party. Such decision of the ALJ shall constitute final agency action and shall not be appealable to the Secretary under § 26.52 of this part.

(e) The ALJ may refuse to consider any motion, request, response, brief, or other document that is not filed in a timely fashion.

### § 26.35 Disqualification of ALJ.

(a) An ALJ in a particular case may disqualify himself or herself.

(b) A party may file with the ALJ a motion for the ALJ's disqualification. The motion shall be accompanied by an affidavit alleging the grounds for disqualification.

(c) Upon the filing of a motion and affidavit, the ALJ shall proceed no further in the case until the matter of disqualification is resolved.

(d) If the ALJ does not withdraw from the proceedings, a written statement of his or her reasons for electing not to withdraw shall be incorporated into the record and the hearing shall proceed.

## Parties

### § 26.36 Parties to the hearing.

(a) *General.* The parties to the hearing shall be the respondent and HUD.

(b) *Rights of parties.* Except as otherwise limited by subpart B of this part, all parties may:

(1) Be accompanied, represented, and advised by a representative;

(2) Participate in any conference held by the ALJ;

(3) Conduct discovery;

(4) Agree to stipulations of fact or law, which shall be made part of the record;

(5) Present evidence relevant to the issues at the hearing;

(6) Present and cross-examine witnesses;

(7) Present oral arguments at the hearing as permitted by the ALJ; and

(8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing, as permitted by the ALJ.

**§ 26.37 Separation of functions.**

No officer, employee, or agent of the Federal Government engaged in the performance of investigative, conciliatory, or prosecutorial functions in connection with the proceeding shall, in that proceeding or any factually related proceeding under subpart B of this part, participate or advise in the decision of the Administrative Law Judge, except as a witness or counsel during the proceeding, or in its appellate review.

**Prehearing Procedures**

**§ 26.38 Commencement of action.**

Proceedings under subpart B of this part shall commence with the Government's filing of a complaint, as that term is defined in § 26.29, with the Docket Clerk. The respondent's response to the complaint shall be timely filed with the Docket Clerk and served upon the Government in accordance with the procedures set forth in the complaint. If the respondent fails to submit a response to the Docket Clerk, then the Government may file a motion for a default judgment in accordance with § 26.41.

**§ 26.39 Prehearing conferences.**

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party or *sua sponte*, the ALJ may schedule a prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may consider the following at a prehearing conference:

(1) Simplification of the issues;

(2) Stipulations of fact and of the authenticity, accuracy, and admissibility of documents;

(3) Submission of the case on briefs in lieu of an oral hearing;

(4) Limitation of the number of witnesses;

(5) The exchange of witness lists and of proposed exhibits;

(6) Discovery;

(7) The time and place for the hearing; and

(8) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

**§ 26.40 Motions.**

(a) *General.* All motions shall state the specific relief requested and the basis therefore and, except during a conference or the hearing, shall be in writing. Written motions shall be filed and served in accordance with § 26.30. Either party may submit a proposed order with any motion.

(b) *Response to motions.* Unless otherwise ordered by the ALJ, a response to a written motion may be filed within 10 days after service of the motion. A party failing to respond timely to a motion may be deemed to have waived any objection to the granting of the motion.

(c) *Motions for extensions.* Either party may file a motion for extension. At the discretion of the ALJ, a motion for an extension of time may be granted for good cause at any time, notwithstanding an objection or any reply to the motion, consistent with § 26.32(f). The ALJ may waive the requirements of this section as to motions for extensions of time or any page limits.

(d) *Right to reply.* The moving party shall have no right to reply, except as permitted by the ALJ.

(e) *Oral Argument.* Either party may request oral argument on any motion, but such argument shall be available at the sole discretion of the ALJ.

(f) *Motions for summary judgment.* (1) A party claiming relief or a party against whom relief is sought may timely move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(2) Objections in the consideration of summary judgment motions or answers thereto based upon a failure to strictly comply with the provisions of Rule 56 of the Federal Rules of Civil Procedure may, at the discretion of the ALJ, be overruled.

(g) *Motions for dismissal.* When a motion to dismiss the proceeding is granted, the ALJ shall make and file a determination and order in accordance with the provisions of § 26.50.

**§ 26.41 Default.**

(a) *General.* The respondent may be found in default, upon motion, for failure to file a timely response to the Government's complaint. The motion shall include a copy of the complaint and a proposed default order, and shall be served upon all parties. The respondent shall have 10 days from such service to respond to the motion.

(b) *Default order.* The ALJ shall issue a decision on the motion within 15 days after the expiration of the time for filing a response to the default motion. If a default order is issued, it shall constitute the final agency action.

(c) *Effect of default.* A default shall constitute an admission of all facts alleged in the Government's complaint and a waiver of respondent's right to a hearing on such allegations. The penalty proposed in the complaint shall be set forth in the default order and shall be immediately due and payable by respondent without further proceedings.

**Discovery**

**§ 26.42 Discovery.**

(a) *General.* The parties are encouraged to engage in voluntary discovery procedures, which may commence at any time after an answer has been filed. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the ALJ may order discovery of any matter relevant to the subject matter of the action. To be relevant, information need not be admissible at the hearing, if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Each party shall bear its own expenses associated with discovery.

(b) *Discovery in Program Fraud Civil Remedies Actions.* (1) Upon receipt of a complaint, the defendant may, upon written request to the Office of General Counsel, review any relevant and material nonprivileged documents, including any exculpatory documents, that relate to the allegations set out in the complaint. Exculpatory information that is contained in a privileged document must be disclosed; however, the privileged document need not be provided.

(2) With the exception of the limited discovery permitted under paragraph (b)(1) of this section, unless agreed to by the parties, discovery shall be available only as ordered by the ALJ. The ALJ shall order only that discovery that he or she determines is necessary for the expeditious, fair, and reasonable consideration of the issues, is not unduly costly or burdensome, and will not unduly delay the proceeding. Discovery of privileged information shall not be permitted. The request for approval sent to the Attorney General from the General Counsel or designee, as described in 31 U.S.C. § 3803(a)(2), is not discoverable under any circumstances. The ALJ may grant discovery subject to a protective order under § 26.44.

(c) *Authorized discovery.* The following types of discovery are authorized:

(1) *Requests for production of documents.* (i) Any party may serve upon any other party a written request to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information—

including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of § 26.42(a) and which are in the possession, custody, or control of the party upon whom the request is served.

(ii) The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(iii) The party upon whom the request is served shall serve a written response within 20 days after the service of the request. A shorter or longer time may be directed by the ALJ or, in the absence of such an order, agreed to in a written document by the parties, which shall be submitted to the ALJ in a timely manner. The response shall state, with respect to each item or category, whether inspection and related activities will be permitted as requested. If there are any objections to any requests, including objections to the requested form or forms for producing electronically stored information, the response shall state the reasons for such objections. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested format for producing electronically stored information—or if no format was specified in the request—the responding party must state the format it intends to use. The party submitting the request may move for an order under paragraph (e) of this section with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(iv) Unless the parties otherwise agree, or the ALJ otherwise orders:

(A) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(B) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a format in which it is ordinarily maintained or in a format that is reasonably usable; and

(C) A party need not produce the same electronically stored information in more than one form.

(2) *Requests for admissions.* Any party may serve upon any other party a written request for the admission of the genuineness of any documents described in the request or of the truth of any relevant matters of fact. Copies of documents shall be delivered with the request unless copies have already been furnished. Each requested admission shall be considered admitted, unless, within 30 days after service of the request, or within such other time as the parties may agree to or the ALJ determines, the party from whom the admission is sought serves upon the party making the request either:

(i) A statement, which:

(A) Denies specifically the relevant matters for which an admission is requested, or sets forth in detail the reasons why the party can neither truthfully admit nor deny them;

(B) Fairly meets the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party specifies as much of it as is true and qualifies or denies the remainder; and

(C) Does not assert lack of information or knowledge as a reason for failure to admit or deny, unless the party states that the party has made reasonable inquiry, and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny; or

(ii) Written objections to a requested admission, which state the grounds for the objection and which object to a requested admission, if necessary, either in whole or in part, on the basis of privilege or relevance. Responses to the request for admission on matters to which objections have been made may be deferred until each objection is ruled upon, but if written objections are made only to a part of a request, a response to the remainder of the request shall be provided.

(iii) Any matter admitted under this rule is conclusively established unless the ALJ, on motion, permits withdrawal or amendment of the admission. Admissions obtained pursuant to this procedure may be used in evidence only for the purposes of the pending action. The use of obtained admissions as evidence is permitted to the same extent and subject to the same objections as other evidence.

(3) *Written interrogatories.* (i) *Service of written interrogatories.* Any party may serve upon any other party written interrogatories, not exceeding 25 in number, including all discrete subparts, unless additional interrogatories are agreed to by the parties or leave to serve additional interrogatories is granted by the ALJ.

(ii) *Response to interrogatories.* Within 20 days after service of the request, the party upon whom the interrogatories are served shall serve a written response, unless the parties agree in a written document submitted to the ALJ or the ALJ determines that a shorter or longer period is appropriate under the circumstances. The response shall specifically answer each interrogatory separately and fully in writing, unless it is objected to, in which event the objecting party shall state the reasons for objection with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the ALJ for good cause shown. If objection is made to only part of an interrogatory, the objectionable part shall be specified and the party shall answer to the extent the interrogatory is not objectionable.

(iii) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(4) *Depositions.* (i) A party may take the oral deposition of any person. Reasonable written notice of deposition shall be served upon the opposing party and the deponent. The attendance of a deponent may be compelled by subpoena where authorized by law or other order by the ALJ.

(ii) Each person testifying on oral deposition shall be placed under oath by the person before whom the

deposition is taken. The deponent may be examined and cross-examined. The questions and the answers, together with all objections made, shall be recorded by the person before whom the deposition is to be taken or under that person's direction.

(iii) *Objections*. Objection may be made to questions or answers for any reason that would require the exclusion of the testimony under § 26.47 as if the witness were present and testifying at hearing. Objections shall be in short form, stating every ground for objection. Failure to object to any question or answer shall be considered a waiver of objection, unless the parties agree otherwise. Rulings on any objections shall be made by the ALJ at hearing, or at such other time as is requested by motion. The examination shall proceed, with the testimony being taken subject to the objections; a person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the ALJ, or to present a motion under § 26.44.

(iv) *Submission to deponent*. A transcript of the deposition shall be submitted to the deponent for examination and signature, unless submission is waived by the deponent and the parties. Any changes in form or substance that the deponent desires to make shall be entered upon the transcript by the person before whom the deposition was taken, with a statement of reasons given by the deponent for making them. The transcript shall then be signed by the deponent, unless the parties by stipulation waive the signing or the deponent is ill, cannot be found, or refuses to sign. If the transcript is not signed, the person before whom the deposition was taken shall sign it and state on the record the reason that it is not signed by the deponent.

(v) *Certification and filing*. The person before whom the deposition was taken shall make a certification on the transcript as to its accuracy. Interested parties shall make their own arrangements with the person recording the testimony for copies of the testimony and the exhibits.

(vi) *Deposition as evidence*. Subject to appropriate rulings by the ALJ on objections, the deposition or any part may be introduced into evidence for any purpose if the deponent is unavailable. Only that part of a deposition that is received in evidence at hearing shall constitute a part of the record in the proceeding upon which a decision may be based. Nothing in this rule is intended to limit the use of a deposition for impeachment purposes.

(vii) *Payment of fees*. Fees shall be paid by the person upon whose application the deposition is taken.

(d) *Supplementation of Responses*. A party who has responded to a request for discovery by providing a response is under a duty to timely amend any prior response to an interrogatory, request for production, or request for admission if so ordered by the ALJ, or if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to all other parties during the discovery process or in writing.

(e) *Motions to compel*. (1) In connection with any discovery procedure, by motion addressed to the ALJ and upon a showing of a good faith attempt to resolve the issue without the ALJ's intervention, either party may file a motion to compel a response with respect to any objection or other failure to respond to the discovery requested or to any part thereof, or any failure to respond as specifically requested. An evasive or incomplete answer to a request for discovery is treated as a failure to answer.

(2) The motion shall describe the information sought, cite the opposing party's objection, and provide arguments supporting the motion.

(3) The opposing party may file a response to the motion, including a request for a protective order in accordance with § 26.44.

(4) Orders compelling discovery shall be issued only where such discovery will not compel the disclosure of privileged information, unduly delay the hearing, or result in prejudice to the public interest or the rights of the parties, and upon a showing of good cause.

(5) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the ALJ may nonetheless order discovery from such sources if the requesting party shows good cause or, when the party's refusal to provide the information sought is solely due to undue expense, the party seeking the discovery agrees to bear the expense associated with the request.

(f) *Refusal to honor discovery order*. When a party refuses to honor a discovery order, the ALJ may issue such orders in regard to the refusal as justice shall require, including the imposition of sanctions pursuant to § 26.34.

**§ 26.43 Subpoenas.**

(a) *General*. Upon written request of a party, the ALJ may issue a subpoena requiring the attendance of a witness at a deposition or hearing, and/or the production of documents. The request shall specify any documents to be produced and shall list the names and addresses of the witnesses.

(b) *Time of request*. A request for a subpoena in aid of discovery shall be filed in time to permit the conclusion of discovery 15 days before the date fixed for the hearing. A request for a subpoena to testify at the hearing shall be filed at least 3 days prior to the hearing, unless otherwise allowed by the ALJ for good cause shown.

(c) *Content*. The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(d) *Service and fees*. Subpoenas shall be served, and fees and costs paid to subpoenaed witnesses, in accordance with Rule 45(b)(1) of the Federal Rules of Civil Procedure.

(e) *Motion to quash*. The individual to whom the subpoena is directed or a party may file a motion to quash the subpoena within 10 days after service, or on or before the time specified in the subpoena for compliance if it is less than 10 days after service.

**§ 26.44 Protective orders.**

(a) A party, a prospective witness, or a deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) Protective orders may be issued by an ALJ if the ALJ determines such an order is necessary to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense because:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(3) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

## Hearings

### § 26.45 General.

(a) *Time of hearing*. The hearing shall commence not later than 90 days following the date of the Government's filing of the complaint and response with the Docket Clerk under § 26.38, unless the time is extended for good cause. The ALJ shall provide written notice to all parties of the reasons for any extension of time.

(b) *Location of hearing*. The hearing shall be held in a place most convenient for the respondent and witnesses, or in such other place as may be agreed upon by the parties and the ALJ.

(c) *Notice of hearing*. The ALJ shall issue a notice of hearing to all parties specifying the time and location of the hearing, the matters of fact and law to be heard, the legal authority under which the hearing is to be held, a description of the procedures for the conduct of the hearing, and such other matters as the ALJ determines to be appropriate.

(d) *Exceptions for Program Fraud Civil Remedies Act matters*. For Program Fraud Civil Remedies actions, the hearing is commenced by the issuance of a notice of hearing and order by the ALJ, as set forth in 31 U.S.C. 3803(d)(2)(B). Hearings for Program Fraud Civil Remedies Act matters shall be located in accordance with 31 U.S.C. 3803(g)(4).

(e) *Burden and standard of proof*. HUD shall prove the respondent's liability and any aggravating factors by a preponderance of the evidence. Respondent shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(f) *Public hearings*. Unless otherwise ordered by the ALJ for good cause shown, the hearing shall be open to the public.

### § 26.46 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. In order to be admissible, any written statement must be provided to all other parties along with the last known address of the witness, in a manner that allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing.

### § 26.47 Evidence.

The ALJ shall admit any relevant oral or documentary evidence that is not privileged. Unless otherwise provided for in this part, the Federal Rules of Evidence shall provide guidance to the ALJ's evidentiary ruling, but shall not be binding. Parties may object to clearly irrelevant material, but technical and hearsay objections to testimony as used in a court of law will not be sustained. The ALJ may, however, exclude evidence if its probative value is substantially outweighed by confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

### § 26.48 Posthearing briefs.

Posthearing briefs shall be filed only upon order by the ALJ.

### § 26.49 The record.

The hearing will be recorded and transcribed by a reporter designated by the Department under the supervision of the ALJ. The parties and the public, at their own expense, may obtain copies of transcripts from the reporter. A copy of the transcript shall be made available at cost to the parties upon request. The transcript of testimony, exhibits, and other evidence admitted at the hearing and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Secretary or designee.

### § 26.50 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the relief granted. The ALJ's initial decision shall not become effective unless it becomes or is incorporated into final agency action in accordance with §§ 26.50(c) or 26.52(l).

(b) The ALJ shall serve the initial decision on all parties within 60 days after either the close of the record or the expiration of time permitted for submission of posthearing briefs, whichever is later. The ALJ may extend the 60-day period for serving the initial decision in writing for good cause. The initial decision shall inform the parties that, if provided for and consistent with Departmental regulations, any party may request, in writing, Secretarial review of the determination within 30 days after the ALJ issues the initial decision, in accordance with § 26.52 of this part. The determination shall include the mailing address, facsimile number, and electronic submission information to which the request for Secretarial review should be sent. A request for Secretarial review may be made by mail, delivery, facsimile, or electronic submission.

(c) If no appeal is timely filed with the Secretary or designee, the initial decision shall become the final agency action.

### § 26.51 Interlocutory rulings.

(a) *Interlocutory rulings by the ALJ*. A party seeking review of an interlocutory ruling shall file a motion with the ALJ within 10 days of the ruling requesting certification of the ruling for review by the Secretary. Certification may be granted if the ALJ believes that:

(1) It involves an important issue of law or policy as to which there is substantial ground for difference of opinion; and

(2) An immediate appeal from the order may materially advance the ultimate termination of the litigation.

(b) *Petition for review*. Any party may file a petition for review of an interlocutory ruling within 10 days of the ALJ's determination regarding certification.

(c) *Secretarial review*. The Secretary, or designee, shall review a certified ruling. The Secretary, or designee, has the discretion to grant or deny a petition for review from an uncertified ruling.

(d) *Continuation of hearing*. Unless otherwise ordered by the ALJ or the Secretary, or designee, the hearing shall proceed pending the determination of any interlocutory appeal, and the order or ruling of the ALJ shall be effective pending review.

### § 26.52 Appeal to the Secretary.

(a) *General*. Either party may file with the Secretary an appeal within 30 days after the date that the ALJ issues an initial decision. The Secretary or the Secretary's designee may extend the 30-day period in his or her sole discretion, for good cause.

(b) *Brief in support of appeal*. The appeal shall be accompanied by a written brief, not to exceed 15 pages, specifically identifying the party's objections to the initial decision or order of the ALJ and the party's supporting reasons for any objections. The appealing party may request leave to file a brief in excess of 15 pages for good cause shown. Alternative proposed findings and conclusions, if any, may be appended as an exhibit.

(c) *Briefs in opposition*. Any opposing party may submit a brief in opposition to the appeal, not to exceed 15 pages, within 20 days of the date a copy of the appeal and accompanying brief were received. The opposing party may request leave to file a brief in excess of 15 pages for good cause shown. The brief in opposition shall specifically state the opposing party's reasons for supporting the ALJ's determination or taking exceptions to any part of the ALJ's determination.

(d) *Extensions and additional briefs.* The Secretary or Secretary's designee may extend the deadlines or page limitations set forth in paragraphs (b), (c), and (d) of this section, in his or her sole discretion. The Secretary may also permit the filing of additional briefs, in his or her sole discretion.

(e) *Forwarding of the record.* Upon request by the Office of the Secretary, the ALJ shall forward the record of the proceeding to the Secretary or designee.

(f) *Personal appearance.* There is no right to appear personally before the Secretary or designee.

(g) *ALJ decisions upon failure to prosecute or defend.* There is no right to appeal any decision issued by an ALJ in accordance with § 26.37(d) of this part.

(h) *Objections not raised before ALJ.* In reviewing the initial decision, the Secretary or designee shall not consider any objection that was not raised before the ALJ, unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) *Evidence considered.* The Secretary or designee shall consider only evidence contained in the record forwarded by the ALJ. However, if any party demonstrates to the satisfaction of the Secretary or designee that additional evidence not presented at the hearing is material and that there were reasonable grounds for the failure to present such evidence at the hearing, the Secretary or designee shall remand the matter to the ALJ for reconsideration in light of the additional evidence.

(j) *Ex parte communications.* The prohibitions of ex parte communications in § 26.33 shall apply to contacts with the Secretary or designee.

(k) *Relief.* The Secretary or designee may affirm, modify, reduce, reverse, compromise, remand, or settle any relief granted in the initial decision. The Secretary or designee shall consider, and include in any final determination, such factors as may be set forth in applicable statutes or regulations.

(l) *Decision.* (1) *Generally.* Where a Secretarial appeal has been timely made, the Secretary, or designee, shall issue a written determination within 30 days after receipt of the brief in opposition, if any, and shall serve it upon the parties to the hearing. The Secretary, or designee, may extend the time in which a written determination must be issued by an additional 60 days for good cause shown in a written justification issued to the parties. The written decision of the Secretary shall be the final agency action. If the Secretary, or designee, does not act upon the appeal of an initial decision within 90 days of service of the appeal, then the initial determination shall be the final agency action.

(2) *Exception for cases brought under the Program Fraud Civil Remedies Act.* Where a Secretarial appeal has been timely made in a case brought under the Program Fraud Civil Remedies Act, the Secretary, or designee, shall issue a written determination within 30 days after receipt of appeal and shall serve it upon the parties to the hearing. The written decision of the Secretary shall be the final agency action. If the Secretary, or designee, does not act upon the appeal of an initial decision within 30 days of service of the appeal, the initial decision shall become final and the Respondent will be served with a statement describing the right to seek judicial review, if any.

**§ 26.53 Exhaustion of administrative remedies.**

In order to fulfill the requirement of exhausting administrative remedies, a party must seek Secretarial review under § 26.52 prior to seeking judicial review of any initial decision issued under subpart B of this part.

**§ 26.54 Judicial review.**

Judicial review shall be available in accordance with applicable statutory procedures and the procedures of the appropriate federal court.

**§ 26.55 Collection of civil penalties and assessments.**

Collection of civil penalties and assessments shall be in accordance with applicable statutory provisions.

**§ 26.56 Right to administrative offset.**

The amount of any penalty or assessment that has become final under § 26.50 or § 26.52, or for which a judgment has been entered after action under § 26.54 or § 26.55, or agreed upon in a compromise or settlement among the parties, may be collected by administrative offset under 31 U.S.C. 3716 or other applicable law. In Program Fraud Civil Remedies Act matters, an administrative offset may not be collected against a refund of an overpayment of federal taxes then or later owing by the United States to the Respondent.

Dated: December 9, 2008.

**Roy A. Bernardi,**

*Deputy Secretary.*

[FR Doc. E8–29772 Filed 12–16–08; 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. 2040/P.L. 110–451**

Civil Rights Act of 1964 Commemorative Coin Act (Dec. 2, 2008; 122 Stat. 5021)

**S. 602/P.L. 110–452**

Child Safe Viewing Act of 2007 (Dec. 2, 2008; 122 Stat. 5025)

**S. 1193/P.L. 110–453**

To direct the Secretary of the Interior to take into trust 2 parcels of Federal land for the benefit of certain Indian Pueblos in the State of New Mexico, and for other purposes. (Dec. 2, 2008; 122 Stat. 5027)

**Last List December 2, 2008**

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